



Submission in response to the Protecting consumers from unfair trading practices Consultation Regulation Impact Statement

Australian Government: The Treasury

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The Association for Data-driven Marketing and Advertising (ADMA) commends the Australian Government for undertaking this review into unfair trading practices and welcomes the opportunity to make a submission to the Australian Treasury (Treasury) in response to the Consultation Regulation Impact Statement (CRIS).

ADMA's submission is based upon views that our members from across the data-driven marketing industry have expressed to us.

Key Recommendations:

ADMA recommends that:

1. No change is made to Australian Consumer Law (ACL) at this point in time.
2. The collection, use and disclosures of personal information is better addressed through Australia's privacy laws. The likely inclusion of an overarching reasonable requirement in the Privacy Act reform (although not necessarily 'fair and reasonable' itself) make this the more sensible regime to govern this. To double this up with ACL unfairness as to business practices would be undesirable as multiple regulators and multiple rules would cover the same thing and lead to potential inconsistencies and confusion.
3. The finalisation of the Privacy Act Review will be helpful to the Treasury and ACCC in establishing whether there are any gaps in the existing consumer protection law framework which expose consumers to the harms of concern. Given that the Privacy Act Review has progressed significantly and that the Government has confirmed its intention to legislate such in 2024, it makes sense to undertake the exercise of mapping the potential harms of concern against the ACL, Privacy Act and other consumer protections once reform has been implemented - ensuring a more accurate determination as to where the gaps in regulation exist;
4. The Government consider deferring the introduction of an unfair trading practices prohibition until the Privacy Act reforms and expanded scope of Unfair Contract Term laws have taken effect, been implemented by business and the respective change in conduct can be monitored;
5. The Government considers working in consultation with industry to develop and introduce guidance that clarifies what it considers to be dark patterns that lead to misleading and deceptive conduct and/or the lack of truth and transparency in disclosure of data rights;
6. The Government refrain from adopting a general prohibition against unfair trading as outlined by options 3 and 4 in the CRIS. The inflexibility of these options at this time would be costly.

Introduction

As the principal body advocating for responsible practices within the data driven marketing and advertising industry, ADMA continues to support moves to enhance protections for consumers from unfair trading practices. ADMA recognises that there is a direct relationship between the marketing practices of a brand and the trust the consumer has in engaging with that brand. It is ADMA's opinion that under the current regulatory framework there is need for reform to strengthen the protections for Australian consumers and the competitive local economy, but that regulatory reform must be done alongside other economy-wide reforms and with a clear understanding of the harms most needing to be addressed and the gaps in consumer protection that need to be filled.

Australia's changing landscape is valuable and requires enhanced protections

Technological innovation has changed the landscape being regulated significantly. This development has been organic and has occurred at a rapid pace. The rise of digital platforms and services has changed what the 'wide economy' looks like. It has opened up opportunities for organisations to improve their efficiency and effectiveness and provide innovative and cost effective ways to reach, engage and do business with their customers in ways and at times that are convenient to them. Data-driven marketing and advertising helps drive Australia's digital economy and makes (the advertising funded services and content) accessible to all. At a macroeconomic level, Australia's digital advertising industry plays a significant role in the economy and society and is responsible for contributing a total economic value of \$94 billion to GDP and supporting over 450,000 jobs¹. This figure is not insubstantial, and therefore ADMA notes the importance of ensuring accountability and fairness in the sustainability of this industry.

While there are a multitude of benefits that have evolved in Australia's 'connected economy' of today, ADMA recognises that left unchecked, there is the possibility of significant competition and consumer harms and that these harms have become more prevalent as reliance on digital platforms services continues to grow. ADMA recognises that harmful business behaviour is present in Australia and that 'self-regulated moral behaviour has the capacity to give way to profit-motivated practices that are offensive in good conscience, and thus have an impact on both consumer trust and fair competition

¹ Ad'ing Value report prepared by PwC and commissioned by IAB Australia. This report confirmed the industry's total contribution is the equivalent of over 4% of GDP and over 3% of total employment in Australia 2021-2022.

in the economy. As such, competition and consumer protection legislation has an important role in regulating these practices².

To this end, ADMA supports the intention behind the Treasury's review and recognises the need to ensure that consumers are protected from harms associated with a lack of truth and transparency in disclosure, or confusing/ deceptive presentation or design. Especially where these business practices lead a consumer to unwittingly waive rights or grant access to data for use that is not fair and clearly articulated upfront.

That said, the starting point is to look at Australia's well established consumer protection framework made up of various controls including the Privacy Act 1988, the SPAM Act 2003 (Cth), the ACL and other protections under the Competition and Consumer Act 2010 (Cth) (CCA) and the Competition and Consumer (Consumer Data Right) Rules 2020 (Cth). These regulations are further supported by industry-specific protections including telecommunications³, financial services⁴, energy⁵ and others. Furthermore, these protections are bolstered by voluntary industry codes providing a comprehensive framework of protections for customers and small businesses. As is well known and documented, the Attorney General's Department (AGD) is still underway in its review of the Privacy Act.

But despite the need for the current landscape to be strengthened to protect consumers from harm, ADMA considers that the timing of this consultation, in being able to definitively determine the actual regulatory impact, is not optimal.

The current legal landscape is largely unsettled and some of the specific concerns identified in the CRIS may be caught by recent amendments to the unfair contract terms regime and proposed changes to the Privacy Act 1988. ADMA acknowledges there is significant and ongoing work in relation to the reform of ACL and privacy laws, including Safe and Responsible use of AI, and thus submits that until the existing legal position for each is settled, it may be too early to make conclusive findings as to where potential gaps exist and how best to intervene in filling such.

The regulatory landscape protecting consumers from unfair trading practices must be reviewed to reflect the changing landscape of Australia's economy, however the timing of such a review (and mapping) is imperative to successfully identifying if there are gaps in the current regulatory framework. It is ADMA's opinion that this is not the optimal time to do this.

² Karen Chester, 'Consumer Outcomes: A truth universally Acknowledged' (Speech, Australian Institute of Company Directors Leaders' Lunch, 29 November 2019)

³ The Telecommunications Consumer Protections Code (TCP Code) which protects customers who use mobile phones, landlines and internet services (including NBN)

⁴ Australian Securities and Investments commission Act 2001 (Cth)

⁵ National Energy Customer Framework

Key observations of this consultation

Scope of consultation

ADMA acknowledges the extensive scope of unfair trading practices outlined in the CRIS, recognising their potential impact on consumers across various touchpoints. Similarly we appreciate the Treasury's focus on unfair trading practices extending beyond the digital economy, however, we note that the examples provided in the CRIS predominantly highlight potential harms more prevalent in the digital sphere.

Given the connection between data driven marketing and advertising and the digital landscape, ADMA takes this opportunity to advocate that fair and transparent marketing and advertising practices promotes consumer welfare and should be both sustainable and practical. Unfair trading practices do, unfortunately, exist and contribute to the underlying distrust in the digital industry, making it more difficult for responsible marketers to build and foster consumer trust.

Consumer trust in a brand is directly related to the digital marketing practices of that brand and how they manage the privacy rights in an environment that endorses and encourages sharing of information. Abuse of digital trust of individuals is not a sustainable business practice and the practice of unscrupulous businesses deriving business benefit and causing individuals to suffer any level of harm must be identified efficiently and minimised with more awareness around best practice and respect for privacy.

As the industry matures in the way the digital marketing and advertising industry has, it becomes an integral part of everyday life. This CRIS, whilst an opportunity to evaluate how to ensure a robust framework that protects the industry, must also consider and review any threat of unintended consequences such as restriction of innovation, limiting the ability of businesses providing free access to services and content, reducing competition, higher operating expenses and increased costs to both consumers and the economy. Such consequences may outweigh any possible benefits an inflexible economy-wide unfair trading practices prohibition might achieve.

The scope of the consultation is intended to be economy-wide but business practices identified in the CRIS are more prevalent in the digital economy. The introduction of a new unfair trading provision must look to substantially strengthen consumer protection. If this is unlikely to occur, ADMA recommends abstaining from making changes as such may lead to unintended impacts to Australian businesses, with no real additional benefit to the Australian consumer.

Identifying Harms

It is ADMA's opinion that there is a lack of clarity around the exact nature of the consumer harm that needs to be protected by a new prohibition. ADMA understands that there are varying levels of harm and that it is important, first and foremost, to eradicate the most serious and nefarious harms to individuals, businesses and broader society. That said, we believe that the CRIS fails to demonstrate that the existing consumer protection framework (which includes the ACL, the Privacy Act and other consumer protections) is unable to provide sufficient protection to consumers.

ADMA recommends clearly identifying and specifically outlining existing harms targeted by the CRIS. This will then allow prioritisation of the most significant threats to consumer well-being and the economy, and exploration of whether other regulatory mechanisms or regulators might be better positioned to address these issues, considering ongoing reforms.

The CRIS is somewhat vague in identifying novel harms that introducing a new unfair trading practices prohibition will eradicate. ADMA believes that the failure to identify any new harms implies a suggestion that a new framework is required to address the use of new technologies to cause consumer harm. ADMA does not agree this is necessary as the existing laws are platform (or business model) agnostic.

Business practices identified in CRIS

The CRIS provides the following examples of potentially unfair trading practices⁶:

- 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;

⁶ CRIS page 9

- 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.

It is ADMA's opinion that these business practices fall within existing laws and/or are already being dealt with in other ongoing law reform processes such as the Privacy Act Review.

Technological innovation is no doubt evolving business models and commercial practices, however, ADMA believes that the ACL is suitably platform agnostic and thereby prohibits conduct regardless of the business model or commercial practices involved.

The specific practice of concern (not platform from which it is delivered) is what is measured against the relevant threshold of conduct prescribed under the relevant provision of the Australian Consumer Law. A new unfair trading practices prohibition is not required to capture new technologies, practices or business models.

Specific Emerging Issue of 'Dark Patterns'

Definition of Dark Patterns

ADMA is principally concerned with activities that can be encompassed within the broader realm of data driven marketing. To establish a benchmark distinguishing responsible marketing behaviour from irresponsible actions, we advocate for a clear definition of 'dark patterns' as a starting point.

ADMA recognises the potential for harm to consumers as a result of digital design features (or 'dark patterns') which seek to deceive, steer or manipulate users, however, contends that there is a significant polarity between manipulation, which is coercive, and persuasion - and that harmful dark patterns sit clearly within the former.

ADMA notes the definition of 'dark patterns' articulated by the Australian Competition and Consumer Commission (ACCC) in the CRIS 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 interests⁷. ADMA respectfully submits that this definition is too broad and may lead to a surge in claims from consumers which are more akin to an instance of buyers remorse, as opposed to a deceitful or nefarious design feature.

ADMA suggests that consideration be given to a definition which has a stronger focus on conduct that obscures, misleads, deceives, coerces or manipulates users as this would offer both greater protection for consumers and increased certainty for the industry. In this regard, ADMA encourages the use of a definition of 'dark patterns' which is more representative of a predatory act, comprised of various hallmarks such as patterns with 'design features used to deceive, steer or manipulate users' into making choices which are in the best interest of an organisation, but can be harmful to the consumer or contrary to their intent⁸.

As the issue of dark patterns arise there is a need to draw a line in the sand to help clarify what is acceptable and what is not. Dark patterns to one person may be seen as creative marketing to another. Advertising will continue to adapt and evolve as technological solutions allow it to. What is required is a clarification that responsible marketers can look to, to ensure that future marketing does not cross the line from persuasion to manipulation.

Scope of harms resulting from Dark Patterns

ADMA believes that 'dark patterns' sit on a spectrum and acknowledges that at the higher end of this spectrum the effect on consumers can result in serious harms, however in the pursuit to regulate in this space, it is important to acknowledge that not all forms of dark patterns cause the same kind of harm. It is, therefore, crucial from a regulatory point of view, to ensure that the harms which are trying to be eradicated are clearly defined.

ADMA is aware that significant research is underway to establish, from a scientific standpoint, the level of harm a consumer may suffer from the use of 'dark patterns'⁹. However, in the absence of detailed guidance, ADMA respectfully suggests that the causal link to demonstrate or disprove 'harm' may be incredibly complex, time consuming and costly to prove. From the perspective of small businesses, who are already impacted by increased regulation, the effect of potential action for practices that sit on the more 'persuasive' side of dark patterns may prove financially prohibitive to defend.

⁷ CRIS, page 10

⁸ Commissioner Rohit Chopra Age of Learning, Inc. Federal Trade Commission File Number 1723186 (Sept. 2, 2020)

⁹ "How Australia can stop unfair business practices: A comparative analysis of unfair trading laws in international jurisdictions" Consumer Policy Research Centre, September 2023

ADMA also remains cautious that any regulations do not negatively impact and harm design innovation and creativity, or affect user preferences or personalisation, which may indeed be preferred by consumers.

In a time-constrained digital world, responsible marketers and advertisers strive to balance a seamless consumer customer journey with transparency in data transactions, acknowledging the complexities involved. It is undisputed that dark patterns exist everywhere, both digitally and in physical settings, and dark patterns which negatively mislead consumers are both unethical and illegal. ADMA is not opposed to the prohibition of conduct which unlawfully manipulates consumers to make decisions which violate their intentions or best interests. To this extent, ADMA supports the current regime which prohibits conduct that is found to be misleading or deceptive and encourages further and better education and guidance within both the marketing industry, and for consumers generally, to ensure that digital practices remain merely persuasive.

ADMA strongly supports and encourages the use of detailed guidance from the regulators to better advise both the business community and consumers about the potential of predatory dark patterns and behaviour. Achieving the right balance requires guidance, education, and flexibility in the framework and ADMA is strongly supportive of guidance rather than legislative reform in this regard.

A clearer definition of 'dark patterns', along with comprehensive guidance material that has been developed by the regulator (in consultation with industry) would be highly beneficial for both consumers and industry. It will also likely provide the required outcome that is intended to occur with any amendment to the ACL.

Emerging issues and the continuing need for education

Digital marketing practices can be impacted by a multitude of factors including (but in no way limited to) a brand's product design; notices, policies and terms; ways of collecting, using and managing data; the environment in which a brand operates (including platforms), the methods a brand uses to enable a consumer to connect and contact the brand, and the way that consumers may provide consent and/or withdrawal of the same.

ADMA regularly provides training to the industry on various aspects of digital marketing and advertising best practices, with a particular emphasis on marketing compliance. This includes detailed coverage of areas such as privacy, consumer law, spam and evolving legal frameworks related to emerging technologies and issues. ADMA's education courses also ensure that they help put compliance 'into practice' - helping marketers understand how regulatory reform and changes in a

platform environment stemming from regulatory reform will impact their day to day jobs. One of the emerging issues that are addressed specifically is that of 'dark patterns', demonstrating our ongoing efforts and commitment to uplift knowledge around reasonable business practices in this domain.

ADMA has been engaging the marketing and advertising industry for some time, to raise awareness and knowledge about emerging issues. By way of illustration, the concept of 'dark patterns' is a relatively recent phenomenon and, as such, there is an inherent lack of consensus, both in Australia and internationally, as to the best approach in how to regulate this. ADMA notes that the marketing community has been very enthusiastic to understand the line to which "marketing creativity must not cross" and, to that end, we have attached one of the guides (in the form of an information sheet) that ADMA regularly uses to help educate marketers. A copy of this fact sheet is attached for your reference.¹⁰

In an attempt to increase an understanding of good and fair industry practice, ADMA regularly provides training and guidance to support the industry on what best practice looks like and encourages our members to take on greater responsibilities in the digital landscape to embed responsible practices that proactively help to avoid consumer harm. ADMA fiercely advocates that 'marketing best practice' surpasses current legal obligations and considers that to be just the starting point. These initiatives play a significant role in ensuring that the industry is both receptive of, and responsive to, the impact of patterns of behaviour on consumers and develops alongside what a consumer will come to expect from a brand.

ADMA takes seriously the responsibility we hold in providing such guidance to the industry especially with the emerging issues that provide both opportunity and threat to the data driven marketing and advertising industry, brands they represent and the consumers they serve. We understand there is, however, a balance which must be struck between regulatory guidance and the responsibility of marketers themselves in helping define where persuasion crosses the line into manipulation. Without this input from professionals engaged in the practice of digital marketing and advertising, we are in danger of stifling innovation, creativity and competition.

ADMA recognises that the foreseeable future is going to be one where clear guidance on what regulatory reform looks like in practice will be critical and looks forward to working closely with the respective regulators in continuing to educate the digital marketing and advertising industry.

¹⁰ "Understanding Dark Patterns - so you can avoid them in your marketing" ADMA (August 2023)

Consumer Protection under existing law

Australian Consumer Law

The unfair trading practices regime within the ACL has been strengthened through review to ensure that it is both effective and applicable to evolving business practices and models. The prohibitions generally apply to both business-to-consumer and business-to-business transactions.

As the CRIS outlines, the existing unfair trading practices regime includes provisions prohibiting misleading and deceptive conduct, false and misleading representations, unconscionable conduct, unfair contract terms, misuse of market power, as well as specific prohibitions for practices like pyramid selling.

Section 18: Misleading & Deceptive Conduct

“It is illegal for a business to, in trade or commerce, engage in conduct that misleads or deceives or is likely to mislead or deceive consumers or other businesses”

This is a strict liability prohibition that applies regardless of intention of the business and regardless of the form in which and/or the platform on which the conduct occurs. In its business guide to the Australian Consumer Law¹¹ the ACCC clarifies this as follows:

The ACL prohibits false, misleading or deceptive conduct in any communication with consumers, whether in person, written down, in advertising or through social media. Misleading or deceiving a consumer can include:

- leading someone to a wrong conclusion
- creating a false impression
- omitting or remaining silent on important information
- making false claims about products or services.

Your business must not make false claims about the quality, value, price or benefits of goods or services, or any associated guarantee or warranty. Using false testimonials or impersonating another business is also illegal. These provisions apply to all interactions with the public – from the overall impression you create in your advertising to one-on-one sales situations.

¹¹ Australian Competition and Consumer Commission, Consumer Vulnerability: - A business guide to the Australian consumer law, page 4

This is also further clarified and confirmed in the ACCC's Advertising and Selling Guide¹²

The protections in section 18 sit alongside and in addition to the prohibitions of section 29 - relating to false and misleading representations.

It is ADMA's view that most of the business practices cited in the CRIS¹³ as unfair trading practices would be covered by this provision.

Section 20 and 21 : Unconscionable Conduct

These sections of the ACL prohibits unconscionable conduct by businesses towards consumers or other businesses. It is a broad prohibition in terms of the circumstances to which it applies. The ACCC's Business Snapshot¹⁴ guidance on Unconscionable Conduct outlines such examples as to when it may be relevant.

In ACCC v Quantum¹⁵ the Federal Court made clear that "

"for conduct to be held to be 'unconscionable' under the Australian Consumer Law and other similar laws, it is not necessary to establish that the business engaging in the conduct has exploited some disadvantage or vulnerability on the part of the consumers or small businesses affected, although this may often be the case."

In this case it was confirmed that "the correct approach to assessing statutory unconscionability is to focus on the conduct, and assess whether it is a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience."

It is ADMA's view that some of the practices of concern that are cited in the CRIS would be caught as being unconscionable conduct - so long as it is regarded to fall out of what is considered to be the "norms of acceptable commercial behaviour" with the context of each case being taken into account each time.

¹² Australian Competition and Consumer Commission, Advertising and Selling Guide - A Guide for business, July 2021 page 6

¹³ CRIS page 9

¹⁴ Australian Competition and Consumer Commission, Business Snapshot - Unconscionable Conduct (https://www.accc.gov.au/system/files/482_Business%20Snapshot_Unconscionable%20conduct_FA2.pdf)

¹⁵ Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd [2021] FCAFC 40 (ACCC v Quantum)

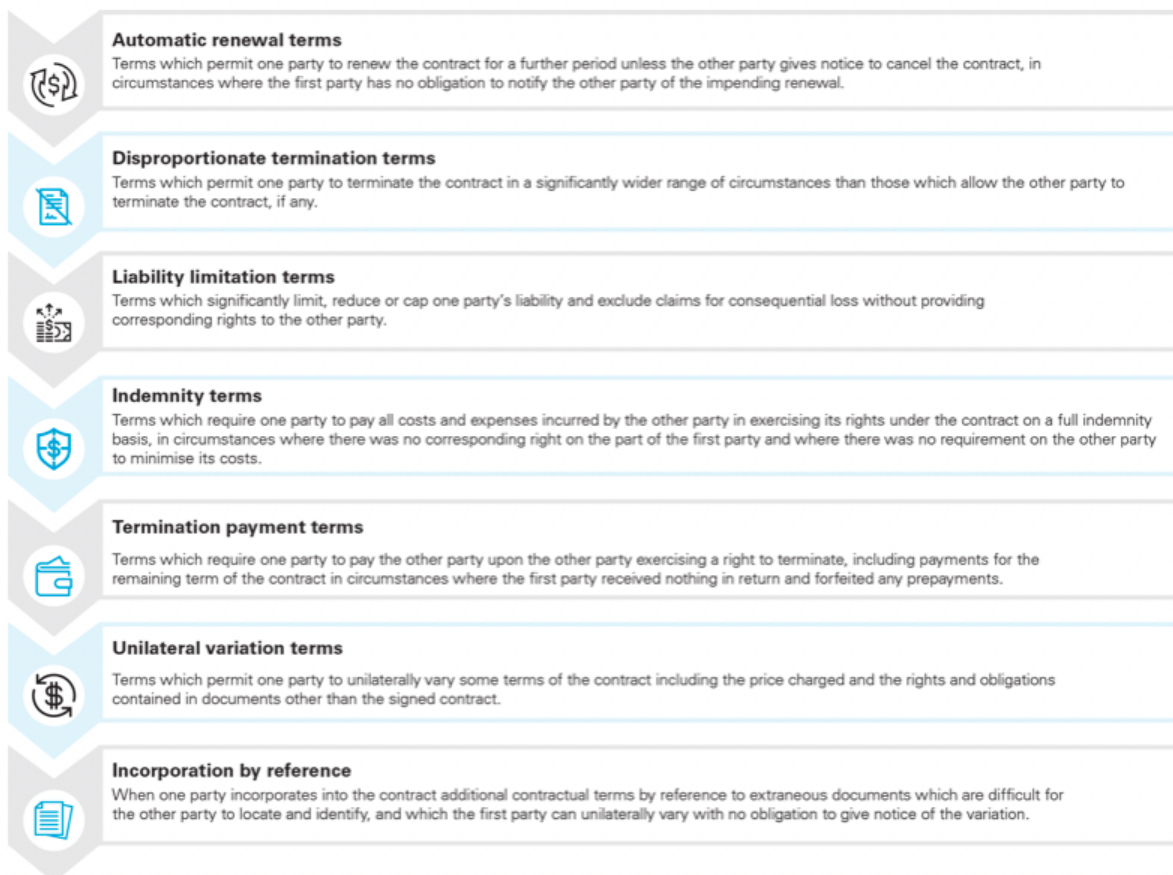
Sections 23 - 25 : Unfair contract terms

Section 23 of the ACL provides that a term of a consumer contract or small business contract is void if it is unfair and contained in a standard contract.

Section 24 explains when a consumer contract is unfair. In particular it is unfair if:

- it 'would cause a significant imbalance in the parties' rights and obligations arising under the contract'
- it is not reasonably necessary to protect legitimate interests; and
- it would cause detriment to a party if applied/relied on.

Section 25 outlines a non-exhaustive list of examples of unfair terms. Unfair terms are determined on a case by case basis, however the Federal Court decision in *ACCC vs Fujifilm Business Innovation Australia Pty Ltd & Anor*¹⁶ provided guidance on the types of provisions likely to be found 'unfair'. These are set out below¹⁷



¹⁶ Australian Competition and Consumer Commission & Anor v Fujifilm Business Innovation Australia Pty Ltd & Anor [2022]

¹⁷ Unfair Contract Terms - Will your business be caught by changes to the regime?, Belinda Harvey, Stefanie Benson, Rachel Stowasser, March 2023 (<https://www.whitecase.com/insight-alert/unfair-contract-terms-will-your-business-be-caught-changes-regime>)

Some of the examples included in section 25 and outlined above are included in the list of practices the CRIS is concerned by. This area of law wouldn't address unfair conduct occurring prior to entering into contracts. However it is ADMA's understanding that such conduct would instead be captured by section 18 (Misleading or deceptive conduct) or sections 20-21 (Unconscionable conduct).

From November 2023, Australia's unfair contract terms regime changed to enhance the regulation of unfair terms in standard form contracts by strengthening and clarifying the existing unfair contract term provisions and reducing their prevalence in both consumer and small business form contracts.

The amendments include substantial changes to ACL and the Australian Securities and Investments Commission Act 2001 (ASIC Act) including:

- the introduction of new unfair contract term prohibitions;
- creating new civil penalty provisions for breaches of the unfair contract term regime;
- clarifying and expanding the powers of a court to make orders to void, vary or refuse to enforce part or all of a contract;
- clarifying a court's power to issue injunctions in relation to unfair contract terms; and
- extending the application of the unfair contract terms regime to a greater number of small business contracts.

The changes will have a significant impact on businesses that routinely work with consumers and small to medium businesses, as well as those which rely on standard form contracts.

Therefore, it is ADMA's view that a broad unfair trading practices provision is not required to deal with the issue of unfair contract terms.

Australian Data Privacy Laws

Privacy Act 1988

Potential unfair trading Issues around the collection, use, disclosure and management of personal information are outlined throughout the CRIS.

The rise in data shared in a digitally led economy and the increase in data related breaches by some of Australia's (previously) most trusted brands, naturally also has consumers concerned about the ways in which businesses are using their personal information. Some of these concerns are clearly outlined in the OAIC's recently published 'Australian Community Attitudes to Privacy Survey' (Survey).

Equally important to note in that same Survey is that most (53%) Australian adults, when asked about the kind of advertisements they receive, stated that they would prefer target ads that were relevant.

When it comes to data privacy regulation, targeted advertising is a contentious topic. Targeting has widespread use across the digital economy and is central to vibrant and sustainable digital advertising which underpins free access to online content and services (ie - the ad supported free digital services). Targeted advertising is a key medium used by small and large businesses, Australian Government agencies, charities and not for profit organisations.

ADMA agrees that a business' activities in relation to collection, use and management of personal information must be carried out in a manner that is consistent with consumers expectations in relation to privacy. ADMA also firmly believes that those businesses who apply best practice which exceeds both the requirements of law and consumer expectations, are the ones which build the most impactful and lasting consumer trust.

It is ADMA's opinion that many of the issues that are related to the collection, use, disclosure and/or management of personal information as raised in the CRIS are most suitably addressed under the Privacy Act 1988. ADMA notes that this Act is currently undergoing a whole-scale, comprehensive review (Review) by the Attorney Generals Department.

The Privacy Act reforms are aimed at strengthening protection of personal information and control individuals have over their information. The Proposals put forward by the Government in the Australian Privacy Act Review Final Report supported greater transparency to, and control by, users over their personal information through improved notice and consent mechanisms as well as the introduction of a range of individual consumer rights.

In this Review, the Australian Government is already considering, amongst other protections, the introduction of an overarching 'fair and reasonable' requirement. Such a requirement would address issues where personal information is collected, used or disclosed as a result of opaque practices, unfair tactics, pressures and manipulation derived by design methods or other practices.

ADMA believes that to consider data privacy related issues under an unfair trading practices prohibition would result in a duplication of laws that would complicate the administration of Australian privacy laws by Australian businesses.

SPAM Act 2003

In addition to the Privacy Act, the SPAM Act also regulates the relationship between businesses and consumers in relation to commercial electronic messages including SMS and emails. Businesses must have consent (inferred or express) from the consumer in order to send a commercial electronic message.

The Australian Communications and Media Authority (ACMA) has been very active in pursuing businesses they deem to be in breach of the SPAM Act and have recently imposed significant penalties on such businesses.

The Government's response to the Privacy Act Review Report included an 'Agreement in Principle' to Proposal 20.2 - that individuals should have an unqualified right to opt out of their personal information being used for direct marketing purposes. ADMA notes that there is still a need to clearly define 'direct marketing'.

Do Not Call Register Act 2006

The Do Not Call Register is a government service provided under the Do Not Call Register Act 2006. It allows consumers to reduce the unwanted telemarketing calls and marketing faxes they receive. Registration is free and telemarketers and fax marketers are required by law to stop contacting consumers once they are on the Register.

Consumer Data Right

The Consumer Data Right (CDR) is a legislative, regulatory, and standards framework for consumer data portability in Australia. It has been introduced to provide greater choice and control to consumers as to the way in which their data is shared so as to protect and provide them with greater benefits. It stimulates competition by allowing consumers to share their data with other service providers to compare products and services so that they can find solutions that best match their needs and at the best available price. The CDR has been rolled out in the banking and energy sectors with an intention to next implement in telecommunications. The CDR has a comprehensive process to determine who can be a 'designated data holder' and once approved these parties are subject to rigorous obligations including (but not limited to) strict consent requirements.

Other related laws

The CRIS outlines that the ACL (and Privacy laws) regime sits alongside many other laws and instruments that also govern the interactions between businesses, consumers and small businesses. These laws provide a comprehensive framework covering potential unfair practices economy wide. Some of the laws additional to what has been mentioned above and most relevant to the data-driven advertising and marketing industry and therefore called out by ADMA in this response include (but is not limited to):

- The Telecommunications Act 1997;
- State and Territory privacy laws;
- State laws covering the ways in which a business conducts Trade Promotions;
- The Freedom of Information Act 1982;
- Various federal and state laws prescribing the use of tracking devices, listening devices and workplace surveillance and/or unauthorised optical surveillance. This includes (without limitation) the Surveillance devices Act 2004 (Cth)

These Acts are then further supported by a number of codes of practice which are applied by various sectors economy wide. Industries such as airline, financial services, telecommunications etc. already have quite structured requirements to address unfair trading practices in the wider economy and to protect consumers. For instance each sectors codes have requirements to act in duty of good faith, operate fairly and efficiently, take extra care for vulnerable customers etc with each respective industry having standards in relation to privacy, fair consumer practices and the general treatment of data and customers.

The CRIS outlines¹⁸ that 'evolving market trends arising from the digital economy have altered and continue to alter the risk of consumers being subject to unfair trading practices'. However ADMA is of the opinion that Australia's legislative framework has also evolved (or in the case of the Privacy Act is under comprehensive review to evolve) to address such risks.

ADMA suggests there is a need to wait until the other regulatory reform reviews are concluded to properly understand whether there are any gaps.

There is a need to avoid duplication of regulation where particular technologies (namely new and novel tech.) are concerned. ADMA stresses the importance of cross-government consultation. Once these reviews are complete, ADMA recommends the Treasury undertake a stocktake of the existing regulatory protections as part of a broader regulatory mapping exercise.

¹⁸ CRIS page 10

Cost considerations in the face of uncertainty

The CRIS specifies that the introduction of an unfair trading prohibition would be a whole of economy reform. This means that there would inevitably be significant costs associated should any economy wide changes be introduced.

Therefore, the need to clarify exactly what is required and then to the extent that it will be addressed by the introduction of an unfair trading prohibition is critical.

The CRIS itself states¹⁹ that “Unfairness is an inherently subjective concept, thus highlighting the need for a calibrated policy response. A reform that is poorly framed or ill defined could create uncertainty, stifle innovation and competition and be difficult to enforce”. Due to this subjective nature, existing case law would provide little or no direction and there will be a significant period of time before jurisprudence is developed.

Burden on small businesses

A case in point is the absence of discussion within the CRIS regarding whether the proposed laws would exclusively be enforceable by the ACCC or state Fair Trading agencies. ADMA respectfully submits that this diverges from the approach taken in other jurisdictions like the United States and the EU, where authorised regulatory agencies are solely empowered to address 'unfair trading practices' or 'unfair competition,' precluding private parties or class actions.²⁰

The CRIS seemingly assumes that any law would be enforceable through both private litigation and class actions, alongside the involvement of the ACCC and State consumer bodies. Allowing private enforcement and class actions to cover conduct deemed 'unfair' in a general sense, in practices where the definition of the prohibitive conduct is not clear, could significantly amplify the impact and costs of new laws on small businesses and the wider economy. This would further heighten the risk of unwarranted claims flooding the legal system. Limited enforcement, as seen in other jurisdictions, could serve as a crucial safeguard against the potential deluge of litigation and class actions.

¹⁹ CRIS page 19

²⁰ 'Fair warning: Federal Government consults on proposed law to ban "unfair trading practices" M Corrigan et al, Clayton Utz - Knowledge, 7 September 2023 <https://www.claytonutz.com/knowledge/2023/september/fair-warning-federal-government-consults-on-proposed-law-to-ban-unfair-trading-practices#:~:text=Fair%20warning%3A%20Federal%20Government%20consults,practices%22%20%2D%20Knowledge%20%2D%20Clayton%20Utz>

Burden on already heavily regulated industries

The timing of this consultation before other legislative reform reviews are complete, together with the lack of clarity in the CRIS, means that there is a risk of duplication of regulation across legislative instruments and regulators. What would be equally concerning is the possibility of inconsistencies across regulations and regulator priorities. This is not only inefficient but such inconsistencies could therefore create administrative difficulties as to implementation, especially to those in heavily regulated industries.

Australia in a global economy

A regulatory impact assessment, especially in a digital economy, needs to both protect the consumer as intended and also protect the ability for Australian businesses to provide an optimal customer experience and compete with international businesses. Any such review must take into account whether the introduction of a new unfair prohibition would provide the necessary protections the Government is looking to achieve or whether the regulatory burden will have the unintended consequence of putting Australia at a disadvantage, either in terms of the customer experience or the ability for an Australian business to compete on the international stage (or even on the world wide web). The introduction of an unfair trading prohibition at this point in time, without the further work required to be done in clarifying issues, has the potential to leave Australian businesses exposed beyond the intention of the reforms.

ADMA commends the Australian Government for looking to align Australian regulation where it makes sense to international standards/models. However as the international model is currently still quite fluid and largely inconsistent, ADMA believes that rather than implementing an inflexible regulatory framework, the Government should consider introducing detailed guidance on how to handle emerging issues. This would be the preferred approach to clarifying any uncertainty at this point in time.

Burden on regulators

The Australian Government has recently taken steps to bolster regulators with more resourcing and funding, however, there is an increasing number of issues and regulatory changes that regulators will be dealing with and it is expected that they will need time and adjustment for what is to come. Therefore, any extra burdens of regulation must be considered both on the impact it will have in eradicating the most concerning business practices but also on the economy as a whole and on the regulators who will govern, enforce and police this space.

This becomes a bigger concern in the circumstances, where the definition of what is “unfair” is not clearly aligned to a level of harm that requires regulatory intervention. Without a clear line, the regulatory framework will open itself up to increased costs and resources going into arguing what falls within the scope of the prohibition and what might instead be falling short of being prohibitive behaviour. Take for example a vague definition of when a dark pattern moves from being a persuasive tactic (i.e. placing certain items closer to the supermarket checkout) as opposed to when they are used to create a lack of transparency and cause an issue of waiving consumer rights and/or or become a misleading digital practice. ADMA advocates for clarification so that protection is given to the consumer and/or competition environment for small businesses, not just allowing a small portion of the economy to waste the resources of regulators in investigating or being involved in class actions that are chased on an opportunistic loophole. This could fundamentally undermine Australia’s adoption of innovative methods of business and negatively impact Australia’s ability to be a digital world leader.

Giving rise to the possibility of class actions will have an unintended effect of increasing the burden on the regulator by diverting valuable resources away from other areas that may be addressing more serious harm. Any regulatory impact, therefore, would need to be considered in terms of cost on ability to pursue what may be a higher priority in the protection of consumers. For instance, with the rise of scams one could argue that the focus of the regulator on helping consumers hold bad actors accountable would be more effective than battling it out with law firms arguing on the dark patterns used when placing certain products closer to the checkout in a store.

Poorly targeted, weak evidenced reform undermines consumer interests and small business in the long term by increasing the cost and complexity to businesses delivering goods and services in Australia, stalling business investment and innovation if the regulatory framework becomes too complex, uncertain and unpredictable. This may also have the negative spillover effect of reducing competition and dynamism in the Australian economy. All of these factors could especially hinder the Government’s desire for “Australia to be a world leading digital economy and society by 2030²¹.”

²¹ Australian Government “Digital Economy Strategy - A leading digital economy and society by 2030 by the Department of the Prime Minister and Cabinet (2021

The International Landscape

The definition of what constitutes 'unfair' has been explored by several jurisdictions, with differing nuances to capture the concept of unfair. As set out in the CRIS, there are a range of overseas jurisdictions that have some form of unfair trading practices prohibition including the UK, EU, US and Singapore. A key difference between these jurisdictions and Australia is that they do not already have comprehensive consumer protection laws like Australia has in place.

Business practices that are considered under unfair trading practices in these other jurisdictions would, in Australia, be considered under misleading and deceptive conduct provisions in the ACL.

The CRIS outlines²² that in a number of respects, the ACL regime protects a broader range of conduct than overseas equivalents.

Under the **EU Directive**, the unfair commercial practices' provision captures conduct that is 'likely to materially distort the purchasing behaviour of the average consumer'. This is covered by the 'unfair commercial practices provision' (UCP). The EU Directive outlines four main categories of unfair commercial practices (misleading actions, misleading omissions, aggressive commercial practices and harassment, coercion and undue influence). It is of special note to ADMA that section 4.2.7 covers Data driven practices and dark patterns. The Directive states that "the principle-based provisions and prohibitions in the UCP can be used to address unfair data-driven business to consumer commercial practices, in addition to other instruments in the EU legal framework such as the ePrivacy Directive, the GDPR or sector specific legislation applicable to online platforms".

Australia has a similar principle-based approach in terms of governance of data-driven practices within its Privacy Act and manages dark patterns that lead to misleading and deceptive practices under the ACL. It is of note that the AGD's Review of the Privacy Act has "Agreed in Principle" to proposals that will directly deal with some of the specific data-related concerns outlined in the CRIS.

In **Singapore**, the primary statute governing consumer protection is the Consumer Protection (Fair Trading) Act 2003 ("CPFTA"). The Unfair practices provision of this Act covers a range of unfair trading practices that are similar to those covered under Australia's provisions for assessing "misleading and deceptive conduct' or 'unconscionability'.

In the **Netherlands**, the general rules of the Dutch Civil Code (Unfair Commercial Practices) derive from the European directives on misleading and comparative advertising and unfair commercial

²² CRIS page 19-20

practices. Section 6.3.3A prohibits unfair commercial practices, including misleading and aggressive practices and provides remedies for consumers who have been harmed by such practices. In addition, certain sector specific laws²³ contain specific rules for advertising. In general, advertising law in the Netherlands has its standards laid out in the Dutch Advertising Code - a self regulated code that covers comparative advertising, a prohibition against advertising and other commercial practices that mislead the average consumer. Advertising law also related to telecommunications law and , privacy and data protection (for direct marketing) sits alongside these Codes. The areas of unfair commercial trading practices addressed as outlined in the Netherlands, are covered in Australia under the ACL, The Privacy Act, the Do Not Call Register Act and the SPAM Act.

The **United Arab Emirates (UAE)** recently implemented significant reforms to its consumer protection framework. The reforms highlight the UAEs focus on enhancing consumer rights and promoting responsible supplier behaviours. The CP Law²⁴ and Regulations²⁵ (UAE Laws) fit in a developing landscape of laws reflecting personal rights, such as the Personal Data Protection Law. The UAE Laws operates around a broad definition of "Supplier" which encompasses manufacturers, distributors, service providers and entities engaged in the produce or trade of products, including e-commerce service providers registered in the UAE. The UAE Laws tackles unfair practices, the dissemination of misleading information, establishes unfair contract terms, advertising (misleading claims that may directly/indirectly create false or misleading impressions to the consumer) and lays down comprehensive rules for warranties and remedies.

The business practices that are outlined in the EU Directive and in the consumer protection laws of Singapore, the Netherlands and the UAE regulatory frameworks are already similarly covered in Australia under its ACL and Privacy laws (including SPAM laws). ADMA suggests that Australia already provides greater protection for consumers than its overseas counterparts.

²³ Financial Supervision Act and the Betting and Gaming Act.

²⁴ UAE Federal Law No 15 of 2020 (the CP Law)

²⁵ UAE Cabinet Decision No 66/2023 Concerning the Executive Regulation of the Federal Law No. 15/2020

Commentary on options 2-4

The following Policy Options are presented in the CRIS²⁶:

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.

Of the above, Options 2, 3 and 4 would introduce a prohibition on unfair trading practices. ADMA, is at this point in time, concerned with all three.

Once the regulatory environment in Australia stabilises, incorporating the newly reformed Privacy laws, as well as updates to the ACL and other legislations addressing safeguards against unfair trading practices, the Government can thoroughly evaluate the regulatory landscape. This will present an opportune time to determine whether there are remaining significant or substantial harms that are not adequately addressed.

If this is the case, and it is the suitable approach - then there is some merit in exploring **Option 2** in expanding the meaning of “unconscionable conduct” to include unfair trading practices. ADMA is cognisant that there will be some risk associated in changing the term ‘unconscionable conduct’, as it is largely already well understood by the public, businesses and the courts to be a structured definition with some legacy.

That said however, in *Australian Securities and Investments Commission (ASIC) v Kobelt*²⁷ the High Court considered the meaning of ‘unconscionable conduct, under section 12CB (1). The majority of judges found that Mr Kobelt’s actions did not amount to unconscionable conduct. The facts of this case, made the ‘unconscionability test’ too hard to satisfy and this has created pressure to broaden the coverage of ‘unfairness’ when unconscionability should convey a higher level of reprehensibility than ‘unfairness’. The dissenting judgements balanced choice and protection in their reasoning - suggesting that ‘the majority’s approach erodes the principle at the root of unconscionability; protection of the vulnerable from exploitation by the strong²⁸.’ The majority’s approach in *Kobelt* opens the door to arguing that a person’s vulnerabilities can be dismissed because other factors contributed to their ‘choice’ to accept unjust or unfair conduct. With the understanding that there may be need to limit such arguments through a better defined legislative directive, ADMA supports

²⁶ CRIS page 5

²⁷ *Australian Securities and Investments Commission (ASIC) v Kobal* [2019]

²⁸ *Kobelt* (n4) 60 [266] (Justice Edelman)

that once a mapping of existing and reformed consumer protections laws take place, there may still be a need to broaden the term 'unconscionability' to include 'unfair trading practices' and if that is the case then Australia would benefit from looking to learn from the European Union and the United States²⁹ as to where the boundaries should and should not lie.

As to **Options 3 & 4**: ADMA believes that until the current regulatory landscape is settled (namely when Privacy Act reform has been finalised and the recommendations are have been both legislated and implemented), it is too soon to determine the need to cover 'gaps' in the consumer protections against unfair trading practices.

Adding an uncertain prohibition for unfair trading practices as that outlined in the CRIS will add confusion to an already complex and comprehensive consumer law framework. This could have the unintended consequence of making Australia less competitive and add an unnecessary cost to Australia at a time where macroeconomic pressures are already high. The direct and indirect costs of unnecessary (or ill-designed) regulation could stifle existing businesses from modernising their business models. Of particular note, it could have a poor outcome in its impact on Australia's future prosperity - all without providing any extra protections for consumers.

Conclusion

To this end, and at this point in time, ADMA believes that the potential costs and benefits for regulatory reform in unfair trade practices is unable to be properly assessed and analysed whilst many areas of reform are still open. Therefore, we believe that status quo ought to remain (option 1) at least until such time as the other consultations have been finalised and further suggest waiting for legislation to have been finalised and operational for a period of time. There is already a complexity to the regulatory system in the digital economy and there are many moving parts that will continue to evolve. We need to avoid inefficiency and duplication as well as unbearable regulatory burdens that do not have a positive outcome for consumers.

ADMA thanks the Treasury for the opportunity to respond to this CRIS and would value any opportunity to engage on behalf of (or where appropriate, facilitate conversation with) our Members on the next phase of this important consultation. ADMA would also be keen to work with the Government as we continue to educate marketers on how to apply best practice in building an industry implementing responsible marketing practices.

²⁹ Federal Trade Commission Act of 1914, 15 U.S.C. § 45(a) (2019).

About ADMA

ADMA represents the full 360 degrees of Australia's media, marketing and advertising ecosystem. ADMA itself is the principal industry body for data-driven marketing and advertising in Australia, representing over 350 organisations from a broad spectrum of Australian industries.

Together these organisations employ about 28,000 marketing professionals, many of whom are on the cutting edge of the data revolution. Members range in size from SME's to multinational corporations. They include banks and telecommunication companies, global tech companies, advertising agencies, specialist suppliers of marketing services, statutory corporations, retailers, specialist industries such as travel, hospitality and automotive, charities (both large and small) and educational institutions.

ADMA, as the principal industry body for data-driven marketing and advertising, is committed to upholding good standards in data privacy. ADMA members are advocates of responsible marketing and as such recognise that a sustainable marketing and advertising sector requires fair and transparent business practices in the handling of consumer data (including personal information) and that such practices reflect a respect of consumers which in turn nurtures digital trust.

ADMA members take their privacy and marketing compliance responsibilities very seriously and support a regime that protects the personal information of consumers, understanding that responsible marketing practices stem from compliance with data privacy law.

ADMA is keen to support all key stakeholders however it can to ensure that the review of unfair trading practices is considered in the context of other related legislative reforms, including the ACL and Privacy Act, to make sure that any ambiguity or overlap is settled prior to further intervention, which may be unwarranted.

ADMA acknowledges that our members may have an interest in individual questions raised in the CRIS; however in this submission we focus on key issues as they pertain to the data-driven marketing and advertising industry.

Individual members of ADMA may provide separate submissions to the Treasury.

ATTACHMENT : Understanding Dark Patterns Information Sheet

(as referred to on page 11 of this response)

UNDERSTAND DARK PATTERNS

– SO YOU CAN AVOID THEM IN YOUR MARKETING

Dark patterns are 'design features used to deceive, steer or manipulate users into making choices that are in the best interest of an organisation but can be harmful to the consumer and/or against their intent. Dark patterns differ from effective marketing, which should focus on persuading consumers, not manipulating them.

Currently dark pattern practices are already prohibited under Australian Consumer Law if such is found to be misleading or deceptive conduct. Not all dark patterns fall under this prohibition so Australian regulators, being keen to stop use of these design tactics, may incorporate this into other areas of regulatory reform as well (ie Privacy, AI etc).

Digital channels have become core to marketing plans and consumer data is increasingly available and valuable to an organisation. Marketers must be careful that their online practices do not cross the line to coercive. Marketers should consider if their product design, consent management and subscription sign up are compliant. The use of dark patterns may not only cause regulatory issues, but also negatively affect your brand's consumer's trust.

See the list below for some common examples of dark patterns.

Type	Description	Example
False Hierarchy of Options	When organisations preferred choice is made to stand out over others through visual techniques (size, placement, colour)	The organisation's preferred choice is presented as big, bold and well-placed, while your non-preferred choice is listed in smaller font and muted tones at the bottom of the page
Pre-Selection of Specific Options	Preselect certain actions that are favourable to the company	Preselecting the option for consumers to receive digital marketing from the company.
Disguised Ads	Advertisements that are designed to blend in with the website in order to trick users into clicking	Making an advertisement button look exactly like the host website call-to-action button
Confirm Shaming	Wording on a button which uses guilt to manipulate consumer into a choice	If a consumer does not want to sign up for a discount and the wording of the button is "No thanks, I hate saving money"
Hidden Costs	Costs which are not disclosed until purchase is nearly complete	Non-optional costs; shipping, service fees, convenience fees, which are added at the final stage of transaction and not clearly shown in cart.
Urgency	Impose a real or fake quantitative limit on a deal to pressure the consumer into making a purchase	Low stock messages or countdown timers which may be misleading or false
Disclosure of Personal Data / Forced Registration	Consumer forced or tricked into sharing more personal information than necessary	Making a customer submit an email address in order to use a website
Nagging	Site repeatedly interrupts customer with requests to do something firm prefers	Examples include pop-ups or auto playing audio or video
Subscription Trapping / Forced Continuity	Services that are easy to sign up for but difficult to cancel.	An online subscription that can only be cancelled by phone. Customers who sign up for a free trial and are automatically charged once trial ends.
Price Comparison Prevention	Makes it difficult to do comparison shopping regarding price or content	Forcing customers to add an item to their shopping cart to see the cost