

**From:**  
**To:** [MG Consumer Law](#)  
**Subject:** Submission re: Unfair trading practices - Consultation Regulation Impact Statement  
**Date:** Wednesday, 22 November 2023 12:09:59 PM

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Director  
Consumer Policy and Product Safety Unit  
Market Conduct and Digital Division  
Treasury  
Langton Cres  
Parkes ACT 2600

Dear Director

I am a professor at Sydney Law School specialising in consumer and business law. I also am an honorary senior fellow at Melbourne Law School co-teaching a Masters course in consumer protection law. With Prof Jeannie Paterson there I have presented seminars for Australian government officials on the ACL regime and cutting-edge issues. Therein and in my ACL Review submission I have elaborated why I think our law should be amended to add a general prohibition on unfair commercial practices.

I am therefore pleased to see this Consultation RIS and I favour Option 3, based on the EU Directive so consumers, suppliers and regulators alike can benefit from very long and widespread experience particularly with its Article 5. Option 1 (do nothing) is untenable given the evidence of market-distorting behaviour - below I give yet another case study of how the existing ACL does not seem sufficient, re the practice of making it very hard to get out of subscriptions entered into online. Option 2 (amend unconscionable conduct provisions) is not compelling because the legislators have kept trying this over many years, but the courts quite understandably default to equity law focus on exploiting vulnerable persons, which does not hone in on unreasonable business models targeting behavioural biases and heuristics within wider groups. Option 4 (adding also specific prohibitions) may enhance consumer protection but could lead to much disputation, depending on the wording of the specific prohibitions, and impose extra costs on the economy which are not justified by the extra benefits. Accordingly this Option could be reexamined if enactment of an EU-style Option 3 is seen as unsuccessful.

If even Option 3 is considered to be too burdensome, at least initially a sub-option would be to restrict its protections to consumers (as defined more narrowly/typically in Europe and many parts of Asia etc as individuals transacting for non-business purposes). This would also reduce the risk of individual consumers cross-subsidising businesses. However, the (somewhat unique) trend in Australian consumer law has been to extend protection widely, and allowing that also for at least "small business" has some socio-economic and indeed political benefits.

In any event, whichever substantive law reform is implemented, there should be enactment as proposed by this federal Labor Government of a UK-style super-complaints mechanism whereby peak consumer groups can provide prima facie evidence of widespread consumer detriment, triggering a public response from regulators within a specified period. For more details and references, see: Nottage, Luke R. and Kozuka, Souichirou, Consumer Law Redress and Administration, Product Safety Regulation and Contracts in Japan and Australia (May 26, 2023). Competition and Consumer Law Journal, forthcoming early 2024, Available at SSRN: <https://ssrn.com/abstract=4459890>

The case study below provides another illustration of the problems under the current law. I

subscribed online very easily and at a discount last year for a 12-month subscription to The Economist magazine. However, fearing it might auto-renew at the higher rate, I tried to login via the "Manage Subscription" or similar option on the interface provided to me. It was not easy to navigate but clicking through to "Cancel Subscription" ended up with a webpage saying it was not possible to do online, unlike renewals etc, but rather I had to call a number to speak with someone. That number was hard to reach someone on, and they tried to dissuade me from cancelling / not renewing, by offering a discount etc. I declined and told them orally and by emails that I thought The Economist website set-up and business method involved misleading conduct and potentially unfair terms under the Australian Consumer Law.

I was not satisfied by their responses so complained online to the ACCC. I received a generic response from " " reproduced below, saying my complaint was noted and suggesting I contact the NSW OFT, along with my response arguing this was inadequate. I then eventually received a further email from her Team Leader " ", also reproduced below. Since that communication five months ago, I have heard nothing further from the ACCC. I suggest you/Treasury ask them if the ACCC contacted The Economist and whether the latter's website / practice has been improved (and/or, assuming some Treasury officials subscribe to The Economist, perhaps try logging in to see if they allow now online cancellation as well as changes/subscriptions). If nothing has improved, this suggests the existing ACL provisions are inadequate, if even a reputable international magazine supplier engages in such practices.

Best regards

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Dr Luke Nottage

Special Counsel

[Williams Trade Law](#)

Professor of Comparative and Transnational Business Law

Co-Director, [Australian Network for Japanese Law](#)

Sydney Law School

Room 647, Building F10, Eastern Avenue, University of Sydney, NSW 2006

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**From:** Infocentre Public Mailbox < >  
**Date:** 19 June 2023 at 1:28:45 pm NZST  
**To:** Luke Nottage < >  
**Subject:** ACCC Response (Reference: ) [SEC=OFFICIAL]

Dear Luke

I refer to your recent correspondence to the Australian Competition and Consumer Commission (ACCC) in relation to your subscription to the Economist. Your report has been escalated to me as a Team Leader for consideration and response. Please accept my apology for the delay in responding to you.

I understand that you are concerned about the conduct of the Economist in making it difficult for consumers to cancel their subscription. I note your views

that this conduct amounts to misleading and deceptive conduct, and an unfair contract term, and falls within the ACCC's current priorities.

As previously advised, we have recorded the information you have provided and we thank you for alerting us to this issue. As also noted, the ACCC generally does not comment on the direct actions we take in relation to the information provided in specific reports. However, we can advise that we use reports from the public, as well as other sources of intelligence, to inform our enforcement work. We use such information to not only inform our decision making on what enforcement action we may take, but also what compliance activities we may undertake, ranging from consumer or business education, to industry engagement, to advocacy and research. We consider both point in time data, but also regularly review data received over longer periods of time to inform our overall compliance and enforcement work.

While we appreciate you submitting your report, we cannot tell you whether we will take further action. The ACCC does not generally comment on its enforcement investigations unless it is in the public interest. Any statement we make in the future as to any investigation, or what action (if any) we may take, will be made publicly, such as through a media release on our website, rather than via direct replies. There are a range of factors that limit our ability to comment on investigations such as ensuring fairness to individuals, companies and businesses being investigated, or the potential to jeopardise investigations through the untimely release of information. You can find more information on our approach in our [media code of conduct](#).

As you are aware, one of the ACCC's 2023 – 23 compliance and enforcement priorities is consumer and fair trading issues relating to manipulative or deceptive advertising and marketing practices in the digital economy. This priority area includes a focus on design choices or 'dark patterns' that exploit behavioural biases and distort consumer choice. These include subscription traps which make it difficult to opt out of a service and practices designed to get consumers to agree to unfair or unfavourable contract terms.

As you have noted, some of these practices may fall within the current provisions of the Australian Consumer Law (ACL), such as the provisions relating to unconscionable conduct, misleading or deceptive conduct or unfair contract terms. As you are aware, the ACCC is advocating for a new economy-wide ban on unfair trading practices to address these practices. This is because the ACCC is also seeing conduct that, while harmful, is unlikely to breach the ACL because it does not reach the thresholds for unconscionable or misleading conduct or constitute an unfair contract term.

However, regardless of whether or not the conduct you have complained about constitutes a potential breach of the ACL, the information you have provided is valuable information that helps to assist the ACCC's work.

I appreciate you were seeking a more definitive response from us, but I hope the information provided today helps to clarify our position

Yours sincerely

 [@acccgovau](mailto:@acccgovau)  [ACCCConsumerRights](mailto:ACCCConsumerRights)

----- Forwarded message -----

From: **Luke Nottage** < >  
Date: Thu, 20 Apr 2023 at 14:55  
Subject: Re: ACCC Response (Reference: ) [SEC=OFFICIAL]  
To: Infocentre Public Mailbox < >  
Cc: < >

Dear

I am lodging specific allegations of misleading conduct etc by The Economist (which operates inter/nationally, not just in NSW) re them making it difficult to not renew / cancel subscriptions, which your own boss has identified recently as a priority concern for the ACCC so I expect you to do more than “make a record” of this complaint - please contact The Economist as they brushed me off and otherwise they will just keep misleading potentially thousands of Australian consumers.

3500.jpg



ACCC boss wants new powers to crack down on  
online businesses that make it hard to cancel  
subscriptions  
[theguardian.com](https://theguardian.com)

Prof Luke Nottage  
University of Sydney Law School

Sent from my iPhone  
Apologies for any typos or perceived terseness

On 20 Apr 2023, at 10:07 am, Infocentre Public Mailbox  
< > wrote:

Dear Luke

I acknowledge that you are reporting broader concerns about the conduct of The Economist and have made a record of this. However, we can also offer you information about your consumer rights and how to resolve a dispute with a business, if you wished to pursue an individual remedy.

## Your next steps

If you're unable to resolve your dispute by speaking with a business, [write them a complaint letter](#). That way they're clearly aware of the problem, what you want, and you have a record of your contact. We have a [complaint letter tool](#) on our website to help you get started.

If writing to the business doesn't resolve your dispute, we would suggest you contact NSW Fair Trading. Unlike the ACCC, which focuses on broad and national issues, your local consumer protection agency may be able to help resolve your dispute by negotiating an outcome. Find out more about how to [make a complaint to NSW Fair Trading](#) on its website.

If they're unable to help, you may need to take your complaint to your state or territory [small claims tribunal](#).

## Your rights: accurate information

The Australian Consumer Law provides consumers with the right to truthful and accurate representations when buying a product or service. This means that businesses must not mislead you with statements that are incorrect or likely to give you the wrong impression. This rule applies to information that a business provides you in any medium, including when talking to a sales representative, on packaging, in online shopping forums or social media.

If a business misleads you, and you experience loss, you might be entitled to a remedy.

You can [read more about false or misleading claims](#) on our website. Our [advertising and selling guide](#) is also a handy resource for businesses to ensure their advertising complies with the law.

## Your report: what the ACCC does with this information

The ACCC uses reports from the public, as well as other sources of intelligence, to inform our enforcement work. You can [read more about how we prioritise our work](#) on our website.

Please note, the ACCC generally does not comment on our work or what we do with the information we receive from reports. We will only contact you again if we require further information.

To keep up-to-date on public announcements from the ACCC, you can [subscribe to our email alerts](#).

We hope the information we have provided is helpful.

Yours sincerely

Public Information Officer | Infocentre  
**Australian Competition and Consumer Commission**  
23 Marcus Clarke Street Canberra 2601 | [www.accc.gov.au](http://www.accc.gov.au)  
T: 1300 302 502



[@accgovau](#)



[ACCCConsumerrights](#)



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Room 647, Building F10, Eastern Avenue, University of Sydney, NSW 2006

- Selected papers: <http://ssrn.com/author=488525>

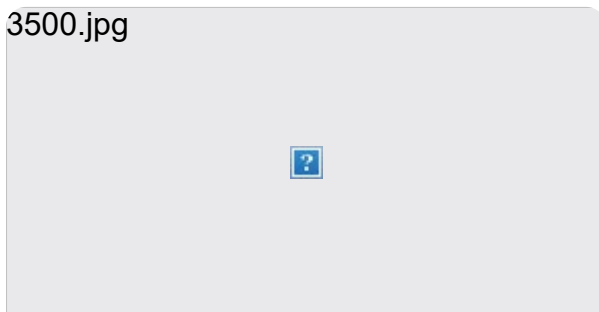
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Public Information Officer | Infocentre

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T: 1300 302 502



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