To: Director
Consumer Policy and Product Safety Unit, Market Conduct and Digital Division
The Treasury
By email: consumerlaw@treasury.gov.au

cc. Tony McDonald
Assistant Secretary of the Competition and Consumer Branch
The Treasury
By email:

Wednesday November 29, 2023

Dear Director,

The Digital Industry Group Inc. (DIGI) thanks you for the opportunity to provide our views on the Treasury's Consultation Regulation Impact Statement, titled *Protecting consumers from unfair trading practices*, released in August 2023 (Consultation RIS).

By way of background, DIGI is a non-profit industry association that advocates for the interests of the digital industry in Australia. DIGI's founding members are Apple, Discord, eBay, Google, Linktree, Meta, Snap, Spotify, TikTok, Twitch and Yahoo. DIGI's vision is a thriving Australian digitally-enabled economy that fosters innovation, a growing selection of digital products and services, and where online safety and privacy are protected.

DIGI shares the Government's strong commitment to consumer protection, and we are pleased to have the opportunity to contribute to this inquiry. We are a key Government partner in this area, through our code development, partnerships, and our ongoing engagement with proposed regulation addressing Australians' online privacy, safety and security. DIGI advocates for regulatory approaches that are clear in their goals, and can be implemented in a practical and effective way by industry.

Our work to support consumer protections includes developing industry codes of practice for the digital industry; DIGI co-led the development of codes required under the Online Safety Act, and developed and oversees *The Australian Code of Practice on Disinformation and Misinformation*. DIGI has also long supported the establishment of the National Anti-Scams Centre (NASC) and is pleased to be represented on its Advisory Board, and its Data Integration and Technology Working Group.

DIGI's members recognise the digital industry has an important responsibility to mitigate and address consumer detriment, and that the Australian Government has a role to play in examining evidence of consumer harm, evaluating existing rules and providing proportionate and targeted interventions to protect consumers.

DIGI welcomes economy-wide approaches to addressing consumer protection, providing consumers with a baseline of protections in both online and offline environments. At the outset, we wish to emphasise that the introduction of such protections needs to be considered carefully, assessing existing regulatory frameworks, current alternative reform processes, as well as potential economic costs arising from new regulation. We further note that under the Australian Consumer Law, Australian consumers, as well as

small businesses, have some of the most robust protections in relation to standards of fairness, quality and safety anywhere in the world.

As the reform proposal for a prohibition on unfair trading practices intersects with the current reform of the Privacy Act, we wish to emphasise that DIGI's members also support the Government's strong commitment to privacy. DIGI's members believe that pro-privacy practices extend beyond simply providing privacy policies and user consent notices, and include strong accountability-based practices and user controls. We fully support the need for reform of the Privacy Act, and see the Privacy Act Review as a landmark opportunity to afford Australian consumers choice, control and transparency while encouraging organisational accountability and best practice economy-wide, across a wide range of sectors.

DIGI considers that the Privacy Act Review, led by the Attorney-General's Department, should take the primary lead in informing the Government's response to the data-related issues identified in the Consultation RIS. Out of the options presented, at this stage, DIGI has a preference for Option 1, yet we do not consider the description of Option 1 as the 'status quo' as accurate, in light of the reform of the Privacy Act that is currently underway, as well as the recent amendments to Australia's Unfair Contract Terms regime. DIGI notes that the release of the Consultation RIS occurred on August 31, 2023, before the Government's release of its privacy reform response on September 28, 2023,[1] and the 9 November 2023 effective date of the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022*.

In this submission, DIGI advances a gap analysis of existing and emerging Australian law, identifies potentially legitimate business practices that may be impacted, and discusses effective solutions to some of the issues canvassed in the Consultation RIS. Taking into account this analysis, DIGI considers that the Consultation RIS lacks a robust justification for further regulatory changes. We therefore encourage the Government to provide additional opportunities for industry stakeholders to engage with any issues raised by consumers, prior to the Government making a decision, and the issuance of a Decision RIS. In the context of that secondary consultation, and with the caveat that we would seek to engage with the detail of any proposals, DIGI sees advantages in providing specificity in relation to defined practices that are considered unfair, which would provide industry with greater clarity about their obligations, rather than ambiguous prohibitions.

DIGI would value the opportunity to further discuss what we would consider to be an effective approach to specific stakeholder concerns raised, and we encourage you to continue to draw upon us as a resource as the consultation process ensues. We hope that the information enclosed in this submission is useful as you further consider approaches to these issues, and we would welcome the opportunity to meet to discuss this input further.

Best regards,

Sunita Bose
Managing Director, DIGI

[1] Attorney-General's Department (28/09/2023), *Government response to the Privacy Act Review Report*, accessed at https://www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF

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Defining the policy problem

1. Defining the problem

1.1. In our view, the Consultation RIS lacks an articulation of a clearly defined policy problem, as well as a robust justification for regulatory intervention. We are also concerned about the breadth and ambiguity of the proposed provisions. These elements must be advanced in order for industry stakeholders in particular to meaningfully comment upon appropriate and proportionate policy solutions.

1.2. To the extent that the current public consultation is designed to surface practices from consumers that advance Treasury's conceptualisation of the policy problem, there should be additional opportunities for industry stakeholders to engage with the issues raised by consumers, prior to the Government making a decision, and the issuance of a 'Decision RIS'. This will ensure a transparent and effective consultation process, and help the Government to better understand the scope of the issues (e.g. whether they relate to a

specific sector rather than the broader economy), the extent to which a real gap exists (e.g. there may be existing regulation that is poorly understood or enforced), and whether there are more targeted solutions available.

1.3. Without that understanding, DIGI's analysis and preferences presented in this submission are based only on the conduct presented in the Consultation RIS. Accordingly, we have formed the view that the combination of existing, recent, and proposed Australian laws comprehensively addresses the conduct identified in the Consultation RIS.

1.4. The introduction of a broad and subjective economy-wide unfair trading practices prohibition, as contemplated by the Consultation RIS, would require further extensive review to ensure the gap presented is tangible, and that the costs of a wholesale reform process are carefully assessed.

2. Gap analysis: Australian law

2.1. With reference to the examples of potentially unfair trading practices listed on p. 9 of the Consultation RIS, DIGI considers that these practices are largely addressed by existing and emerging Australian regulation. We have demonstrated this in the gap analysis presented in Chart 1.

2.2. DIGI's gap analysis largely focuses on federal legislation that applies economy-wide. It does not include any additional requirements for specific sectors, such as the Consumer Data Right or sectoral industry codes.

2.3. DIGI urges Treasury to undertake a comprehensive review of the various applicable regulations, as well as emerging Government policy, in order to identify with more precision whether an actual gap exists. This should include, but not be limited to, the Privacy Act, the Government Response to the Privacy Act Review Report[2], the consumer law protections in the Australian Consumer Law (ACL) and competition law prohibitions in the Competition and Consumer Act 2010 (CCA) (including the Unfair Contract Terms regime), the Online Safety Act and relevant state fair trading regulations.

Chart 1: Gap analysis in relation to existing and emerging Australian law

Examples of potentially unfair trading practices listed in the Discussion Paper:	**DIGI response**
Inducing consumer consent or agreement to data collection through concealed data practices.	2.4. DIGI considers that Existing Australian Privacy Principles (APPs) – specifically APP 1, 3, 4, 5, 6, 7 – contain relevant provisions in relation to ensuring informed consumer consent and notice.

[2] Attorney-General's Department (28/09/2023)

	2.5. While there are already relevant privacy protections in place, DIGI fully supports the need for the current reform of the Privacy Act, and sees the Privacy Act Review as a key opportunity to afford consumers with more choice, control and transparency while encouraging organisational accountability and best practice economy-wide. Through the reform process, the Government has agreed in principle to a number of relevant proposals made by the Attorney-General's Department in the Privacy Act Review Report (PARR)[3]. Specifically: 2.5.1. An agreement in principle to PARR Proposal 11.1 to 'amend the definition of consent to provide that it must be voluntary, informed, current, specific, and unambiguous.' All of these elements, except 'current', would impact an entity's ability to 'induce' consent by concealing data practices. 2.5.2. The ability to 'induce' consent by concealing data practices will be limited by the Government's agreement in principle to PARR Proposal 10.1 to 'Introduce an express requirement in APP 5 that requires collection notices to be clear, up-to-date, concise and understandable'. 2.5.3. An agreement in principle to PARR Proposal 20.4 to introduce a requirement that an individual's consent must be obtained to trade their personal information, subject to refining the scope of what is considered to constitute 'trading'. This, combined with PARR Proposal 11.1, is likely to address any consumer concerns raised about data collection in relation to traded audience lists, to the extent that these are considered to be 'concealed data practices'. 2.5.4. The Government's agreement in principle to PARR Proposal 12 to establish a fair and reasonable test directly references this type of example, where the Government has stated: *'This new (fair and reasonable) test will also help to protect individuals from the use of 'dark patterns' which may nudge users towards consenting to more privacy intrusive practices. Dark patterns can also encourage users to choose more privacy intrusive settings.[4]'* The PARR indicates that the fair and reasonable test may apply regardless of whether individuals provide their consent to the relevant activity. Note that DIGI has

[3] Attorney-General's Department (16/02/23), *Privacy Act Review Report 2022*, https://www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report_0.pdf
[4]Attorney-General's Department (28/09/2023), p.8

	definitional questions about the concept of 'dark patterns', as outlined in Section 6, Chart 2. 2.6. Section 18 of the ACL indicates that 'a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. This provision is extremely broad, and covers misleading conduct by silence; depending on the specific circumstances, it may apply. 2.7. DIGI also considers that Section 29 of the ACL, relating to false or misleading representations about goods or services, as well as both Sections 33 and 34 of the ACL that relate to misleading conduct as to the nature of goods and services respectively, may apply, depending on the specific circumstances.
Exploiting bargaining power imbalances in supply chain arrangements, including by unilaterally varying supply terms at short notice.	2.8. DIGI considers that this example overlaps with the Unfair Contract Terms reforms that commenced on November 9, 2023[5]. These cover both consumers and an expanded class of small businesses – which now covers a sizeable portion of all Australian businesses – and will allow courts to impose substantial penalties on businesses, rather than simply declaring them void[6]. 2.9. The Unfair Contract Terms regime is intended to address bargaining power imbalances in supply arrangements.[7] One of the conditions in determining if a contract is unfair, under Section 24 of the ACL, is that 'it would cause a significant imbalance in the parties' rights and obligations arising under the contract'. This speaks to the notion of 'exploiting bargaining power imbalances'. One of the examples of unfair terms in Section 25 of the ACL is a right to unilaterally vary the supply contract. Examples of cases where such terms have been found to be unfair include *ACCC v Servcorp*, *ACCC v JJ Richards & Sons*, *ACCC v Mitolo Group*, *ACCC v Fuji Xerox*, *AIBI Holdings v Virtual Technology Services.* 2.10. The CCA also prohibits businesses with a substantial degree of market power from engaging in conduct that has the purpose or likely effect of substantially lessening competition. This negates the need for an unfair trading practices prohibition to apply to

[5] ASIC (09/11/23), *Unfair Contract Terms reforms commence*, https://asic.gov.au/about-asic/news-centre/news-items/unfair-contract-terms-reforms-commence/#:~:text=Unfair%20Contract%20Terms%20(UCT)%20reforms,not%20include%20any%20unfair%20terms.

[6] ACCC (11/9/23), *Businesses urged to remove unfair contract terms ahead of law changes*, https://www.accc.gov.au/media-release/businesses-urged-to-remove-unfair-contract-terms-ahead-of-law-changes

[7] The Hon Dr Andrew Leigh MP & Julie Collins MP, (9/8/2022) *[Opinion piece] Policy banning unfair contracts will shield SMEs from exploitation*, https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/articles/opinion-piece-policy-banning-unfair-contracts-will-shield-smes

	competitors. This prohibition may also apply to exploitation of bargaining power in supply chain arrangements. Exploiting vulnerabilities in the supply chain may also amount to unconscionable conduct.
Omitting or obfuscating material information which distorts consumers' expectations or understanding of the product or service being offered.	2.11. DIGI considers that all of the existing and emerging regulation across the ACL and, to the extent this relates to the use of data, the Privacy Act, that we have listed in relation to 'inducing consumer consent or agreement to data collection through concealed data practices', listed from 2.4 to 2.7, applies here. 2.12. Furthermore, it is well established that omissions, not just positive actions, are captured by the prohibition against misleading or deceptive conduct. For example: 2.12.1. In ACCC v TPG Internet Pty Ltd [2013] HCA 54, TPG advertised a broadband plan as 'unlimited ADSL2+ for $29.99 per month' but failed to disclose that the plan required a bundled home phone service for an additional $30 per month. TPG's fine print disclosures were inadequate to cure the misleading dominant message. 2.12.2. Hardy v Your Tabs Pty Ltd (in liq) [2000] NSWCA 150 concerned the sale of a pizza franchise. The NSW Court of Appeal found that the respondent engaged in misleading and deceptive conduct because they failed to advise the applicant that the reason for the sale was that a competing franchise was starting in the local area. 2.12.3. In Fleetman Pty Ltd v Stone [2005] FCAFC 80, the Full Court affirmed a decision by a Federal magistrate that the appellant, a car dealer, had engaged in misleading conduct under s 52 of the Trade Practices Act 1974 (Cth) by failing to advise the respondent that a car it purchased was a prior year model. 2.13. Additionally, depending on circumstances, we consider that the restrictions on unconscionable conduct, under Section 21 and Section 22 of the Competition and Consumer Act 2010, may apply. Matters that the court may have regard to for the purposes of determining 'unconscionable conduct' include 'whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services' and 'whether any undue influence or pressure was exerted on, or any unfair tactics were used.' For example, in *ACCC v Captain Cook College*, the college enrolled vulnerable and disadvantaged consumers in courses they were unlikely to ever complete or receive any vocational benefit from despite incurring a large VET FEE-HELP

		debt (see also ACCC v AIPE). Additionally, in May 2022, the Federal Court ordered Telstra to pay $50 million in penalties for engaging in unconscionable conduct when it sold mobile contracts to more than 100 Indigenous consumers. 2.14. Consumers also have rights to remedies under the consumer guarantees at sections 51-62 of the ACL such as where the product or service is not of acceptable quality or does not match the relevant description in certain circumstances.
Using opaque data-driven targeting or other interface design strategies to undermine consumer autonomy.		2.15. To the extent that this refers to the use of data-driven targeting to influence consumer consent, DIGI considers that the existing provisions under the Australian Privacy Principles apply – specifically APP 1, 3, 4, 5, 6, 7 – which contain relevant provisions in relation to ensuring informed consumer consent and notice. 2.16. The proposed reforms to consent and related provisions, detailed in 2.5, also bear relevance, such as PARR Proposals 10.1, 11.1 and 12. 2.17. Specifically in relation to targeting and consumer autonomy, in its response to the PARR, the Government indicated that *'further consideration will be given to how to give individuals more choice and control in relation to the use of their information for targeted advertising, including layered optouts and industry codes which could specify how to give individuals more control over how their information is used in online advertising*[8]*.'* 2.18. Furthermore, the Government also agreed in principle to PARR Proposal 20.1b to amend the Privacy Act to include a definition of 'targeting', differentiated from what it considers to be more traditional forms of direct marketing. 2.19. We also consider that Section 18 of the ACL in relation to misleading or deceptive conduct may apply here, depending on the specific circumstances. In *ACCC v Trivago*, the Federal Court found that Trivago had breached the ACL by misleading consumers when representing that its website would quickly and easily help users identify the best deal or cheapest rates available for a given hotel. In fact, Trivago used an algorithm which placed significant weight on which online hotel booking site paid Trivago the highest cost-per-click fee in determining which rates to highlight on its website and as a result often did not highlight the

[8] Attorney-General's Department (28/09/2023), p. 12

	cheapest rates for consumers.[9]
Exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the 'choice architecture' of products or services (digital or otherwise);	2.20. The PARR seeks to address the notion of behavioural vulnerabilities. The Government has agreed to PARR Proposal 17.1 to introduce OAIC guidance that includes a non-exhaustive list of factors that indicate when an individual may be experiencing vulnerability and is at a higher risk of harm from interferences with their personal information. 2.21. It is important to recognise that behavioural vulnerabilities will vary from user to user. In DIGI's submission to the PARR[10], we noted the challenge for digital industry practitioners in particular in identifying and assessing a user's vulnerability without the collection of more data; we therefore welcomed the Government's clarification in its response to the PARR that 'entities would not be obliged to collect additional information to establish if someone is experiencing vulnerability'[11]. 2.22. To the extent that minors are considered vulnerable users, the Government's response to the PARR includes a number of recommendations in relation to children's privacy, including: 2.22.1. Agreement in principle to PARR Proposal 20.5 to prohibit direct marketing to a child unless the personal information used for direct marketing was collected directly from the child and the direct marketing is in the child's best interests. 2.22.2. Agreement in principle to PARR Proposal 20.7 to prohibit trading in the personal information of children. 2.22.3. Agreement in principle to PARR Proposal 16.4 to require entities to have regard to the best interests of the child as part of considering whether a collection, use or disclosure is fair and reasonable in the circumstances. 2.22.4. Agreement to PARR Proposal 16.5 to introduce a Children's Online Privacy Code that applies to online services that are 'likely to be accessed by children', that could align with the scope of the UK Age Appropriate Design Code. The Government has also suggested that

[9]ACCC (22/4/22), Trivago to pay $44.7 million in penalties for misleading consumers over hotel room rates, https://www.accc.gov.au/media-release/trivago-to-pay-447-million-in-penalties-for-misleading-consumers-over-hotel-room-rates

[10] DIGI (4/4/23), Privacy Act Review Report 2023: Submission to the Attorney-General's Department, https://digi.org.au/wp-content/uploads/2023/10/FINAL-DIGI-submission-_-Privacy-Act-Review-Report-2023.pdf

[11] Attorney-General's Department (28/09/2023), p. 14

	substantive requirements of the code could address how the best interests of child users should be supported in the design of an online service, which could capture considerations around the notion of 'choice architecture'. 2.23. Depending on the specific circumstances, Section 18 of the ACL in relation to misleading or deceptive conduct may apply here, as well as Section 21 in relation to unconscionable conduct, and Section 23 in relation to unfair terms of consumer contracts and small business contracts. 2.24. The existing prohibition against unconscionable conduct in the ACL deals with harsh behaviour which may involve exploiting the vulnerability of a class of persons and could apply in these circumstances. Please see the examples referenced in 2.12 above. 2.25. Additionally, the Online Safety Act contains extensive protections for young people, to the extent that they are considered 'vulnerable': 2.25.1. The eSafety Commissioner can require removal of multiple categories of material and issue an infringement notice or seek an injunction or civil penalty for failing to comply. 2.25.2. The eSafety Commissioner can also seek reports on how a service complies with the legislated Basic Online Safety Expectations (BOSE). Note that proposed revisions to the BOSE were announced on November 22, 2023, that include ensuring the best interests of the child is a primary consideration for all services used by children[12]. 2.25.3. There are also industry codes, the first of which will be registered in December 2023, that concern the protection of minors; DIGI co-led the development of these codes and would welcome the opportunity to discuss these further.
Adopting business practices or designing a product or service in a way that dissuades a	2.26. DIGI considers that the notion of 'dissuad(ing) a consumer from exercising their contractual or other rights', to the extent that this relates to consumer rights (vs. small business rights) is intrinsically linked to whether informed consent was obtained by

[12] The Hon Michelle Rowland MP (22/11/2023), Media release: Albanese Government takes major steps forward to improve online safety, https://minister.infrastructure.gov.au/rowland/media-release/albanese-government-takes-major-steps-forward-improve-online-safety

consumer from exercising their contractual or other legal rights;	the consumer. Therefore, DIGI considers that all of the existing and emerging regulation across the Privacy Act and the ACL included in relation to 'inducing consumer consent or agreement to data collection through concealed data practices', listed from 2.4 to 2.7, applies here. 2.27. Depending on the specific circumstances, Sections 18 and 29 of the ACL in relation to misleading or deceptive conduct may apply here. Misleading consumers as to their legal rights (for example in relation to their rights under the consumer guarantees) is prohibited under the ACL and commonly enforced by the ACCC. 2.28. In addition, Section 21 in relation to unconscionable conduct may apply where the practices cause detriment to consumers, and Section 23 in relation to unfair terms of consumer contracts and small business contracts where the practices are represented in contractual terms. 2.29. Additionally, state fair trading regulations include relevant provisions. For example, section 47A of the NSW Fair Trading Act requires the disclosure of prejudicial terms relating to supply of goods or services, requiring that '*A supplier must, before supplying a consumer with goods or services, take reasonable steps to ensure the consumer is aware of the substance and effect of any term or condition relating to the supply of the goods or services that may substantially prejudice the interests of the consumer*'.
Non-disclosure of contract terms including financial obligations (at least until after the contract is entered into);	2.30. To the extent that this concerns consumer rights (vs. small business rights), DIGI considers that the notion of 'dissuad(ing) a consumer from exercising their contractual or other rights' is intrinsically linked to whether informed consent was obtained by the consumer. Therefore, DIGI considers that all of the existing and emerging regulation across the Privacy Act and the ACL that we have listed in relation to 'inducing consumer consent or agreement to data collection through concealed data practices', listed from 2.4 to 2.7, applies here. 2.31. Depending on the specific circumstances, Sections 18 and 29 of the ACL in relation to misleading or deceptive conduct and false or misleading representations may apply where businesses have induced consumers to enter contracts under false impressions. Section 21 in relation to unconscionable conduct, and Section 23 in relation to unfair terms of consumer contracts and small business contracts, may also apply where this conduct results in detriment (financial or otherwise) to consumers or small businesses. 2.32. We also consider that state fair trading regulations include

		relevant provisions, such as, sections 47A of the NSW Fair Trading Act, as noted in 2.29.
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	2.33.	To the extent that this concerns consumer rights (vs. small business rights), DIGI considers that the notion of 'all or nothing 'clickwrap' consents' is intrinsically linked to whether informed consent was obtained by the consumer. Therefore, DIGI considers that all of the existing and emerging regulation across the Privacy Act and ACL that we have listed in relation to 'inducing consumer consent or agreement to data collection through concealed data practices', listed from 2.4 to 2.7, applies here.
	2.34.	DIGI also considers that questions about users' 'meaningful control' will be addressed by the Government's agreement in principle to PARR Proposal 18, that provides consumers with strengthened consumer rights, such as the right to erasure, the right to access and the right to object, which mirror similar laws including EU General Data Protection Regulation (GDPR). When applied economy-wide, affording Australians with these consumer rights will empower people with a consistent level of choice, control and transparency over their personal information.
Providing ineffective and/or complex disclosures of key information when obtaining consent or agreement to enter into contracts.	2.35.	To the extent that this concerns consumer rights (vs. small business rights), DIGI considers that this example is intrinsically linked to whether informed consent was obtained by the consumer. Therefore, DIGI considers that all of the existing and emerging regulation across the Privacy Act and the ACL that we have listed in relation to 'inducing consumer consent or agreement to data collection through concealed data practices', listed from 2.4 to 2.7, applies here.
	2.36.	Section 18 and 29 of the ACL in relation to misleading or deceptive conduct and false or misleading representations may also apply, as ineffective and confusing disclosures may cause consumers to enter contracts they otherwise would not have.
	2.37.	To the extent that it concerns small business rights, DIGI considers that this overlaps with the Unfair Contract Terms reforms that commenced on November 9, 2023. These cover both consumers and an expanded class of small businesses, and will allow courts to impose substantial penalties on businesses, rather than simply declaring them void.

3. Laws could create duplication

3.1. As demonstrated in the gap analysis in Chart 1, DIGI is concerned that additional laws could create duplication, particularly with the landmark reform that is currently underway of Australia's Privacy Act and expected to be advanced in 2024. This creates the risk of potential double jeopardy where multiple penalties are levied at the same business for the same conduct. More concerningly, a new unfair trading practices prohibition could create a different standard of practice to that ultimately set at the conclusion of the Government's multi-year review of the Privacy Act.

3.2. DIGI considers that the Privacy Act Review, led by the Attorney-General's Department, should take the primary lead in determining how the Government should respond to the data-related issues identified in the Consultation RIS.

3.3. We also consider that the OAIC should take the lead in enforcement actions in relation to data-related issues identified in the Consultation RIS. As we note in Section 8, DIGI is supportive of PARR recommendations that increase the empowerment and resourcing of the OAIC.

3.4. Accordingly, DIGI urges close consultation between Treasury's Unfair Trading Practices team and the Attorney-General's Department's Privacy Act Review team.

4. Gaps in relation to international law are limited

4.1. DIGI considers that overall the Australian legal framework which covers the conduct identified in the Consultation RIS is as robust as the unfair practices laws in comparable jurisdictions.

4.2. As the Consultation RIS notes, Annex 1 to the EU's Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market (EU 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. Analysis undertaken by law firm Clayton Utz examined these 31 specific EU UCPD practices against provisions in Australia's ACL which can be used to capture the same unfair practice. Their analysis shows that most, if not all, of the specific practices on that list can already be regulated using an existing ACL provision[13].

4.3. A comprehensive 2016 comparative analysis of overseas consumer policy frameworks reveals 'high levels of convergence between the consumer policy frameworks of Australia and several jurisdictions chosen for comparison.'[14] It finds that the specific 'highly unfair

[13]Corrigan, M., Richmond, E., & Pourahmary, H. (16/9/21), T*he ACCC is calling for a new ban on unfair trading practices in business – why, and what it would mean*, https://www.claytonutz.com/knowledge/2021/september/the-accc-is-calling-for-a-new-ban-on-unfair-trading-practices-in-business-why-and-what-it-would-mean

[14] Corones, S., Christensen, S., Malbon, J., Asher, A., Paterson, J.M. (2016), *Comparative analysis Of overseas consumer policy frameworks,* accessed at

trading conduct' covered in the UK, US, Canada and Singapore regimes is covered in Australian regulation[15], as well as through comparable general protections[16].

4.4. This comparative analysis examines, and post-dates, many of the specific overseas laws in Appendix A of the Consultation RIS. DIGI encourages Treasury to undertake a comprehensive comparative analysis of overseas consumer policy frameworks in comparable OECD markets.

4.5. However, DIGI cautions against a sole focus on emerging overseas regulatory developments to justify domestic regulation, without consideration of the Australian regulatory context, which often has foundational differences. This can lead to bias toward new regulation to address consumer concerns, rather than more efficient approaches that address emerging issues and gaps through existing regulatory frameworks.

Summary of recommendations: Defining the policy problem

A. To the extent that the current public consultation is designed to surface practices from consumers that advance Treasury's conceptualisation of the policy problem, there must be additional opportunities for industry stakeholders to engage with the issues raised by consumers, prior to the Government making a decision and the issuance of a 'Decision RIS'. This will ensure a transparent and effective consultation process and help the Government to better understand the scope of the issues (e.g. whether they relate to a specific sector rather than the broader economy), the extent to which a real gap exists (e.g. there may be existing regulation that is poorly understood or enforced), and whether there are more targeted solutions available.

B. DIGI urges Treasury to undertake a comprehensive review of the various applicable regulations, as well as emerging Government policy, in order to identify with more precision whether an actual gap exists. This should include, but not be limited to, the Privacy Act, the Government Response to the Privacy Act Review Report, the ACL, Competition and Consumer Act 2010, the Online Safety Act and relevant state fair trading regulations.

C. DIGI considers that the Privacy Act Review, led by the Attorney-General's Department, should take the primary lead in determining how the Government should respond to the data-related issues identified in the Consultation RIS.

D. We also consider that the OAIC should take the lead in enforcement actions in relation to data-related issues identified in the Consultation RIS. As we note in Section 8, DIGI is supportive of PARR recommendations that increase the empowerment and resourcing of the OAIC.

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

[15] Corones et. al (2016), p. 2-4

[16] Corones et. al (2016), p. 2-3

E. Accordingly, DIGI urges close consultation between Treasury's Unfair Trading Practices team and the Attorney-General's Department's Privacy Act Review team.

F. DIGI encourages Treasury to undertake a comprehensive comparative analysis of overseas consumer policy frameworks in comparable OECD markets.

Understanding the costs

5. Unfairness vs. unconscionable

5.1. DIGI considers that the introduction of a vague and poorly defined concept of 'unfair' may present significant challenges for business. We agree with the statement in the Consultation RIS that 'unfairness is an inherently subjective concept', and that 'a reform which is poorly framed or ill-defined could create uncertainty, stifle innovation and competition, and be difficult to enforce.'

5.2. Over time, judicial interpretation of a prohibition on 'unfair' trading practices' would see the breadth of behaviours and consumers covered under the statutory provisions expand and evolve. Therefore, introducing a new concept of 'unfairness' into the regulation would take significant time for a corpus of judicial decision making to evolve, creating business uncertainty in the interim.

5.3. DIGI is concerned that there could be significant overreach with such a provision. For example 'unfair' could capture legitimate actions taken by businesses where they refuse a consumer service. For example, digital services routinely disable accounts when their users violate their Terms of Service through posting objectionable content, or engaging in unacceptable behaviour; the user affected is likely to consider these actions to be 'unfair'.

5.4. It should further be noted the expansiveness of protections afforded by the ACL, covering both consumers and small business, would mean that a new unfair trading practices provision would create implications for a far broader range of business transactions than exists under similar regimes in other markets.

5.5. Introducing a new standard of 'unfair' conduct may also have the unintended consequence of impacting the significant progress in the interpretation of 'unconscionable' conduct diminished. To date, the ACCC has a strong track record in bringing unconscionable conduct cases:

5.5.1.1. Since 2013, there have been 33 cases brought by the ACCC pleading statutory unconscionable conduct; the regulator was successful in 28 of those cases.

5.5.1.2. Of the 5 cases where the ACCC was not successful on statutory unconscionable conduct, it was successful on other Australian Consumer Law grounds in 3 of the cases.

5.5.1.3. There were two cases where the regulator was not successful. In essence, the ACCC has been successful in 31 out of 33, or 94%, of cases involving conduct that the ACCC alleged was unconscionable.

5.6. Furthermore, the introduction of 'unfair' may cause conflicts with existing ACL protections, such as in situations where advertising might not be false or misleading but could potentially be claimed to be unfair.

5.7. As detailed in Section 6, we are concerned that such a broad and unclear term as 'unfair' may see businesses over-correct, providing a counterproductive competitive advantage to the businesses more prepared to take risks.

6. Consideration of legitimate business interests

6.1. We wish to underscore that DIGI does not seek to support indefensible business practices. We consider that there are business practices economy-wide that should be restricted under various Australian laws. However, we are concerned with the potential regulatory and economic impact of a subjective unfair trading provision in the ACL.

6.2. Speaking generally, wherever an acceptable standard of conduct is identified, there will be questions as to whether regulatory efforts should capture a broader set of perceived negative behaviours. This needs to be balanced against the economic risk of over-correction, where restrictions cover behaviours that are legitimate business practices and may in circumstances be pro-consumer, or benign, or do not cause financial or other harm to consumers.

6.3. The recently expanded Unfair Contract Terms regime addresses this issue by requiring an assessment of whether the relevant term in a standard form contract is reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term. It recognises that there may be some terms that could cause detriment to a party if they were relied on, but that are nonetheless not *unfair* because they are reasonably necessary in order to protect the legitimate interests of the counterparty. Examples include:

6.3.1. a forfeiture term, which allowed a supplier to keep the unused balance of prepayments when a customer cancelled their service plan, which enabled the supplier to offer low price plans and minimise bad debts (ACCC v TPG); and

6.3.2. a term which allowed the supplier to automatically renew the contract and increase prices to cover inflation (ACCC v Employsure).

6.4. It is noted that the unfair contracts regime applies to standard form contracts only. A general prohibition on unfair trading practices would potentially apply to *negotiated* contracts presenting a dramatic expansion in the scope of agreements subject to the new regulation, and limiting that capacity of businesses to confidently negotiate with consumers and each other.

6.5. To further illustrate our concerns in Chart 2, DIGI includes some examples of the type of business practices that may be caught in scope with expanded restrictions in the specific areas identified on p.9 of the Consultation RIS.

6.6. The introduction of uncertain or vague concepts in the law would present significant challenges for businesses to confidently assess how they are engaging with both consumers and business, and may impede their ability to innovate products and services in a way that may otherwise advantage consumers. Definitional uncertainties and further consideration of legitimate business use cases require further evaluation by Treasury, particularly as these will bear significant costs for businesses and consumers alike.

Chart 2: Consideration of legitimate business interests

Examples of potentially unfair trading practices listed in the Discussion Paper:	**DIGI response**
Inducing consumer consent or agreement to data collection through concealed data practices. *Using opaque data-driven targeting or other interface design strategies to undermine consumer autonomy.*	'Dark patterns online' 6.7. We understand that these examples listed in the Consultation RIS may relate to the concept of 'dark patterns online' that is advanced in various ACCC digital platforms reports, specifically in the ACCC Digital Platform Services Inquiry Interim Report No. 5 – Regulatory Reform (ACCC DPSI#5)[17]. 6.8. DIGI agrees that consumers should be able to make informed choices in their online interactions and be protected from exploitative or manipulative practices. While we again consider that Privacy Act Review proposals are the most appropriate method with which to address such behaviour, DIGI is also of the view that further clarity is needed on what might constitute a 'dark pattern online' to differentiate this activity from benign marketing that occurs in an online and offline environment, by private as well as Government organisations. For example, is a 'dark pattern online' analogous to a supermarket placing low-priced consumer items at the checkout counter to entice further purchases? Is it analogous to a clothing store offering a discount at the checkout counter if customers provide an email address to be added to their mailing list, without providing a printed privacy policy to the consumer? Such practices are common in offline and online retail environments, and we believe that further analysis and

[17] ACCC (September 2022), *Digital platform services inquiry Interim report No. 5 – Regulatory reform,* https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf

	differentiation of the 'dark patterns' concept needs to occur, with a focus on consumer harm. 6.9. Consideration needs to be given to business practices or design strategies that have a reasonable justification, or are a byproduct of some other legitimate objective, that a business may be trying to achieve. For example, a business may employ interface strategies that encourage users to take action in areas considered to be in their best interests, such as when services 'nudge' users to review their privacy or security settings; however, not all users may agree with the legitimacy of this business intent.
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;	'Excessive tracking' 6.10. DIGI understands that this example may relate to the concept advanced in the ACCC DPSI#5 of 'excessive tracking'[18]. We understand 'tracking' to entail the use of cookies and other pixels, that enables personalisation that occurs online. We are unclear what would constitute 'excessive tracking', particularly when there are moves by major browsers to deprecate third-party cookies[19]. 6.11. Tracking can be used for retargeted, personalised advertising. We would caution against the consideration of this practice as 'excessive tracking', or 'unfair' in any way. While DIGI considers that harmful privacy-intrusive practices should be in scope of the reform of the Privacy Act, in our submission to the PARR[20] we have provided detail on the practice defined in that report as 'targeting', which may be considered 'tracking'. Targeting has widespread use across the digital economy and is central to the viability of digital advertising as a medium for all small and large businesses, Government agencies and not-for-profit organisations, as well as the viability of ad-supported free digital services. The removal of relevance from advertising runs counter to consumer interest: An OAIC 2020 survey of Australians that asked 'If I have to receive ads, I'd prefer them to be targeted and relevant to me' found that 35% agreed, and 13% strongly agreed vs. 13% who disagreed and 10% who strongly disagreed[21].

[18] ACCC DPSI#5, p. 65
[19] Google, Protecting your privacy online: Protecting your privacy online, https://privacysandbox.com/
[20] DIGI (4/4/23), Privacy Act Review Report 2023: Submission to the Attorney-General's Department, https://digi.org.au/wp-content/uploads/2023/10/FINAL-DIGI-submission-_-Privacy-Act-Review-Report-2023.pdf
[21] OAIC (2020), *Australian Community Attitudes to Privacy Survey 2020*, available at https://www.oaic.gov.au/__data/assets/pdf_file/0015/2373/australian-community-attitudes-to-privacy-survey-2020.pdf

Providing ineffective and/or complex disclosures of key information when obtaining consent or agreement to enter into contracts. *Omitting or obfuscating material information which distorts consumers' expectations or understanding of the product or service being offered.* *Adopting business practices or designing a product or service in a way that dissuades a consumer from exercising their contractual or other legal rights;*	Consent in a digital environment 6.12. DIGI understands that these recommendations (as well as those listed directly above in Chart 2) relate to obtaining user consent. DIGI considers that many of the Government's proposed privacy reforms to strengthen consumer consent, and related consumer rights aimed at situations where consent is withdrawn, are extremely important. Noting that, digitally-enabled businesses often confront a tension between the desire to create privacy and consent notices that are understandable to a range of consumers, and also legally comprehensive. Care must also be taken not to oversimplify the communication of more complex data practices, that provide the basis for innovations that consumers increasingly expect. DIGI considers that guidance from the Office of the Australian Information Commissioner (OAIC) would be useful in this area to encourage companies to strike the right balance between understandable, accessible and comprehensive notice and consent requirements under the reformed Privacy Act, as we detail in Section 9. 6.13. In its exploration of this example in the ACCC DPSI#5, the ACCC references what can be described as 'subscription traps' that make it difficult for consumers to cancel paid subscriptions. While DIGI would welcome clarification and potential prohibitions on a defined threshold in relation to subscription traps, it is important to ensure a level field and online parity, and a conceptualisation of what is an annoyance as opposed to a consumer harm. For example, a consumer may find it annoying to click through several screens to cancel a subscription, but this may cause less potential financial burden, than a requirement to wait on hold with a call centre, or attend a facility in person to cancel a service. 6.14. Treasury might consider some sort of conceptual threshold, similar to 'serious harm' in Australia's Model Defamation Provisions, that differentiates consumer inconvenience or annoyance from meaningful harm. In the United States, the Federal Trade Commission 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. A similar threshold would prevent minor claims or disputes being advanced, and incurring costs for all parties when no genuine harm has taken place.

Exploiting bargaining power imbalances in supply chain arrangements, including by unilaterally varying supply terms at short notice. *Non-disclosure of contract terms including financial obligations (at least until after the contract is entered into);*	Legitimate variations 6.15. In further exploring the issues relating to bargaining power and contract terms, we encourage a separation between legislative protections for small businesses and consumers from provisions relating to conduct that impacts competitors. Small businesses will have distinct issues with suppliers that need to be examined separately from end consumers. For example, the EU UCPD is limited to business-to-consumer (B2C) transactions, with business-to-business transactions (B2B) excluded from the Directive[22]. 6.16. In relation to the variation of supply terms at short notice, we encourage the Government to consider the legitimate circumstances in which a business may need the ability to unilaterally vary supply terms at short notice, which is an important element of the relevant test to determine whether a term is unfair under Section 24 of the ACL. For example, this may enable a business to address an emerging cybersecurity threat or comply with a change in law. 6.17. In relation to consumers, a reasonable scenario may be where a consumer is refused service due to risk concerns, and considers this to be within the realm of an 'unfair' practice. Without clarity for any potential protection for such legitimate business interests, business would operate with a level of uncertainty over such operations.
Exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the 'choice architecture' of products or services (digital or otherwise);	Determining behavioural vulnerability 6.18. In relation to the notion of determining behavioural vulnerability, it is unclear whether this is intended to relate to consumers' general vulnerabilities, or a specific individual user's vulnerabilities. In relation to the latter, digital businesses in particular will encounter fundamental barriers in making informed determinations about whether one of their consumers is 'behaviourally vulnerable', because of both their medium and the scale at which they operate. 6.19. Additionally, it is unclear what would constitute a 'behavioural vulnerability, and 'exploiting or ignoring it'. Broad restrictions could prevent a business from marketing its goods and services to a general audience that may include consumers with unknown vulnerabilities. For example, does marketing fast food to a consumer on a diet, or discretionary spend items to someone

[22] Corones et. al (2016), p. 32.

	prone to impulse shopping, constitute exploiting or ignoring a behavioural vulnerability? What if a company's choice architecture, and default settings, reflect the preferences of the majority of its consumers? Definitional uncertainties, and such legitimate business use cases, require further evaluation by Treasury.

Summary of recommendations: Understanding the costs

G. Definitional uncertainties and further consideration of legitimate business use cases require further evaluation by Treasury, particularly as these will bear significant costs for businesses and consumers alike.

H. Treasury might consider some sort of conceptual threshold, similar to 'serious harm' in Australia's Model Defamation Provisions, that differentiates consumer inconvenience or annoyance from meaningful harm.

Effective solutions

7. Robust Privacy Act reform

7.1. Out of the options presented, at this stage, DIGI has a preference for Option 1, yet we do not consider that the description of Option 1 as the 'status quo' to be accurate, in light of the landmark reform of the Privacy Act that is currently underway. The Government has signalled a robust policy direction that is centrally relevant to the issues being considered in the Consultation RIS, of which we have provided an overview in Chart 1[23]. Additionally, the recent amendments to Australia's Unfair Contract Terms regime came into effect on November 9, 2023, and it is premature to assess their impact on business conduct.

7.2. DIGI wishes to underscore that its members share and support the Government's strong commitment to privacy. DIGI's members believe that pro-privacy practices extend beyond providing privacy policies and user consent notices, and include strong accountability-based practices and user controls. Members continue to make industry leading investments in the privacy of their users, including having cross-functional privacy experts and teams who ensure that privacy is built into their products and services ('privacy by design'); providing information and tools to give people transparency, choices and control in relation to their personal data; recognising their customers' rights to access, delete, correct and control personal data, and specific protections for minors' privacy.

[23] Attorney-General's Department (28/09/2023).

7.3. DIGI recognises that large technology companies are often in the spotlight when it comes to questions of data privacy, and are held to a high level of public scrutiny. However, we consider that there is a high level of technical experience with data governance in 'digital first' companies that may not exist to the same extent in other industries that are also using personal information. In an economy where arguably every company is digital, we believe that Australians should be given a clear expectation of their privacy rights no matter what service they are using.

7.4. DIGI therefore fully supports the need for reform of the Privacy Act, and sees the Privacy Act Review as a key opportunity to afford Australian consumers choice, control and transparency while encouraging organisational accountability and best practice economy-wide, across a wide range of sectors.

8. Increased resourcing for regulators

8.1. DIGI considers it imperative that the OAIC is provided with an expansion of its resourcing in order for it to have a rounded litigation strategy in relation to the data-related matters contemplated in the Consultation RIS.

8.2. We consider that the enforcement strategy of the OAIC should be multi-pronged, examining a wide range of entities in order to encourage compliance and the expectation of enforcement economy-wide.

9. Clear guidance for consumers and industry

9.1. Having said that, the Government should avoid enforcement becoming the primary measure of success of privacy reform and should ensure that the OAIC balances enforcement with other important work including aiding company compliance, engagement with data-driven sectors of the economy and consumer and industry education. DIGI welcomes the PARR recommendations supported by the Australian Government that call for OAIC guidance in relation to aspects of the reformed Privacy Act.

9.2. We consider the same applies for the ACCC in relation to ensuring greater industry and consumer awareness for existing industries and new market entrants in relation to Australian Consumer Law. Conversely, working from a goal to give broad powers to the ACCC to address ill-defined unfairness without a capacity for business to understand the standard of conduct required will not give industry clarity, nor will it ultimately protect consumers.

9.3. Currently, there are no comprehensive portals whereby new industry entrants to the Australian market or companies seeking to understand their compliance obligations can receive information about the various regulatory tools that may apply. Furthermore, there is no comprehensive portal of information for consumers about the tools and avenues they may explore for recourse in relation to particular issues.

9.4. Treasury should consider advancing recommendations that increase the clarity of rights and responsibilities for consumers and industry respectively, perhaps through a

consolidated website that provides links and information about their obligations and rights under the various regulatory frameworks aimed at addressing relevant issues.

9.5. While DIGI considers regulatory enforcement to be extremely important, if a goal of this reform process is to better protect Australian consumers, then the role of regulatory guidance is critical. Arguably, such guidance could have a broader ripple effect of positive consumer impact, than a more narrow litigation strategy.

Summary of recommendations: Effective solutions

I. DIGI fully supports the need for reform of the Privacy Act, and sees the Privacy Act Review as a key opportunity to afford consumers choice, control and transparency while encouraging organisational accountability and best practice economy-wide, across a wide range of sectors.

J. DIGI considers it imperative that the OAIC is provided with an expansion of its resourcing in order for it to have a rounded litigation strategy in relation to the data-related matters contemplated in the Consultation RIS.

K. The enforcement strategy of the OAIC should be multi-pronged, examining a wide range of entities in order to encourage compliance and the expectation of enforcement economy-wide.

L. The Government should avoid enforcement becoming the primary measure of success of privacy reform and ensure that the OAIC balances enforcement with other important work including aiding company compliance, engagement with data-driven sectors of the economy and consumer and industry education. DIGI welcomes the PARR recommendations supported by the Australian Government that call for OAIC guidance in relation to aspects of the reformed Privacy Act.

M. The ACCC should work to increase industry and consumer awareness for existing industries and new market entrants in relation to Australian Consumer Law.

N. Treasury should consider advancing recommendations that increase the clarity of rights and responsibilities for consumers and industry respectively, perhaps through a consolidated website that provides links and information about their obligations and rights under the various regulatory frameworks aimed at addressing relevant issues.