Law Council
OF AUSTRALIA

Unfair trading practices—Consultation Regulation Impact Statement

The Treasury

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council acknowledges the contributions of the following Constituent Bodies and Section Committees in the preparation of this submission:

- Queensland Law Society;
- Law Institute of Victoria;
- Australian Consumer Law Committee, Legal Practice Section;
- Competition and Consumer Committee, Business Law Section; and
- SME Committee, Business Law Section.

Introduction

1. The Law Council of Australia welcomes the opportunity to respond to the Treasury's Consultation Regulation Impact Statement (**Consultation RIS**) titled *Protecting consumers from unfair trading practices*.

2. The Consultation RIS identifies examples of potentially unfair trading practices that cause harm to consumers and small businesses which, it is suggested, may not be captured by the current prohibitions in the Australian Consumer Law (**ACL**).[1]

3. The Consultation RIS details several proposals intended to address such practices, namely:

    - Option 1: status quo (no change);
    - Option 2: amend the statutory prohibition on unconscionable conduct in section 21 of the ACL, extending it to capture a broader range of conduct;
    - Option 3: introduce into the ACL a general prohibition on unfair trading practices; or
    - Option 4: introduce both a general prohibition on unfair trading practices (as in Option 3) with the addition of a list of specific prohibited practices.

4. These proposals have been crafted in response to ongoing commercial practices causing significant consumer harm, particularly (although not only) in the digital environment, which often fails to be captured by existing prohibitions in the ACL.

Note on the structure of this submission

5. There are differing views among the legal profession regarding the issues canvassed in the Consultation RIS. The Law Council has not developed a consensus view among its stakeholders in relation to the four options.

6. The Law Council therefore has structured this submission in two distinct sections for consideration by the Treasury. First, the Law Council provides a 'majority' view, which brings together a broad consensus among a majority of contributors to the Law Council's submission. Second, the Law Council provides the alternative view of the Competition and Consumer Committee (**C&C Committee**) of the Law Council's Business Law Section.

7. There is broadly agreement among the Queensland Law Society (**QLS**), the Law Institute of Victoria (**LIV**), the Australian Consumer Law Committee (**ACL** Committee) of the Law Council's Legal Practice Section and the SME Committee of the Law Council's Business Law Section in favour of a general prohibition on unfair trading practices (although there are some differing views on the necessity of the addition of a list of specifically prohibited practices). Unless otherwise noted, references throughout this submission to the 'majority' of contributors are references to this group of stakeholders.

[1] *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

8. Conversely, the C&C Committee considers that no change to the existing legislative framework is required and supports Option 1. However, should the Treasury consider that legislative reform is necessary, the C&C Committee would support Treasury recommending Option 2 rather than Options 3 and 4 on the basis that, this option would create the least uncertainty.

Submission of the majority of contributors

The problem

Question 1.

Do you agree or disagree with the representation and scope of unfair trading practices identified in this paper? Please provide any evidence to support your position.

9. The majority of contributors consider that the Consultation RIS provides a useful and accurate summary of the 'problem'. This includes characterising unfair trading practices as taking many forms and touching on a wide range of consumer and competition laws, including: the targeting of vulnerable people or groups; difficulty in opting out or cancelling goods or services; and misleading omissions and hidden information.[2]

10. The existing framework of standards-based provisions and specific provisions regulating business behaviour largely emerged in the 1970s in response to commercial and consumer behaviour in that era. Later developments, including elaboration of statutory unconscionability and invalidation of unfair contract terms have improved consumer protection but have limitations in their scope, application and practical availability of remedies.

11. Since the 1970s there has been a transformation of consumer products and services and significant changes in the ways in which consumers engage with businesses in relation to goods and services.

12. The consumer protection framework that emerged in the 1970s to fill gaps in the common law and equity and traditional sale of goods legislation can be seen as responding to trends in the marketing and consumption of consumer goods and services where legal models based on ideas of the freedom of individually contracting parties to strike bargains were no longer fit for purpose.

13. The growth of digital technology and the emergence of new patterns of marketing and consumption based on digital platforms have accelerated the trend away from individual interactions between businesses and consumers. This growth and emergence has reduced payment friction meaning it is easier for consumers to commit potentially substantial sums of money without opportunities to pause or reconsider.

14. The Consultation RIS has emerged following extensive work undertaken by the Australian Competition and Consumer Commission (**ACCC**) examining digital platform services. As noted in the Consultation RIS, the provision of goods and services is becoming more complex and that the response of consumer law reform

[2] The Treasury, *Protecting Consumers from Unfair Trading Practices* (Consultation Regulation Impact Statement, August 2023) 9 ('Consultation RIS').

should aspire to be responsive to future developments in digital technology and the consumer economy.

15. The focus on the prevalence and impact of dark patterns and choice architecture is considered appropriate. In recent times there has been increasing recognition of the use of dark patterns and choice architecture in seeking to 'nudge', or in some cases, coerce, consumers (including small business consumers) into making decisions which are not in their best commercial interests.

Question 2.

How do you think unfair should be defined in the context of an unfair trading prohibition? What, if any, Australian or overseas precedent should be considered when developing the definition? Are there things which you think should be included, or excluded, from the definition?

16. The concept of 'unfairness' is no longer novel in terms of its application in respect of unconscionable conduct (for example, 'unfair tactics' in paragraphs 22(1)(d) and 22(2)(d) of the ACL) and the unfair contract terms (**UCT**) regime (see the definition of 'unfair' provided in section 24 of the ACL). The submission of the C&C Committee contains further discussion of the concept of 'unfairness' in relation to unconscionable conduct at [73]-[77] and more generally at paragraphs [118]-[119] below.

17. As the examples outlined in the Consultation RIS recognise, the present difficulty is that even if a practice is objectively 'unfair' and causes detriment, it may not be captured by the existing ACL conduct protections, including misleading and deceptive conduct and/or unconscionable conduct.

18. The introduction of a new concept, outside of the well-established and understood concept of unconscionable conduct, which is clearly directed towards harmful unfair trading practices which do not currently fall within the ACL framework is supported by a majority of contributors to this submission.

19. The SME Committee and the LIV consider section 5 of the *Federal Trade Commission Act* (US) (**US FTC Act**) (general prohibition against 'unfair or deceptive acts or practices in or affecting commerce') provides a useful model for the definition of 'unfair' in the context of a new unfair trading prohibition. The US FTC Act provides that an act or practice is unfair when it meets the following criteria:

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

20. Although the US FTC Act employs the concept of 'substantial injury', consideration could be given to instead importing a concept of substantial 'detriment' (whether financial or otherwise) in any Australian unfair trading prohibition. The concept of 'detriment' is already familiar to Australian regulators and businesses, as it is used within the definition of 'unfair' in subsection 24(1) ACL (used to determine whether a contract term is 'unfair'). Similar to the US provision, any Australian provision should apply to business conduct affecting other businesses, as well as business conduct affecting individual consumers.

21. Similarly, in considering a definition of 'unfair', the QLS considers it appropriate to apply a similar definition of 'unfair' in respect of contractual terms to supplier conduct. The QLS proposes the following possible definition of 'unfair conduct' for consideration by the Treasury.

> *Unfair conduct*
>
> (1) A person must not, in trade or commerce, engage in conduct that is, in all the circumstances, unfair.
>
> *Meaning of unfair conduct*
>
> *Unfair conduct*
>
> *(2) Conduct is unfair if:*
>
> *(a) it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the conduct; and*
>
> *(b) it causes a detriment (whether financial or otherwise) to a party.*

Examples of unfair conduct could also be included in the drafting to assist in providing legislative clarity for parties and their legal advisors.

22. As further elaborated at paragraphs [50]-[51] below, the ACL Committee considers the United States specific prohibition of conduct which causes or is likely to cause 'substantial injury' imposes a standard that may be difficult to establish by individual consumers and instead generally supports the EU and UK approaches. The submission of the C&C Committee contains further discussion on the adoption of overseas approaches in an Australian context at paragraphs [130]-[131] below.

Question 3.

Do you have any specific information, analysis or data that will help measure the impact of the problems identified?

23. Further analysis of case law regarding misleading and deceptive conduct under section 18 of the ACL and unconscionable conduct under sections 20 and 21 of the ACL, such as is included in the Consultation RIS, would assist with identifying the scope of conduct not currently captured by prohibitions in the ACL. The submission of the C&C Committee further discusses the application of existing consumer protection provisions at paragraphs [69]-[70] below.

24. Contributors to this submission who generally act for consumers and small businesses consider that some of the key disadvantages of current consumer protection law include:

    (a) Misleading or deceptive conduct does not impose an obligation to disclose information unless the circumstances give rise to a reasonable expectation in the consumer that if a certain fact existed, it would be disclosed by the supplier. At the high level of advertising or promoting services, the protection from misleading or deceptive conduct is only practically available in incorrect representations rather than omissions. The submission of the C&C

Committee discusses the application of misleading and deceptive conduct provisions in this context in the table at paragraph [70] below.

(b) Statutory unconscionable conduct has been authoritatively held by courts to have the key requirement that the impugned conduct be against conscience. While courts have made allowances for evolving social norms about what are the limits of acceptable commercial behaviour, the focus on the conscience of the supplier means that the foundation for relief is not harm to the consumer but whether the supplier's behaviour was wrongful. As Allsop CJ observed in *Paciocco v Australian and New Zealand Banking Group Ltd*, 'a degree of morality lies within the word "unconscionable"'.[3] This requires courts to make evaluative moral judgements. This form of protection needs to be supplemented by legislation focusing on the impact on consumers without regard to ethical questions about the behaviour of the supplier. The submission of the C&C Committee discusses the principles of statutory unconscionable conduct at paragraphs [73]-[77] and [100]-[101] below.

(c) Unfair contract terms prohibitions are not constrained by questions of good conscience. However, they are limited in scope by being confined to standard form contracts and by excluding terms that define the main subject matter of the contract and set the upfront price. There are also complexities and difficulties for consumers in seeking redress for unfair contract terms in the framework of contract law. A suitable prohibition on unfair trading practices would have the advantage of addressing pre-contractual conduct, unfair pricing, and unfair definition of main terms and provide greater flexibility in the remedies that can be obtained. Further, consumers are experiencing problems post-contract, such as not being able to unsubscribe (easily or at all) and businesses making it difficult for consumers to manage their contracts.

(d) Implied guarantees of due care and skill and fitness for purpose in the area of services depend on the scope of the services being held out or contracted for. They have limited effectiveness if the service parameters are too narrowly defined.

25. These limitations are demonstrated in a case that concerned a vulnerable consumer who was unable to obtain substantial relief against a company which was in the business of selling debt management services to those at risk of losing their homes due to mortgage arrears. In *Wade v J Daniels and Associates Pty Ltd*, the consumer who had been experiencing financial difficulty for some years was in mortgage arrears when she responded to a promotional letter offering to 'save' her home.[4] The applicant alleged that the respondent represented that it could help her save her home by way of arranging re-finance of her home loan. In reality, given the applicant's financial situation, there was no realistic prospect of obtaining re-finance on any affordable terms. The applicant paid significant fees to the respondent secured by way of a caveat over the home to no avail and her home was ultimately sold by the mortgagee bank.

26. The applicant alleged that the respondent:

(a) breached the contract for services including the consumer guarantees of 'due care and skill' and 'fitness for purpose' implied by the *Australian Securities and*

[3] (2015) 236 FCR 199, [262].
[4] [2020] FCA 1708.

Investments Commission Act (**ASIC Act**) or, alternatively, the *Australian Consumer Law* (**ACL**);

(b) engaged in misleading or deceptive conduct in contravention of section 18 of the ACL or section 12DA of the ASIC Act; and

(c) engaged in unconscionable conduct in contravention of section 21 of the ACL or section 12CB of the ASIC Act.

27. The respondent was found to have engaged in unconscionable conduct relating to part of its service (removal of a default from the applicant's credit report). However, the Court took some issue with the applicant's credibility, and she was largely unsuccessful in her claims for reasons that demonstrate weaknesses in existing consumer protection law.

28. First, the services were found to be fit for purpose and provided with due care and skill because the stated desire of the applicant was to save her home. It was not found that the services called for were at the higher level of providing sound advice about the serious unlikelihood of that goal being capable of achievement.

29. Second, the claim for misleading or deceptive conduct failed. The Court was not satisfied that, the respondent knew the applicant's situation was hopeless and the respondent was holding itself out as being able to assist distressed home loan borrowers to save their homes. Rather, the Court found the purpose for the respondent's engagement was for the applicant to 'buy time'.

30. Finally, the claim for unconscionable conduct failed because the court was not satisfied that the respondent had taken advantage of the applicant's vulnerability and disadvantaged circumstances. This finding was influenced by the court's earlier findings that the services were fit for purpose and did not involve misleading or deceptive conduct.

31. The case highlights that the mix of existing legislative provisions can result in a vulnerable consumer needing to bring complex proceedings in the hope that different facets of unfair trading practices are captured by one or more existing provision.

32. Additionally, the following examples have been identified by members of the profession as demonstrating gaps in the existing legal protections:

Topic	**Potential issues**
Buy now pay later arrangements	• The Consultation RIS does not consider the extension of reform to Australian Securities and Investments Commission (**ASIC**) regulated financial services but this will be considered in a separate consultation in 2024.
Motor vehicles	• Rent to buy car arrangements .
Digital and online services	• Online agreements and inability for consumers to easily understand what is being agreed.
Energy	• Fees being applied for service reconnection for non-monetary (unpaid service) disconnections.

Topic	Potential issues
	• Bills generated on an estimated bill/meter read basis where consumers are unaware they can have the bill revised to reflect actual usage.
Water	• Estimated water meter readings for body corporates, readings based on complex rather than individual usage.
Body corporate practices	• In respect of resident/owner hardship and collection of outstanding levies.
Consumer goods	• Structuring of lines of communication and avenues of complaint for enforcement of warranties.
Telecommunications and internet	• Sales practices: - Confusing contract terms which limit the ability of consumers to understand what they are agreeing to. - Omitting information prior to consumer signing up to agreement. • External factors that do not affect provider (for example, change to NBN) being used as opportunity to change provider terms on a less favourable basis for the consumer.
Insurance	• Health insurance being offered on basis of private care but no basis to ensure that private health care can be provided when required.
Obstacles to consumers exiting online/other subscriptions.	• Requirements to cancel a contract by attending the business premises (such as gyms/fitness centres). • Consideration could be given to requiring suppliers to notify subscribers who have not utilised the service in last 3 months and send them a link to 'unsubscribe'
Barriers to communicate issues and raise/pursue complaints and enforce rights generally.:	• Examples include: - Suppliers not having an email address with which consumers can effectively communicate. - Suppliers who only have robotised inbound phone system. - Suppliers engaged in trade or commerce (as defined in ACL) not having an office in Australia at which process can be served. - Suppliers structuring their business with the aim of preventing or minimising the avenues of enforcement of the ACL by consumers. For instance, by using entities within the corporate group with no assets in Australia as the supplier for ACL purposes, by benefitting from the group's Australian subsidiary's corporate veil to require the consumer to enforce rights overseas or by relying on foreign laws to avoid having to comply with the ACL. - Suppliers requiring consumers to communicate with various persons and departments within the group, repeating information already provided to the supplier.

Question 4.

Do you agree with the consultation objectives as outlined? If not, why not?

Question 5.

Are there any other consultation objectives that should be considered in addressing unfair trading practices in Australia?

33. The consultation objectives outlined in the Consultation RIS are considered appropriate. They are sufficiently broad to encompass the range of commercial conduct that may constitute unfair trading practices. The Law Council does not propose any alternative or additional objectives for Treasury's consideration.

Question 6.

As a consumer or small business, have you suffered detriment from unfair trading practices? Please describe your experience and quantify the impact in monetary terms, if possible.

Question 7.

Have you experienced any difficulties with challenging or disputing a potentially unfair trading practice? Please provide any relevant details.

34. There is anecdotal evidence that consumers have suffered detriment from unfair trading practices. By way of example, see submissions to the Inquiry of the Senate Select Committee on Commonwealth Bilateral Air Service Agreements which include reference to consumers being unable to convert Frequent Flyer points to various benefits—contrary to the spirit of the program. Widespread frustration with the Frequent Flyer program was further outlined in over 100 other submissions to the Inquiry, where concerns including a fluctuating (and typically, declining) value allocated to points.[5]

35. The inequality of bargaining power between large business and consumers can create, difficulties for consumers in challenging or disputing decisions regarding travel and general insurance claims. Recent customer difficulties in challenging a Qantas deadline for use of flight credits earned during the COVID-19 pandemic provide a further example.

36. SME Committee members are aware of various unfair practices including anecdotal accounts of the following conduct:

- businesses impersonating other small businesses online;
- businesses hijacking a competitor's website or listings (for example, their Google listing);
- competitors orally spreading false rumours about their competitors with a view to damaging their competitor;
- businesses making false statements about competitors on industry discussion sites (for example, about a competitor's ethics, professionalism or safety record);

[5] See Senate Select Committee on Commonwealth Bilateral Air Service Agreements, *Commonwealth Bilateral Air Service Agreements* (Report, October 2023) 68-69, 93.

- posting fake negative reviews on a small business competitor's website/free listing;
- setting up a new business using a defunct business's name and appropriating the defunct business positive consumer reviews;
- businesses buying advertising keywords which are closely related to a competitor's business in order to drive traffic to their business and away from their competitor's business;
- large competitors funding of local community groups to object to a small business's development or other application; and
- businesses making offensive statements about small business competitors on industry discussion sites, including racist or sexist comments.

37. A number of the unfair practices identified above can be pursued under existing laws. However, the complexity and cost of pursuing such claims is often prohibitive for small businesses. The SME Committee considers a broad unfair trading practices prohibition including a blacklist of the above or similar practices would be of considerable benefit.

Policy options

Question 8.

What is your preferred reform option, or combination of options? What are your reasons?

38. The majority of contributors broadly agree to this submission in favour of a general prohibition on unfair trading practices.

39. As set out in response to questions 1–7, the majority of contributors do not consider maintaining the status quo (Option 1) to be an appropriate course of action. Amending the current definition of statutory unconscionability as proposed by Option 2 is also not supported.

Amendment of the statutory prohibition on unconscionable conduct

40. The majority of contributors are concerned about the high threshold required for unconscionable conduct.[6] The decisions in *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155 and *Australian Securities and Investment Commission v Kobelt* [2019] HCA 18 (***Kobelt***), demonstrate predatory behaviour toward vulnerable consumers may not amount to breaches of section 21 of the ACL.[7] The submission of the C&C Committee discusses previous ACCC initiated proceedings that involved a claim of statutory unconscionable conduct at paragraphs [78]-[79] below.

41. In Kobelt, the predatory behaviour involved an informal credit scheme, where Mr. Kobelt provided high interest loans to members of the local Anangu community, where the community as a whole displayed low levels of financial literacy. The High Court did not consider this to be unconscionable conduct within section 21. The decision demonstrates the existing statutory regime may be insufficient to target

[6] Consultation RIS, 14.
[7] Cited in J M Paterson and E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? RespExploitative Business Systems in Person and Online?' (2021) 44(1) *Journal of Consumer Policy* 5.

business operations that are unfair or predatory by design.[8] A prohibition on unfair trading practices may better regulate this 'design' element, which can be deployed passively by companies to the detriment of consumers. The Treasury's concerns in the Consultation RIS regarding the emergence of 'dark patterns' in ecommerce and online settings are noted, including the OECD's identification of practices like 'forced action', 'nagging' and 'urgency'.[9] The submission of the C&C Committee discusses systems of statutory unconscionable conduct at paragraph [77] and jurisprudence on statutory unconscionable conduct more broadly at paragraphs [100] to [101] below.

42. The jurisprudence in this area of the law is so well entrenched it is difficult to envisage courts distinguishing earlier authorities. Previous amendments of statutory unconscionability have not been sufficient to move courts away from primary focus on a moral evaluation of the supplier's conduct. As Edelman J (in dissent) noted in *Kobelt* after reviewing various reforms of statutory unconscionability:

> *This legislative history clearly demonstrates that although Parliament's proscriptions against unconscionable conduct initially built upon the equitable foundations of that concept, over the last two decades Parliament has repeatedly amended the statutory proscription against unconscionable conduct in continued efforts to require courts to take a less restrictive approach shorn from either equitable preconditions imposed in the twentieth century, by which equity had raised the bar of moral disapprobation*.[10]

43. Despite those attempts, courts have persisted in requiring moral disapprobation as an element of statutory unconscionable conduct. A distinct and separate prohibition of unfair trading practices is required to make it clear that it imposes a new standard.

General prohibition on unfair trading practices

44. Existing jurisprudence concerning the unfair contract terms regime has reflected similar objectives to a general prohibition on unfair trading practices, being a recognition that businesses may engage in actions that are on balance harmful and unfair. For example, in considering unfair contract terms, the Federal Court in *Australian Securities and Investment Commission v Bendigo and Adelaide Bank Limited* evaluated holistic and contextual factors such as the imbalance between customers and the Bank; the potential detriment faced by customers (it was not necessary to establish that this detriment had occurred); and the lack of other contractual mechanisms to reduce or prevent unfairness.[11]

45. It is understood a general prohibition is consistent with the ongoing advocacy of the ACCC, which has repeatedly supported an unfair trading practice prohibition.[12]

46. The increasing prevalence of online and digital commercial interactions raises concerns about the vulnerability of consumers to exploitation. The Final Report of the ACCC's Digital Platforms Inquiry notes the emergence of several practices that have the potential to cause 'significant consumer harm' and which are facilitated by

[8] Ibid 1.
[9] Consultation RIS, 43.
[10] [2019] HCA 18, [295].
[11] [2020] FCA 716.
[12] See, eg, Rod Sims, '2021 National Consumer Congress: Road to recovery address' (Speech, Australian Competition and Consumer Commission, National Consumer Congress, 22 March 2021) < https://www.accc.gov.au/about-us/media/speeches/2021-national-consumer-congress-road-to-recovery-address>.

online data collection, including: amending services without reasonable notice (such as in relation to products that operate as subscriptions or contracts); requiring the provision of unnecessary information from consumers to access benefits; and using long contracts to induce consent (or providing insufficient time to consider these contracts).[13]

47. The LIV considers Option 3, is sufficient, without the inclusion of a list of specific prohibited practices (Option 4). Framing a new provision as a general prohibition on unfair trading practices would ensure it is inherently flexible and may adapt to technological and commercial change. It is understood comparable jurisdictions, the UK and Singapore, have combined general and specific provisions, however the LIV considers the ACL already contains several prohibitions that, in overseas jurisdictions, are included in their list of specific prohibitions against unfair practices. The LIV therefore queries the need for such a list in Australia.

48. Conversely, the ACL Committee, SME Committee and the QLS support Option 4.

49. A potential advantage of Option 4 over Option 3 is that specific prohibitions in addition to a general prohibition may directly address some of the practices identified in reviews of digital platform services. A combination of general and specific prohibitions could also achieve an appropriate balance in addressing egregious practices and be sufficiently flexible to respond to new practices as they evolve, as a result of new technologies or otherwise.

50. Having considered the international legislative approaches to the prohibition of unfair trading practices set out in Appendix A of the Consultation RIS, the ACL Committee recommends the EU and UK approach be adopted. The Committee is concerned that the use of the term 'substantial injury' in the US FTC Act imposes a standard that may be difficult to establish by individual consumers. The Singapore approach has the disadvantage of requiring proof that the supplier knew or ought to have known of the consumer's disadvantage. In Australian Law the requirement of knowledge or detriment by the stronger party has often been a barrier to relief in equitable unconscionability cases.

51. While the ACL Committee prefers the EU and UK approaches, it acknowledges the provisions that define conduct with reference to the 'average consumer' are fraught with difficulty. An objective standard can be achieved by imposing a prohibition on unreasonable conduct without reference to average consumers. There are communities of disadvantage in Australia who might be excluded if the protection is defined with reference to the impact of the conduct on the average consumer. A non-exhaustive list of people who might not fit within notions of the average consumer include, Indigenous people, people for whom English is not a first language, people with disabilities and, in the context of e-commerce, elderly people.

52. Having regard to the specific prohibitions raised by other jurisdictions, as outlined in the Consultation RIS, the QLS provides below practices which could be considered for specific prohibitions:

- ineffective or complex disclosures of key information when obtaining consent or agreements to enter into contracts whether online or otherwise;
- onerous or disproportionate non-contractual barriers for exercising consumer rights;
- exploitation of specific misfortune or circumstances;

[13] Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 26.

- omitting material information which distorts consumers' expectations or understanding of the product or service being offered (for example, omitting material facts);
- accepting payment without intention to supply; and
    - obstructive practices which make it hard to contact the supplier to:
    - raise complaint;
    - change terms of service; or
    - cancel the service

Alternative or additional reforms

Question 9.

Are there any alternative or additional reform options to those presented you think should be considered?

Legal assistance funding and regulator resources

53. Consumers should be given the opportunity to have their cases tested and to enforce their rights in a timely and cost-effective manner. Whilst legislative reform is welcome, additional legal assistance sector funding for civil matters is required to ensure any avenues of redress afforded by the new protections are accessible by consumers and small businesses.

54. Regulators should also be allocated additional resources and funding to provide access to dispute resolution services and regulatory investigations to respond to systemic and/or industry-specific issues in appropriate circumstances. This is particularly important for consumers seeking to navigate larger suppliers, particularly those working across jurisdictions. Regulators should also be equipped to monitor and respond to emerging conduct which may inform subsequent additions to specific prohibitions in the legislation.

Unfair trading and financial services

55. The Consultation RIS and the prospective Decision RIS are confined to consideration of unfair trading prohibition under the ACL and that it is envisaged that there will be a separate consultation for financial services.

56. In ACL Committee members' experience, the prospect of receiving financial services consumer protection under the ASIC Act and the current ACL protections can turn on fine and complex distinctions, which is illustrated in the case example of *Wade* referred to above.

57. The ACL Committee acknowledges Parliament has made an informed choice to separate financial services consumer protection law from the ACL, it is however notable that in respect of key consumer protections the provisions of the ASIC Act mirror the provisions of the ACL. The Committee suggests it is necessary and desirable for any unfair trading prohibition to continue with this practice of being mirrored in financial services consumer protection law.

58. The ACL Committee is concerned that a separate process for consideration of financial services unfair trading reform will result in arbitrary gaps in consumer protection and would be vulnerable to exploitation by suppliers designing products

or contracts to seek to have their conduct regulated in what they perceive to be the less restrictive environment.

59. Another benefit of harmonious consumer protection laws for financial services and consumers of other goods and services is that community education about legal rights and consumers' expectations and understanding about their legal rights can be aligned.

60. For these reasons, the ACL Committee recommends the next stage of the process include consideration of the application of unfair trading practice reforms to financial services.

Further reforms to statutory unconscionability

61. The SME Committee believes further reforms to statutory unconscionability should be explored. There is a degree of judicial divergence on the correct way to interpret and apply statutory unconscionability under section 21 the ACL. For example, the Full federal Court decisions in *Productivity Partners Pty Ltd v ACCC* [2023] FCAFC 54 and *ACCC v Mazda Australia Pty Limited* [2023] FCAFC 45 where the majority and minority judges adopted diametrically opposed positions on the interpretation and application of statutory unconscionability under the ACL. There are also concerns about the inconsistency of High Court authority on unconscionability as discussed in the NSW Court of Appeal decision in *Nitopi v Nitopi* [2022] NSWCA 162.

Restraints of trade

62. A further issue the SME Committee considers could be considered as part of the current consultation is whether restraints of trade, particularly in the employment context, could be included as a prohibited unfair trading practices. The current position at common law is that restraints of trade are prima facie invalid unless the employer demonstrates that at the time of entering into the contract there were circumstances justifying the restraint and the restraint is reasonable.[14] Unfortunately, many employees are unaware of the legal position in relation to employment restraints and also correctly believe that the costs of litigating these issues are prohibitive. Inclusion of unreasonable employment restraints of trade as an unfair trading practice may go some way to reducing their use by employers.

[14] *Lindner v Murdock's Garage* [1950] 83 CLR 628,653

Submission of the Competition and Consumer Committee

Key takeaways

63. The C&C Committee makes the following principal points:

- The Consultation RIS appears to rely on subjective and undefined concepts of what is 'unfair' which creates substantial uncertainty and regulatory risk, and delays in resolution, which are not in the interest of consumers or businesses.
- The Consultation RIS conflates the level of consumer protection offered in different jurisdictions with whether there is a general prohibition against unfair trading practices.
- The Consultation RIS appears to be predicated on the challenges the ACCC has had in prosecuting unconscionable conduct claims. It is noteworthy that the ACCC have succeeded in 85 per cent of claims of unconscionable conduct it has brought, and of the small percentage it did not, the ACCC still managed to succeed on other ACL grounds in the majority of instances. This is addressed further in relation to Option 2.
- In the C&C Committee's view, the Government should not rush to change a law such as unconscionable conduct, which has been the subject of many years of court interpretation. It is therefore a law that is generally well understood. The same can be said about the law of misleading and deceptive conduct, which has resulted in a long established and wide-ranging body of case law.

64. The C&C Committee provides the following responses to each of the four options proposed in the Consultation RIS.

Comments regarding Option 1

65. Option 1 of the Consultation RIS proposes no change to the existing legislative framework. The C&C Committee prefers this option because:

(a) Australia already has a comprehensive and wide-reaching set of consumer laws and regulations regulating unfair trading practices and the ACCC has extensive powers to investigate potential non-compliance and enforce those laws, and regularly does so; and

(b) it is not clear there is any 'gap' to be filled by a prohibition on unfair trading practices.

66. The existing legislative framework includes primarily (but not limited to) the:

- prohibition on misleading or deceptive conduct (section 18, Australian Consumer Law);
- prohibition on false or misleading representations (section 29, Australian Consumer Law);
- prohibition on conduct liable to mislead the public (section 33, Australian Consumer Law);

- prohibition on unfair contract terms in consumer and small business contracts (section 23, Australian Consumer Law);
- prohibition on misuse of market power (section 46, *Competition and Consumer Act 2010* (Cth) (**CCA**));
- consumer guarantees (sections 51–62, Australian Consumer Law);
- prohibition on unconscionable conduct (section 20, Australian Consumer Law); and
- various industry specific regulations and codes of conduct.

67. Non-compliance with a number of these prohibitions will subject the infringer to very significant penalties. Maximum penalties per infringement of the greater of $50 million, three times the value of the 'reasonably attributable' benefit obtained (if that can be determined) or 30 per cent of the corporation's adjusted turnover during the breach turnover period (if the Court cannot determine the value of the 'reasonably attributable' benefit).

68. In the case of the consumer guarantees regime, consumers have redress against the supplier. In the case of the general prohibition on misleading or deceptive conduct, compensation is available, and this prohibition is often coupled with specific Australian Consumer Law prohibitions which attract a financial penalty.

69. To the extent any 'gaps' in the regulatory landscape exist in relation to privacy and data collection issues, the Attorney-General's Department has proposed reforms to the *Privacy Act 1988* (Cth) (**Privacy Act**) which will address those gaps and the Government has said it supports those reforms.

70. The Consultation RIS sets out on page 9 examples of potentially unfair trading practices which an unfair trading prohibition might address. Each of the examples of conduct are likely to be subject to existing laws or will be covered by the proposed amendments to the Privacy Act, as shown in the table below. In each case, an additional 'general' prohibition on unfair trading is, in the C&C Committee's view, unlikely to increase deterrence but would likely increase uncertainty and regulatory burden for businesses.

	Consultation RIS unfair trading practices examples	**Existing regulations or CCA provisions (or other protections)**	**C&C Committee Comments**
1	Inducing consumer consent or agreement to data collection through concealed data practices.	• Privacy Act (and proposed Privacy Act reforms). • Misleading or deceptive conduct. • False or misleading representations.	The proposed reforms to the Privacy Act include measures to ensure the fair collection of data, which would squarely address this behaviour:[15] • Fair and reasonable test: the collection, use and disclosure of personal information must be fair and reasonable in the circumstances;

[15] See Attorney-General's Department, *Government Response to the Privacy Act Review Report* (28 September 2023).

	Consultation RIS unfair trading practices examples	Existing regulations or CCA provisions (or other protections)	C&C Committee Comments
		• False or misleading representations about goods or services. • Misleading conduct as to the nature of goods and services. • Unfair contract terms. • Unconscionable conduct. • Consumer Data Right (**CDR**) rules.	• Consent: consent will only be valid if it is voluntary, informed, current, specific and unambiguous; • Objection to collection: an individual right to object to the collection, use and disclosure of personal information and a requirement for an entity to provide a written response to the objecting individual with reasons; • Opt-out: an individual right to opt-out from receiving targeted advertising and of their personal information being used for direct marketing; • Automated decision making: an obligation on entities to include in their privacy policy the types of information used for automated decisions which have a significant effect on an individual. An individual right to request information on how substantially automated decisions are made where they have a significant effect on an individual. The conduct may also be caught by the existing Australian Privacy Principles (**APP**) which regulate the collection, use and/or disclosure of personal information, including sensitive information. 'Serious' and/or 'repeated' contraventions of the APPs can result in civil penalty proceedings under s 13G of the Privacy Act. Inducing a consumer to consent or agree to data collection through concealed data practices may constitute misleading or deceptive conduct and/or false or misleading representations where the trader is representing a state of affairs which is not true and correct. A well-defined class of misleading or deceptive conduct cases involves traders purporting to limit or negate representations they make through fine print, disclaimers or concealed qualifications. Such conduct would also likely contravene the prohibition in s 33 of the ACL on engaging in conduct that is liable to mislead the public as to the nature of goods and services.

	Consultation RIS unfair trading practices examples	Existing regulations or CCA provisions (or other protections)	C&C Committee Comments
			In addition, the conduct could be assessed as: • unconscionable conduct; • the relevant term authorising the data collection may be challenged as unfair under the unfair contracts term regime; or • if applicable to the contravening entity, the processes for obtaining consent may contravene CDR rule 4.10(b)(ii) prohibiting the bundling of consent with other directions, permissions, consents or agreements.
2	Exploiting bargaining power imbalances in supply chain arrangements, including by unilaterally varying supply terms at short notice.	• Unfair contract terms. • Misuse of market power. • Unconscionable conduct. • Industry Codes.	A term of a consumer or small business contract that allows the trader to unilaterally vary supply terms at short notice is at high risk of being found to be an unfair contract term under the ACL where it causes a significant imbalance in the rights of the parties and is not reasonably necessary for the protection of the legitimate interests of the trader. Unfair contract terms are now prohibited under the ACL and are subject to significant penalties. Where a trader has substantial power in a market, such conduct could be characterised as a misuse of market power where such conduct involves a substantial lessening of competition, or the conduct could be unconscionable. The ACCC has previously successfully brought proceedings against Coles, for example, for its treatment of suppliers with lesser bargaining positions than Coles.[16] In addition, this conduct would likely be captured in certain industries by applicable codes. For instance, section 9 of the Food and Grocery Code would captures attempts by grocery retailers or wholesalers to unilaterally vary agreements without the consent of the supplier concerned.[17]

[16] Australian Competition and Consumer Commission, 'Court finds Coles engaged in unconscionable conduct and orders Coles pay $10 million penalties' (Media Release, 22 December 2014).
[17] This conduct could also be captured by: ss 6B, 16, 22 and 23 of the Food and Grocery Code; ss 6, 27-29 and 31A of the Franchising Code; and ss 11, 28 and 33 of the Dairy Code.

	Consultation RIS unfair trading practices examples	Existing regulations or CCA provisions (or other protections)	C&C Committee Comments
3	Omitting or obfuscating material information which distorts consumers' expectations or understanding of the product or service being offered.	• Misleading or deceptive conduct. • False or misleading representations. • False or misleading representations about goods or services. • Consumer guarantees. • Industry Codes. • Privacy Act.	Omitting or obfuscating material information which distorts consumers' expectations or understanding of the product or service being offered is the type of conduct in respect of which the ACCC regularly brings enforcement action for false or misleading conduct. For example, Queensland Yoghurt Company paid a penalty of $12,600 after the ACCC issued it with an infringement notice for allegedly misleading consumers by omitting gelatine as an ingredient in some of its yoghurt products.[18] The consumer guarantees regime under the ACL also provides consumers and small businesses with rights to remedies and redress in the event that certain products and services are not, for example, of acceptable quality or do match their description. This conduct may be subject to heightened regulation in certain industries through applicable codes. For example, under subsections 8–11 and 17 of the Franchising Code as well as Schedule 1 of the Unit Pricing Code. In addition, depending on the nature of the conduct, including whether it involves the collection, use or disclosure of personal information, it may be captured by APPs 1, 3, 5–7 and 11.
4	Using opaque data driven targeting or other interface design strategies to undermine consumer autonomy.	• Privacy Act (and proposed Privacy Act reforms). • Misleading or deceptive conduct. • False or misleading representations. • False or misleading representations about goods or services.	The proposed reforms to the Privacy Act outlined in row 1 would be available to address entities using opaque data driven strategies to the detriment of consumers. Depending on the nature of the conduct and the contravening entity, this conduct may also be caught by the existing APP 7 which regulates the use or disclosure of personal information for direct marketing purposes. The conduct may also involve corresponding contraventions of APPs 1, 3–6 and 11. Such conduct is also capable of discipline through the general prohibition on misleading or deceptive conduct and false or misleading representations. The

[18] Australian Competition and Consumer Commission, 'Queensland Yoghurt pays penalty for failing to disclose gelatine ingredient' (Media Release, 15 May 2020).

	Consultation RIS unfair trading practices examples	Existing regulations or CCA provisions (or other protections)	C&C Committee Comments
		• Misleading conduct as to the nature of goods and services.	conduct may also involve contraventions of the more specific prohibitions against making false or misleading representations about goods or service in section 29 of the ACL, as well as, against engaging in misleading conduct as to the nature of goods or services.
5	Exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the 'choice architecture' of products or services (digital or otherwise).	• Unconscionable conduct. • Misleading or deceptive conduct. • False or misleading representations. • Unfair contract terms. • Industry Codes. • Misuse of market power.	Exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the 'choice architecture' of products or services could be assessed as unconscionable and/or misleading or deceptive. It may also be found to be a false or misleading representation about goods or services in contravention of section 29 of the ACL. This conduct could be found to involve an unfair contract term in contravention of section 23 of the ACL. For example, an unfair contract term may be found in the following scenarios: where an entity requires a consumer to agree to terms and conditions before making a purchase; if consumers are dissuaded from accessing or reading the terms; if there is an automatic renewal provision which is not readily identifiable; and/or if the consumer cannot terminate the agreement during the term without penalty. Further, an entity with substantial market power that exploits or ignores the behavioural vulnerabilities of consumers that are present in the 'choice architecture' of products or services may be considered to have misused their market power in breach where the 'choice architecture' has been designed for the purpose, or has the effect of, substantially lessening competition (for example, self-preferencing). It is also important to recognise that practices such as 'choice architecture' are not necessarily harmful and can provide consumers will a more enjoyable and efficient buying experience. Such practices can be pro-consumer and ought not be prohibited provided they are not misleading or deceptive or involve exploitation of vulnerabilities. The key issue is thus whether the conduct is misleading or unconscionable, which is

	Consultation RIS unfair trading practices examples	Existing regulations or CCA provisions (or other protections)	C&C Committee Comments
			covered by the current legislative framework.
6	Adopting business practices or designing a product or service in a way that dissuades a consumer from exercising their contractual or other legal rights.	• Unconscionable conduct. • Unfair contract terms. • Misleading or deceptive conduct. • False or misleading representations. • False or misleading representations about goods or services. • Misleading conduct as to the nature of goods and services. • *Spam Act 2003* (Cth). • Industry Codes. • Privacy Act.	Practices that dissuade consumers from exercising their legal rights to their detriment may, depending on the circumstances, constitute unconscionable conduct. If those practices are embedded in the terms of a standard form consumer or small business contract, the term may be a prohibited unfair contract term. In addition, representing to consumers that they do not have rights or remedies under the ACL when they do have such rights (for example, under consumer guarantees) constitutes false, misleading, or deceptive conduct which is prohibited by the ACL. The ACCC has taken many traders to court for misrepresentations in relation to consumer guarantees.19 Consumers and traders can and should be encouraged to come to a mutually satisfactory resolution to disputes where possible, and the existing regulatory landscape does not prohibit good faith negotiations. Further, depending on the precise nature of the conduct and the contravening entity, such practices or designs may involve corresponding contraventions of: sections 16–18 of the Spam Act; APPs 6, 7, 11, 12 and 13; and section 29 of the Grocery Code.
7	Non-disclosure of contract terms including financial obligations (at least until after the contract is entered into).	• Unfair contract terms. • Misleading or deceptive conduct. • False or misleading representations. • False or misleading representations	Common law principles as to contract formation will apply and there is a real question about whether disclosure of contract terms after a contract has been entered into would constitute a valid 'meeting of the minds' as to those terms. In any case, non-disclosure of key contract terms would also be covered by the prohibitions against misleading or deceptive conduct (which includes misleading omissions) and false or misleading representations in circumstances where a trader has explicitly or otherwise represented that

[19] Consider, for example, that Booktopia was ordered by the Federal Court to pay $6 million in penalties for making false or misleading representations on its website, and in dealings with consumers, about consumer guarantee rights: see Australian Competition and Consumer Commission, 'Booktopia to pay $6m for misleading statements about consumer guarantee rights' (Media Release, 10 March 2023).

	Consultation RIS unfair trading practices examples	Existing regulations or CCA provisions (or other protections)	C&C Committee Comments
		about goods or services. • Cooling-off rights. • Industry codes. • *Fair Trading Act 1987* (NSW).	the terms of the contract contain one set of obligations only to later reveal they contain other obligations. This conduct would also likely contravene the prohibition on making false or misleading representations about goods or services. Additionally, the unfair contract terms regime will apply where the contract is a consumer or small business contract. A term that imposes onerous obligations on a consumer or small business that was not disclosed ahead of contract formation, and for which the consumer or small business had no expectation the term would arise, risks challenge for fairness and/or may be misleading through silence. Consumers also have various statutory or code-based 'cooling off' rights, which may provide further protection from this type of conduct in certain circumstances. For example: • telemarketing and door-to-door sales (10 business days cooling off period);[20] • certain contracts for motor vehicles;[21] • retail electricity contracts (10-day cooling off period);[22] • financial products such as risk insurance, investment life insurance, managed investment products, and superannuation products (14-day cooling-off period);[23] • health and fitness services (2-day cooling-off period required by the majority of health and fitness services who have adopted the relevant code of conduct);[24] and

[20] *Australian Consumer Law*, s 82. Extended cooling off periods of 3 months apply where the salesperson visited outside of the permitted selling hours, did not disclose the purpose of the visit, did not produce identification or did not leave the premises upon request. Extended cooling off periods of 6 months apply where the salesperson did not provide information about the cooling-off period or was in breach of any requirements for unsolicited consumer agreements.
[21] See eg, *Motor Dealers and Repairers Act 2013* (NSW) s 80; *Motor Dealers and Chattel Auctioneers Act 2014* (Qld) s 99 (1 business day); *Sale of Motor Vehicles Act 1977* (ACT) s 83; *Motor Car Traders Act* 1986 (Vic) s 43 (3 business days). In South Australia, a cooling-off period of 2 business days applies to purchases of second-hand vehicles (see *Second-hand Vehicle Dealers Act 1995* (SA) s 18B).
[22] National Energy Retail Rules, rule 47(2).
[23] See *Corporations Act 2001* (Cth) ss 1019A, 1019B.
[24] National Code of Practice for Health and Fitness Industry, rule 6.1.

	Consultation RIS unfair trading practices examples	Existing regulations or CCA provisions (or other protections)	C&C Committee Comments
			• health insurance contracts (30-day cooling-off period for the majority of health insurers who have adopted the relevant code of conduct).[25] This conduct may be subject to heightened regulation in certain industries through applicable codes. For example, under the Grocery Code, Franchising Code and Dairy Code. Finally, state specific legislation may capture this conduct. For instance, it would likely be regulated by sections 47A and 47D of the *Fair Trading Act 1987* (NSW).
8	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.	• Privacy Act (and proposed Privacy Act reforms). • Misleading or deceptive conduct. • False or misleading representations. • False or misleading representations about goods or services. • Unconscionable conduct. • CDR Rules.	The proposed reforms to the Privacy Act outlined in row 1 would also cover this example. The proposed reforms would provide individual consumers with rights to control the types of data being collected and how that data is used. In addition, practices that conceal the purpose for which data collected may be used could be characterised as involving false or misleading representations and/or engaging in misleading or deceptive conduct. It is also possible that such conduct, when taken together with other practices of an entity, results in a finding of systemic unconscionable conduct in contravention of section 21 of the ACL. If applicable, this conduct may also result in a contravention of the prohibition on bundling consents in agreements under the CDR Rules. This practice may also result in non-compliance with various APPs under the Privacy Act. For example, it may contravene APP 5 as depending on the nature of the consents, the entity may not be found to have taken 'reasonable steps' to notify the individual of the information that is being collected.

[25] Private Health Insurance Code of Conduct, 6.

	Consultation RIS unfair trading practices examples	Existing regulations or CCA provisions (or other protections)	C&C Committee Comments
9	Providing ineffective and/or complex disclosures of key information when obtaining consent or agreement to enter into contracts.	• Privacy Act (and proposed Privacy Act reforms). • Unfair contract terms. • Misleading or deceptive conduct. • Unconscionable conduct. • False or misleading representations. • False or misleading representations about goods or services. • Statutory simplified disclosure requirements. • Industry Codes. • *Fair Trading Act 1987* (NSW).	The proposed reforms to the Privacy Act outlined in row 1 would require entities to be more transparent around data collection, use and disclosure when obtaining consent. Depending on the nature of the disclosures, this conduct may also be captured by the current Privacy Act under APPs 1, 3–7 and 11. The unfair contract terms regime also provides protection for consumers and small businesses from unfair terms in standard form contracts (whether properly disclosed to them or not). Ineffective or complex disclosure may also be caught by the misleading or deceptive conduct and false or misleading representations prohibitions where it results in confusion caused by misleading or deceptive conduct.[26] Further, conduct of this kind may form part of an overall matrix that results in a finding of system unconscionable conduct (as occurred in *ACCC v Australian Institute of Professional Education Pty Ltd (in liq) (**AIPE**) (No 3)* [2019] FCA 1982). Consumers also have the benefit of industry specific regulations requiring standardised and simplified disclosures in relation to certain products in addition to the contract itself. For example: • issuers of financial products are required to provide customers with a Financial Services Guide and simplified Product Disclosure Statement, which have prescribed length, format and minimum content requirements;[27] • telecommunication providers are required to provide a Critical Information Summary for each product, service and plan before consumers commit to a sale;[28]

[26] See generally *Bing! Software Pty Ltd v Bing Technologies Pty Ltd* [2009] FCAFC 131.
[27] *Corporations Act 2001* (Cth) ss 942B, 1012A-1012C.
[28] Telecommunications Consumer Protections Code, rule 4.2.

	Consultation RIS unfair trading practices examples	Existing regulations or CCA provisions (or other protections)	C&C Committee Comments
			• energy providers are subject to similar requirements to provide consumers with a written disclosure statement before the formation of a contract;[29] and • under various industry codes, including: section 20 of the Grocery Code; sections 8–11 and 17 of the Franchising Code; and section 29 of the Dairy Code. In addition, this conduct may be captured under state-based regulation such as s 47A of the *Fair Trading Act 1987* (NSW).

Comments regarding Option 2

Introductory comments

71. Option 2, contemplates:

    (a) retaining the core statutory prohibition on unconscionable conduct contained in section 21 of the ACL; and

    (b) extending the prohibition to capture unfair conduct within subsection 21(3) or section 22 of the ACL as a factor or element that must be assessed in determining whether conduct is unconscionable in connection with the supply or acquisition of goods or services.

72. This policy option also intends to maintain the prohibition in section 20 of the ACL on unconscionable conduct within the parameters of the unwritten law developed under equity.

Factors to consider that weigh against the necessity to amend sections 21 and 22 of the ACL

Conduct is already intended to be captured by unconscionable conduct provisions

73. It is clear from the explanatory materials regarding the introduction of the statutory prohibition against unconscionable conduct under section 21 of the ACL that Parliament has always intended that provision to capture 'unfair' conduct. In particular, the Second Reading Speech and Explanatory Memorandum stated that the provision:[30]

    - was 'directed at conduct which, while it may not be misleading or deceptive, is nevertheless clearly unfair or unreasonable'; and

[29] National Energy Retail Rules, rules 62-64.
[30] Second Reading Speech, Trade Practices Revision Bill 1986 (Cth) (House of Representatives Hansard, 19 March 1986, page 1627); Explanatory Memorandum, Trade Practices Revision Bill 1986 (Cth) 23 (this Explanatory Memorandum concerns ss 52A(2)(d), which has been in replicated under ss 22(1)(d) of the ACL).

- '… draws attention to the use of unfair tactics, including whether any undue influence or pressure was used. It is intended that the court could consider all tactics including those which are commonly used in business but which may be considered unfair'.

74. The terminology of 'unconscionable' was specifically preferred over 'unfair' as it was a legally familiar term that built on existing concepts in equity and case law.

75. Indeed, the Senate Economics Reference Committee Report (**Senate Report**) had previously rejected proposals to introduce the language of 'unfair' conduct into consumer protection legislation.[31] The Senate Report noted Parliament's intention and expressly advised that 'unfair' conduct is an ambiguous concept that would carry 'a serious risk' of making the existing unconscionable conduct prohibition unworkable. The Senate Committee found it was not clear 'unfair' would capture broader conduct than unconscionable conduct.

76. As the Consultation RIS does not address the findings of the Senate Report or identify failings in the alignment between the current provision and Parliament's express intention, it fails to identify that the proposed amendments would have any clear utility to consumer protection. This failing is amplified by the existence of an extensive range of protections available to consumers under the ACL beyond the unconscionable conduct prohibition.

77. Further, jurisprudence on unconscionable conduct clearly demonstrates that unfair practices are intended to be caught by the statutory prohibition and in particular by the prohibition on engaging in systemic unconscionable conduct. For instance, in *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd*, the Full Court of the Federal Court observed (emphasis added):

> *Predation on vulnerability, taking advantage of disability or disadvantage and victimisation may be found in business, as in other fields of human life. Such behaviour does not, however, exhaust the meaning of against conscience… 'Unconscionable' is the language of business morality and unconscionable conduct is referable to considerations expressed and recognised by the statute. The word is not limited to one kind of conduct that is against or offends conscience. Surely to* ***predate on vulnerable consumers or small business people*** *is unconscionable. But why is it not also unconscionable to act in a way that is* ***systematically dishonest****, entirely in* ***bad faith*** *in* ***undermining a bargain****, involving* ***misrepresentation, commercial bullying or pressure and sharp practice, using a superior bargaining position, behaving contrary to an industry code, using significant market power*** *in a way to* ***extract an undisclosed benefit*** *that will harm others who are commercially related to the counterparty? The proposition that such conduct (not all of which might be seen to be present here) is not unconscionable by an Australian statutory business standard of conscience because the counterparty to the business transaction suffered from no relevant pre-existing disadvantage, disability or vulnerability (other than, perhaps, having a decent degree of trust and faith in its business counterparty's honesty and good faith) is difficult to accept, unless one posits a narrow*

[31] Senate Economics References Committee, *Report into the effectiveness of the Trade Practices Act 1974 in protecting small business* (March 2004), [3.27]-[3.33].

defined meaning of 'unconscionable' that remains hinged in some way to the structural form of the equitable doctrine…[32]

Unconscionable conduct cases are typically successful

78. The Consultation RIS reasons that amendments are required as the current legislative framework is insufficient to capture harm from unfair trading practices to the ACL. In particular, the impetus for Option 2 is predicated on a belief that the current statutory unconscionable conduct provision requires a higher threshold of misconduct than 'unfair' conduct. Treasury has suggested that the insufficiency of the unconscionable conduct provision may be illuminated by the fact that the ACCC has not been successful in bringing such cases to date. In particular, the Consultation RIS cites three instances in which the courts have found that otherwise unfair conduct did not meet this statutory threshold.[33]

79. However, this is at odds with the ACCC's rate of success in the 33 statutory unconscionable conduct cases that have been brought by the regulator since 2013. The regulator was successful in 28. On three occasions where the ACCC was not successful in proving unconscionable conduct, it was nonetheless successful in establishing misleading or deceptive conduct. As a result, the ACCC has been successful in 31 of 33 of cases involving allegations of unconscionable conduct, being a 94 per cent success rate.

Federal regulator success	Count	Total number of cases	Percentage
Decisions where the ACCC was successful on a statutory unconscionable conduct claim.	28	33	85%
Decisions where the ACCC was unsuccessful on a statutory unconscionable conduct claim.	5	33	15%
Decisions where the ACCC was unsuccessful on a statutory unconscionable conduct claim but succeeded on alternative ACL grounds.[34]	3	33	9%
Contested decisions (decisions where the respondent did not admit to the alleged contraventions).[35]	18	33	55%

[32] [2021] FCAFC 40, [91].
[33] *Australian Competition and Consumer Commission v Medibank Private Ltd* [2018] FCAC 235, *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2021] FCA 1493, and *Pitt v Commissioner for Consumer Affairs* [2021] SASC 24.
[34] Ibid.
[35] This category includes decisions that were contested by the respondents as well as where the respondents did not contest, but did not admit to, the allegations. The latter circumstance can arise due to a decision of a party not to actively defend a proceeding or where a respondent becomes insolvent throughout the proceedings. Where a proceeding is of a serious nature and there is the potential for pecuniary penalties to be ordered, the ACCC is required to 'establish its allegations by clear and cogent proof of the necessary elements': per *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408, [5].

Option 2 is the most appropriate reform option of those canvassed in the Consultation RIS

80. If the C&C Committee's submission supporting Option 1 are not adopted, the Committee would support Treasury recommending Option 2 rather than Options 3 and 4, principally because it is the reform option that will create the least uncertainty.

81. For the reasons outlined below, the C&C Committee cannot see any basis for making the prohibition on unconscionable conduct prospective so that it applies to conduct that is 'likely' to be unconscionable. The C&C Committee also does not support the alternative approach of adding the concept of unfairness to the unconscionable conduct provision itself (section 21 of the Act). If the unconscionable conduct provisions are to be amended, then the C&C Committee recommends including 'unfairness' as a mandatory factor that the court must take into account. The C&C Committee does not support adding the concept of unfairness to the unconscionable conduct provision itself for similar reasons to those outlined regarding Option 3 below.

82. In considering Option 2, the C&C Committee has provided the following answers to some of the questions from the Consultation RIS.

Responses to the Option 2 questions

2.1 Do you agree with the impact analysis of this option? Are there other benefits or costs that should be taken into account when analysing the impact of this option?

2.2 What would be the impact of pursuing this policy option for consumers and businesses?

2.4 Would this policy option place any additional financial or administrative cost or burden on small businesses and/or consumers?

83. While it is difficult to comprehensively assess the impact of any reform options without a clear understanding of the gap that any reform is seeking to address, the C&C Committee considers Option 2 is the option likely to have the least detrimental impact on stakeholders. In contrast with Options 3 and 4 (discussed further below), Option 2 seeks to expand upon existing concepts with which the court is legally familiar. By doing so, it minimises the substantial risk of uncertainty that the ill-defined language of 'unfair' poses, including the risk that the court's interpretation of 'unfair' differs from Parliament's intention.

84. Based on the Treasury's current articulation of the desired outcomes of any reform, Option 2 is more likely to remedy any gap (if such a gap does exist) in the current regime than Options 3 or 4. The proposed reform would clarify the statutory unconscionable conduct provisions in the ACL are intended to capture 'unfair trading practices' and ensure businesses are capable of understanding the prohibition such that compliance is possible. It strikes the best balance between protecting the interests of consumers and avoiding the risks to other stakeholders that arise as a result of imprecise legislative drafting.

2.3 Are there any consequences or risks that need to be considered when pursuing this policy option? Please provide details.

85. In addition to the risks discussed above, the Treasury should carefully consider the formulation of any amendment(s) to sections 21 and/or 22 to ensure that it does not

significantly depart from the current formulation of unconscionable conduct such that the amendments displace the existing significant body of jurisprudence that currently guides business in their activities. Amendments that effectively create a new prohibition and repeal an existing protection could destabilise the substantial body of case law that currently protects consumers in a manner that would likely adversely impede the objectives of such reform.

86. As the Consultation RIS only considers the option at a high level and does not contemplate the precise language of any proposed amendment, the C&C Committee cannot assess the likelihood that this risk would arise if Option 2 were to be adopted. However, the C&C Committee considers this risk would be minimised by ensuring that the court retains the discretion to take into account all of the relevant circumstances when assessing whether impugned conduct is unconscionable. In particular, any amendment should not remove the court's flexibility to consider factors outside of those enumerated in section 22. This discretion is crucial to ensuring that the concept of 'unconscionability' is able to evolve and adapt to changing societal standards and norms of what conduct is against conscience through judicial interpretation.

2.5 Do you consider amending 'unconscionable conduct' under the ACL would sufficiently deter businesses from engaging in unfair trading practices? Please provide reasons for your response.

87. Whether any prohibition acts as a sufficient deterrent to businesses seeking to engage in the proscribed conduct is entirely contingent on whether it clearly and transparently defines the kinds of conduct that it prohibits. Regulation (and corresponding regulatory guidance) that *does not* clearly delineate what is and is not permissible will not act as a sufficient deterrent as it does not provide a precise standard against which businesses can assess their conduct. Vague and ill-defined prohibitions impede business attempts to implement appropriate compliance measures and procedures.

88. In the context of the Treasury's concerns that the existing statutory unconscionable conduct regime is ineffective, it is notable that the ACCC has provided minimal guidance on the provisions to date. Indeed, the only substantive guidance published by the ACCC lists the provisions under the heading: 'Treating customers fairly' and advises businesses that 'There are rules in place to ensure businesses treat their customers fairly'.[36] Further, the 'practical tips' provided in that guidance to assist businesses to avoid engaging in unconscionable conduct capture some of the unfair trading practices listed in the Consultation RIS.[37] If the Treasury does not believe that the existing prohibition sufficiently deters businesses from engaging in such conduct then this may indicate that the use of vague concepts such as 'fairness' in the ACCC's guidance is impeding the compliance efforts of businesses.

2.7 Do you think that the prohibition should be made prospective, so it applies to conduct that is likely to be unconscionable? Why or why not?

89. The C&C Committee does not support the statutory prohibition against unconscionable conduct in section 21 being made prospective.

[36] Australian Competition and Consumer Commission, *Small business and the Competition and Consumer Act: Your rights and responsibilities* (2021), 23.
[37] Ibid.

90. Treasury has not disclosed any policy rationale behind such an amendment. It appears from the Consultation RIS the intention is to align statutory unconscionable conduct more closely with the misleading and deceptive conduct protections under section 18 of the ACL. The C&C Committee observes that Treasury has noted that the high threshold of what constitutes unconscionable conduct under section 21 could limit the application of the prohibition to conduct that 'was likely to result in significant consumer detriment'.[38]

91. The C&C Committee cannot see any basis on which the amendment contemplated by this question would expand the scope of the existing statutory unconscionable conduct prohibition. The suggestion that such an amendment would assist in addressing the alleged gap in the existing consumer protection regime seems to be based on a fundamental misunderstanding of the application of both the statutory unconscionable conduct and misleading and deceptive conduct provisions of the ACL.

92. While section 18 does contain prospective language, in that the prohibition captures conduct that is 'likely to mislead or deceive', this language cannot be considered in the abstract. It must be assessed against the overall nature and intention of the prohibition. Through this assessment, it is clear that the statutory construction and jurisprudence which underpins the misleading and deceptive conduct provisions of the ACL are not comparable to the prohibition against statutory unconscionable conduct.

93. Section 18 is a provision which requires an assessment of both the nature of the impugned conduct and the actual effect that the conduct has, or is likely to have, on consumers. In contrast, whether conduct is, in all circumstances, unconscionable is not dependent on the conduct having achieved a particular outcome or impact. It is in this context that the prospective language of section 18 operates as the disjunctive of 'or is likely to mislead or deceive' and allows the prohibition to address conduct that objectively is capable of being characterised as being misleading or deceptive but where no individual has actually been misled or deceived. This reasoning is borne out by French CJ, Crennan and Kiefel JJ's judgment in *Google v Australian Competition and Consumer Commission* in which their Honour's state that the purpose of the prospective language is to make clear that 'it is not necessary to demonstrate actual deception to establish a contravention'.[39] Rather, whether impugned conduct contravenes section 18 will be a question of fact that the Court must determine with reference to the relevant facts and circumstances (as per *Australian Competition and Consumer Commission v Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement)* (***Phoenix Institute***).[40]

94. The importance of prospective language in the context of section 18 is further made evident by comparing the provision against the false or misleading representation provisions under section 29 which do not contain the language of 'likely to mislead or deceive'. As Rares, Murphy and Abraham JJ stated in *Australian Competition and Consumer Commission v Employsure Pty Ltd*, the implication of the formulation of section 29, when compared with section 18, is that:

> *the applicant must prove to the requisite standard that the respondent made representations that were actually false or misleading. It is not*

[38] Consultation RIS, 14.
[39] [2013] HCA 1, [6].
[40] [2021] FCA 956, [557])

sufficient for the applicant to prove only that it was likely that they were such.[41]

95. Thus, the prospective language ensures that the evidence which must be adduced by the ACCC or private applicant is aimed at the characterisation of the conduct itself rather than proving that the conduct did in fact cause a consumer to subjectively be deceived or misled.

96. The C&C Committee notes that the references in the Consultation RIS to prospective language in the consumer protection regimes of overseas jurisdictions similarly concern prohibitions which are predicated on a particular effect on a consumer. For instance, an element of the prohibition in Section 5 of the Federal Trade Commission Act in the US is that the impugned conduct 'is likely to cause substantial injury to consumers' and in the European Union, an element of the cited provision under the Unfair Commercial Practices Directive (**EU Directive**) is that the conduct 'is likely to materially distort the economic behaviour' of consumers.[42]

97. Although it may initially appear that prospective language could be introduced such that section 21 captures conduct which is 'likely' to be unconscionable, this would ignore the fundamental nature of the inquiry that the court undertakes in the context of section 18. That inquiry is an objective assessment made by reference to the hypothetical effect of the conduct on 'reasonable members of the class' of consumers to whom the conduct is directed and whether that conduct would be capable of achieving the outcome that those consumers would be 'misled' or 'deceived' (per *Australian Competition and Consumer Commission v TPG Internet Pty Ltd*.[43] Conversely, the assessment the court undertakes when determining whether conduct is, in all circumstances, unconscionable is 'informed by a sense of what is right and proper according to values which can be recognised by the court to prevail within contemporary Australian society'.[44] Thus, the focus of an inquiry under section 21 is at all times on the characterisation of the conduct itself and not whether the conduct does, or is likely to, result in an identifiable outcome for consumers.

98. This is further evidenced by explicit statements in the Explanatory Memorandum of the *Competition and Consumer Legislation Amendment Act 2011* (Cth) in relation to subsection 21(4)(b) (which extended the unconscionable conduct prohibition to 'a system of conduct or pattern of behaviour') that Parliament's intention was that 'the focus is on the conduct in question, as opposed to the characteristics of a particular person, or the effect of the impugned conduct on that person.' On this basis, the C&C Committee considers it clear that the current statutory unconscionable conduct provision would in fact apply to conduct that 'was likely to result in significant consumer detriment' where this conduct is capable of being characterised as being conduct which, in all circumstances, is unconscionable.

99. The C&C Committee therefore finds it difficult to ascertain how an amendment which makes the prohibition prospective would have any beneficial impact on the protection of Australian consumers from unfair trading practices. Even if the prohibition were to be made prospective, it would not alter the focus of the courts inquiry in assessing whether the conduct constitutes unconscionable conduct. It would not lower the 'high threshold of misconduct to be met' which appears to be the gravamen of Treasury's regarding the scope of section 21. Further, the C&C Committee cannot envisage a scenario in which conduct would be capable of being

[41] [2021] FCAFC 142, [89].
[42] Both references are drawn from page 19 of the Consultation RIS).
[43] [2020] FCAFC 130, [22].
[44] *Australian Securities & Investment Commission v Kobelt* [2019] HCA 18, [93].

characterised as 'likely' to be offensive to the normative standard of conscience but in which that same conduct is not actually against the normative standard of conscience.

2.6 What forms of unfair trading conduct could be included as additional factors in section 22?

2.8 Should the list of factors contained in section 22 be mandatory for courts to consider in determining whether conduct is unconscionable? In other words, should section 22 be amended so that the courts must have regard to the list of factors for the purposes of section 21?

How does the Court currently take the factors in section 22 into account?

100. Although the factors listed in section 22 have been framed as ones which the Court 'may' take into account, this provision has been interpreted as requiring that the Court does take into account at least the enumerated factors to the extent that the factors are relevant in the context of the individual case. In particular, as discussed by Wigney, O'Bryan and Downes JJ in *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* (***Captain Cook College***), while section 22 refers to factors which the Court 'may' have regard to, the context of the provision 'imports a requirement' that 'regard must be had to all considers listed in subsection 22(1) to the extent that they are applicable' as these factors form part of the overall framework in which the impugned conduct must be assessed.[45] Their Honours noted this construction is supported by the High Court's interpretation of the analogous statutory unconscionable conduct provision under section 12CB of the *Australian Securities and Investment Commission Act 2001* (Cth) (**ASIC Act**) in *Paciocco v Australia and New Zealand Banking Group Ltd* (**Paciocco**).[46] In that decision, where Gageler J stated that the word 'may' was 'not permissive, but conditional' and that parties are not open to 'pick and choose' which of the enumerated factors they will rely upon (as quoted in *Captain Cook College* at [413]). Further, in *Captain Cook College* their Honours at [416] applied the reasoning of Kiefel CJ and Bell J in *Kobelt* in which the equivalent of s 22 under the *ASIC Act* was referred to as providing 'guidance as to the norms and values that are relevant to inform the meaning of unconscionability and its practical application'.[47]

101. Similarly, Perry J in *Phoenix Institute* stated,[48] with reference to *Kobelt*, that the absence of evidence going to the factors will also be relevant to the Court's assessment of whether a supplier's conduct contravene section 21 of the ACL. However, this does not mean that parties can avoid a finding that conduct contravenes section 21 on the basis that the factors in section 22 are not satisfied. Rather, as Mortimer J (as her Honour then was) and Halley J surmised in *Australian Competition and Consumer Commission v Mazda*,[49] the unconscionability provisions in the ACL are intended to reinforce and reflect, but not constrain, societal values and expectations against which the impugned conduct is to be assessed. Therefore, despite the discretionary wording of 'may', the Court must take into account the factors in section 22 of the ACL, to the extent that such factors are

[45] [2023] FCAFC 54, [400].
[46] [2016] HCA 28 [189].
[47] [2019] HCA 18 [14].
[48] [2021] FCA 956, [136].
[49] [2023] FCAFC 45, [480]-[488].

relevant in assessing whether conduct in a particular case is, in all circumstances, unconscionable under section 21 of the ACL.

What is the likely impact of making the factors in section 22 mandatory?

102. It follows that section 22 as previously drafted does not, contrary to the suggestion in the Consultation RIS, presently provide discretion to either the parties or the Court as to whether the listed factors are taken into account. Therefore, mandating the factors would not result in a significant departure from the existing body of case law on statutory unconscionable conduct. For this reason, amending the ACL to mandate consideration of the factors under section 22 of the ACL will likely have minimal impact on suppliers, consumers and the ACCC.

103. Further, as statutory unconscionable conduct under section 21 of the ACL is assessed with reference to 'all the circumstances', mandating the consideration of the factors in section 22 is unlikely to result in any significant change to the Court's approach to assessing whether impugned conduct is unconscionable as the Court would still be required to consider relevant factors beyond those listed in section 22. Nor is it clear that such an amendment would necessarily result in the Court placing any greater weight on section 22 factors over any other relevant factors.

104. However, depending on the approach adopted to mandating consideration of the section 22 factors, the Treasury should consider further whether there is a potential risk that such an amendment could remove or reduce the Court's flexibility to consider the totality of the circumstances. This may impact the Court's ability to consider practices which may fit within any current vision of an 'unfair trading practice' (whether by the ACCC, government or otherwise) but which does not neatly align with the current factors (or any proposed additional factors). As Allsop CJ stated in *Paciocco v Australia and New Zealand Banking Group Limited (No 2)*, under the current provisions the evaluation of whether conduct is, in all the circumstances, unconscionable is 'not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules'.[50] Without being able to consider the precise form that such an amendment would take, there is risk that an amendment which mandates consideration of the factors in section 22 constrains the evaluation of whether conduct is unconscionable by creating such 'fixed rules' and thereby adversely limits the Court's ability to be flexible in having regard to factors that are not enumerated under section 22. Such a result would appear to be contrary to the purported intention of the Treasury in pursuing such an amendment.

Are the potentially unfair trading practices discussed in the Consultation RIS currently captured by the factors in section 22?

105. The below table considers whether the unfair trading practices identified in page 9 of the Consultation RIS would be captured by the factors in section 22 for the purpose of assessing whether the current factors are sufficient to address the concerns raised in the Consultation RIS or whether the provision should be amended to refer to new factors to clarify that section 21 is intended to capture such practices.

[50] *Paciocco v Australia and New Zealand Banking Group Limited (No 2)* [2017] FCAFC 146 [304].

Unfair trading practices listed in the Consultation RIS	Potentially applicable factors in section 22
Inducing consumer consent or agreement to data collection through concealed data practices.	Subsections 22(1)(b), (d), (i) and (l).
Exploiting bargaining power imbalances in supply chain arrangements, including by unilaterally varying supply terms at short notice.	[Noting that the same provisions apply in the supplier/customer context under subsection 22(1)] Subsections 22(2)(a), (i)-(l).
Omitting or obfuscating material information which distorts consumers' expectations or understanding of the product or service being offered.	Subsections 22(1)(c), (d), (i) and (l).
Using opaque data-driven targeting or other interface design strategies to undermine consumer autonomy.	Subsections 22(1)(d), (i) and (l).
Exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the 'choice architecture' of products or services (digital or otherwise).	Subsections 22(1)(a), (c), (d), and (l).
Adopting business practices or designing a product or service in a way that dissuades a consumer from exercising their contractual or other legal rights.	Subsections 22(1)(d), (j) and (l).
Non-disclosure of contract terms including financial obligations (at least until after the contract is entered into).	Subsections 22(1)(i) and (j).
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.	Subsections 22(1)(b) and (i)-(l).
Providing ineffective and/or complex disclosures of key information when obtaining consent or agreement to enter into contracts.	Subsections 22(1)(c) and (j).

What forms of unfair trading conduct could be included as additional factors in section 22?

106. If the Treasury decides to pursue Option 2, the following section details the C&C Committee's suggestions for an additional factor or factors that could be included in sections 22(1) and (2). These suggestions are drafted to achieve Treasury's stated policy objective of ensuring that the consumer protection regime encompasses a more targeted and deliberate inclusion of the harms outlined in the Consultation RIS.

107. For completeness, these suggestions have been informed by approaches adopted in comparable jurisdictions, with particular consideration of the EU Directive and the UK Regulations.

Suggestion	Justification
AMEND: Existing sub-paragraph 22(1)(l) to clarify that acting in 'good faith' includes acting 'honestly, reasonably and fairly', consistent with Australian case law.	Sub-paragraph (l) could be amended to clarify that acting in 'good faith' connotes considerations of honesty, reasonableness and fairness, consistent with Australian case law. Currently, sub-paragraph (l) provides that the court 'may' have regard to: *(l) the extent to which the [supplier / acquirer] and the [customer / supplier] acted in good faith.* However, in order to maximise the deterrent effect sought to be achieved under Option 2, acting in 'good faith' could be clarified and expressed to include acting 'honestly, reasonably and fairly', for example: *(l) the extent to which the [supplier / acquirer] and the [customer / supplier] acted in good faith including with regard to whether the parties acted honestly, reasonably and fairly.* Such a clarification codifies, in simple terms, the meaning afforded to 'good faith' under settled Australian case law, as it applies to the ACL, equivalent ASIC Act provisions and more generally.[51] It should also be noted that the 'good faith' factor is principally equivalent to the current EU / UK requirement to act in accordance with 'professional diligence',[52] which means (emphasis added): *'[P]rofessional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with **honest market practice** and/or the general principle of **good faith** in the trader's field of activity.*[53] It can be observed from this definition that '*professional diligence*' connotes considerations of honesty, reasonableness and fairness—all of which, if expressly drawn out—could achieve a greater

[51] See *Productivity Partners Pty Ltd (trading as Captain Cook College) v ACCC* [2023] FCAFC 54, [489], approving *Paciocco v ANZ Group Ltd* (2015) 236 FCR 199, 287 (emphasis added):

> *Consideration of what it means to act in good faith [under ss 22(1)(l) and (2)(l)] was addressed in relation to equivalent provisions in the ASIC Act in Paciocco (FC). In that case, Allsop CJ stated at [288]–[290] that:*
>
> > *The usual content of the obligation of good faith … is an **obligation to act honestly and with a fidelity to the bargain**; **an obligation not to act dishonestly** and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an **obligation to act reasonably and with fair dealing** having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.*
> >
> > *None of these obligations requires the interests of a contracting party to be subordinated to those of the other. It is good faith or **fair dealing** between the parties by reference to the bargain and its terms that is called for, be they both commercial parties or business dealing with consumers.*

[52] *EU Directive* art 5(2)(a); *UK Regulations* s 3(3)(a).

[53] *EU Directive* art 2(h); *UK Regulations* s *2(1)* ('*professional diligence*'). See also, *Guidance on the Unfair Commercial Practices Directive* 2005/29/EC (EU), [2.7]:

> *The notion of 'professional diligence' encompasses principles which were already well-established in the laws of the Member States before the adoption of the UCPD, such as **'honest market practice', 'good faith'** and 'good market practice'. These principles emphasise normative values that apply in the specific field of business activity.* [Emphasis added]

Suggestion	Justification
	deterrent effect than the current, higher-level drafting contained in sub-paragraph (l). For completeness, implementing this amendment also complements the suggestion below to insert a new sub-paragraph (k) to capture practices resulting in 'material distortions in economic behaviour'. This is reflective of the fact that the requirement to act in accordance with 'professional diligence' is one part of a two-part test to establishing an 'unfair commercial practice' in the EU / UK.
INSERT: A new sub-paragraph (m) to address 'material distortions in economic behaviour', in order to achieve more targeted consideration of 'unfairness'	A new sub-paragraph (k) could be inserted to explicitly capture situations where a person's economic behaviour is 'materially distorted, or is likely to be materially distorted', by a particular practice, that is: (k) whether, as a result of the conduct engaged in by the [supplier / acquirer], the [customer / acquirer]'s economic behaviour is materially distorted or is likely to be materially distorted This is consistent with the current general prohibition against 'unfair commercial practices' in the EU / UK,[54] and could provide more targeted consideration of matters relating to 'unfairness' than the current language of 'unfair tactics' (see sub-paragraph (d)). It would also be appropriately balanced, noting that the relevant distortion must be 'material', that is, it must: *[A]ppreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.*[55] **For completeness:** • Although the EU / UK provisions are applied by reference to the standard of an 'average consumer', for consistency with the broader Australian Consumer Law we have used the language of 'reasonable consumer'. • The C&C Committee understands that the UK Regulations are currently the subject of an ongoing legislative reform process where the precise wording of the test is proposed to change by deleting 'materially distorts or is likely to materially distort'.

2.9 Are there any other principles that would be useful to consider in amending statutory unconscionable conduct? Please provide details.

108. Although the C&C Committee has sought to thoroughly consider the matters raised in the Consultation RIS its ability to meaningfully contribute to this consultation process is limited by the detail and information that the Treasury has provided in the Consultation RIS.

109. Currently, the concerns raised in the Consultation RIS in relation to the effectiveness of statutory unconscionability appears to be confined by the outcomes of prior cases brought by the ACCC and existing jurisprudence. The C&C Committee has

[54] *EU Directive* art 5(2)(b); *UK Regulations* s 3(3)(b).
[55] *EU Directive* art 2(e); *UK Regulations* s 2(1) ('materially distort the economic behaviour').

undertaken a review of these cases and, has not found the concerns to be made out. The Committee therefore does not consider the analysis in the Consultation RIS provides a sufficient justification to pursue the proposed reforms to sections 21 and/or 22. Most importantly, it does not appear that these reforms would provide tangible benefits to consumers that outweighs the clear risk of regulatory uncertainty posed.

110. On the basis of this limited information, the C&C Committee is unable to substantially support Option 2. If, however, Treasury concludes that reform is necessary then we note that Option 2 is the C&C Committee's preferred proposal.

111. In light of the above, any additional matters that are raised in the course of this consultation process, whether through stakeholder submissions or further investigation by the Treasury, that alter in any way the justifications for pursuing the proposed reforms or the reform options themselves, the C&C Committee submits should be subject to further public consultation. If this were to occur, the C&C Committee would welcome the opportunity to meaningfully engage further with the Treasury on that consultation.

Comments regarding Option 3

No demonstrated need for a general prohibition against unfair trading practices

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

113. The C&C Committee submits there is a threshold question, which is whether a need for a general prohibition against unfair practices has been demonstrated.

114. The C&C Committee's view is that much of the conduct identified as potentially covered by such a provision is already covered by the existing provisions of the ACL, including the various prohibitions against false, misleading, or deceptive practices, the unfair contract terms regime and the unconscionable conduct (as described in the table at paragraph 6 above).

A general prohibition would create uncertainty and regulatory burden

115. The C&C Committee submits that if there are demonstrated gaps in the existing laws, any new regulation should be principles-based, flexible and apply universally in a way that minimises the regulatory burden on businesses and provides certainty for businesses and consumers.

116. The C&C Committee acknowledges that option 3 is described as broad, flexible and principles-based. However, the C&C Committee does not consider a general prohibition on unfair trading practices meets the important principle that it would apply in a way that minimises the regulatory burden and provides certainty.

117. The options paper does not propose a specific definition of unfair within this context. The intention appears to be that if this option were progressed, it is possible a definition of unfair would be developed through the policy development process. The options paper suggests this could be informed by its use and application in international jurisdictions and the informed feedback of stakeholders in this and future consultation processes. However, the options paper also acknowledges that

the meaning of unfair would require an appropriate and adaptable definition for a general prohibition against unfair trading practices.

118. However, even if a definition of 'unfair' was to be developed following such a process, the C&C Committee's is concerned that the concept of an 'unfair practice' is inherently subjective. The Committee contends the subjectivity that is necessarily involved in the determination of 'unfairness' creates inherent uncertainty. A finding of unfairness inherently turns on the unique facts and context and the assessment of unfairness is necessarily an evaluative process. What is unfair in one context may be permissible in another.

119. The introduction of a prohibition where the conduct that is prohibited cannot be identified with certainty would increase the burden on businesses and would not provide any certainty for businesses or consumers. It would also be likely to have an adverse effect on innovation, competition and efficiency. The options paper recognises these consequences might arise from a poorly framed prohibition. However, the C&C Committee submits that the uncertainty that is inherent in prohibiting practices that are 'unfair', with its inherent subjectivity, cannot be addressed no matter how the prohibition is framed.

Relevance of regimes in other jurisdictions

120. The options paper refers to general unfair trading prohibitions in other jurisdictions, stating:

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

121. The C&C Committee recognises there can be significant efficiency benefits to international alignment, both in the law reform and enforcement process, and that compatibility with international regimes is also likely to facilitate cross border international trade, given the global nature of some businesses. However, in considering overseas frameworks, the C&C Committee submits that the commercial and market realities in Australia must be carefully considered to ensure legislative reform is fit for purpose.

122. Having regard to the differences between those regimes and commercial and market realities, and the comprehensive coverage of our existing laws, the Committee submits that the fact that other jurisdictions include a form of unfair trading provision does not justify the inclusion of a general provision in the ACL.

Penalties

123. The Consultation RIS states any reform introducing a general prohibition on unfair trading practices could align with the approach to unfair contract terms and include civil penalties for a breach. It refers to the recent reforms to the ACL introducing penalties for businesses that include UCTs in their standard form contracts with consumers and small businesses which came into effect in November 2023.

124. The C&C Committee submits that if a general prohibition on unfair trading practices is to be introduced, breach of that prohibition should not be subject to penalties. A prohibition punishable by penalties would be an overreach, and the prohibition is not sufficiently clear to enable penalties to apply (page 6). If a general prohibition was introduced, it should take the same form as section 18, which is a broad,

flexible, and principles-based prohibition with a large body of case law built up over many years giving guidance to businesses and consumers. There are additional prohibitions which more precisely define specific conduct which is subject to penalties, for example, the specifically prohibited false and misleading representations listed in section 29.

Guidance

125. The options paper acknowledges that businesses would incur compliance and training costs in order to ensure practices are not in contravention of the principles-based prohibition. However, with a new and inherently uncertain prohibition, training is unlikely to be sufficient to ensure no contravention.

126. If any broad prohibition was to be introduced, a lengthy transition and implementation period would be necessary, as well as adequate regulatory guidance and education programs to promote awareness and certainty for all parties.

Potential benefits and costs

127. The Committee's views on the potential benefits and costs identified in the options paper are set out in the table below (benefits and costs identified in the paper are in italics).

Potential benefits	Potential costs
A general prohibition on unfair trading practices would provide a greater deterrence against predatory, aggressive or misleading business conduct. It would enable future and evolving unfair trading practices to be captured. The C&C Committee considers that this conduct is likely to be currently prohibited.	*Businesses would incur compliance and training costs to ensure they are not engaging in unfair trading practices.* The C&C Committee agrees that businesses would incur these costs and also notes that with a broad prohibition of this kind, training is unlikely to ensure no contraventions of such a prohibition.
A general prohibition on unfair trading practices may better meet community expectations for protecting consumers and small businesses under the ACL. The C&C Committee considers that such expectations can be addressed through use of the existing ACL prohibitions.	*Judicial precedent on a general prohibition may take time to develop and be consistently applied. This could create uncertainty for businesses which could have a chilling effect on competition and innovation.* The C&C Committee agrees that this cost is likely to arise if such a prohibition is introduced.
Government and regulators would have more tools to more appropriately and efficiently respond to misconduct, and therefore allow for less complex and less costly regulatory intervention. The C&C Committee considers that regulatory intervention to enforce a broad 'unfair trading practices' prohibition will result in lengthy and costly litigation proceedings to interpret the provision and its scope and application, noting that something that is unfair in one context might be fair in another.	*Government and regulators could incur greater costs through increased enforcement and administration actions, particularly as more conduct is captured.* The C&C Committee agrees that this is likely.

Potential benefits	Potential costs
A general prohibition on unfair trading practices would bring Australia in line with other international jurisdictions and prominent trading partners. The C&C Committee considers that international examples are a relevant consideration but are not of themselves a sufficient reason to introduce this prohibition.	*Government and regulators would incur upfront costs in developing guidance and education measures in order to support business certainty.* The C&C Committee agrees that upfront guidance and education would be critical, and this will involve government and regulator costs, as well as business compliance costs.
A general prohibition on unfair trading may increase consumer and small business confidence. The C&C Committee considers that increased enforcement of the existing ACL prohibitions should result in an increase in consumer and small business confidence.	*Depending on how it is framed, a general prohibition could create uncertainty for businesses and consumers and be difficult to enforce.* The C&C Committee considers that any broad prohibition on unfair trading practices is likely to create such uncertainty and would be difficult to enforce, because of the inherent uncertainty and subjectivity involved in the concept of unfairness.

Comments regarding Option 4

No demonstrated need for a general prohibition against unfair trading practices combined with a list of specific prohibited practices

128. This policy option is described as a combination of a general principles-based prohibition against unfair trading practices (Option 3) together with the addition of a list of specific prohibited practices. It is described as being the most 'comprehensive and targeted' policy approach of all options considered.

129. The C&C Committee does not support Option 4. The Committee's views on the introduction of a general prohibition against unfair trading practices are discussed in respect of Option 3 above and are not repeated here. In respect of the proposal to *combine* a general prohibition against unfair trading with a list of specific practices, the Committee considers that:

    (a) **New prohibitions should only be introduced where there is a demonstrated need or 'policy gap' to be addressed**. The Consultation RIS describes Option 4 at a conceptual level but otherwise does not identify the specific practices that ought to be prohibited as part of this approach. It is therefore difficult to see what need there is for a combined approach and why this approach should be *assumed* to provide more protection to consumers and business beyond the general and specific prohibitions that already exist in the ACL.

    (b) **A combined approach would create duplication in the ACL, increasing the complexity of consumer protection laws for both businesses and consumers**. The Consultation RIS cites a number of overseas approaches in support of Option 4, including the fact that several specific practices prohibited in these combined regulatory approaches are already prohibited in the ACL such as bait advertising, pyramid schemes and false offers of gifts and prizes. Far from supporting the adoption of Option 4 in Australia, the fact that these specific prohibitions already exist in the ACL suggests that there isn't a need

for a combined regulatory approach here and that seeking to transplant overseas approaches to the Australian context is likely to create significant duplication and complexity in the ACL. This is particularly undesirable as the ACL should be as simple as possible so that it is accessible to consumers and small business.

(c) **Overseas approaches are not analogous to the Australian context**. It appears that the main reason Option 4 has been included is because it reflects a number of overseas approaches. This approach would therefore bring Australia into alignment with global practice in this regard. At the same time, the Consultation RIS acknowledges Option 4 would have the highest regulatory impact and present the largest transition cost to businesses of all the options considered. The C&C Committee considers that serious caution is required before adopting overseas approaches for the sake of alignment, particularly given important differences in underlying consumer protection laws here as compared to overseas and other important regulatory context. This is discussed further below.

Overseas approaches are not analogous to the Australian context

130. The C&C Committee recognises there can be efficiency benefits to international alignment. However, the Committee advocates for caution in adopting overseas approaches for the sake of alignment in circumstances where no clear regulatory gap has been identified in Australia. This is more so where we already have a comprehensive and wide-reaching set of consumer laws and regulations regulating unfair trading practices.

European Union's Unfair Commercial Practices Directive 2005

131. Overseas laws which contain a general prohibition against unfair trading practices and specific prohibited practices have been adopted in a very different context not relevant to the Australian experience. We highlight these differences by discussing the EU Directive below as one example:

(a) The EU Directive contains a general prohibition on 'unfair commercial practices', defined as practices which are 'contrary to the requirements of professional diligence' and which materially distort or are likely to materially distort the economic behaviour with regard to the product of the average consumer. As discussed above in respect of Option 1, the existing provisions of the ACL already contain broad and flexible prohibitions. These prohibitions regulate unfair trading and it is unclear what introducing a general prohibition on unfair trading would add to these existing ACL protections. They potentially only introduce duplication and complexity, as well as uncertainty for business about the conduct that is intended to be targeted by such a new prohibition.

(b) The EU directive also sets out a list of practices which are deemed to be unfair. As acknowledged by the Consultation RIS, each of these examples would likely be covered by an existing provision in the ACL. For example:

(i) Article 6 describes misleading commercial practices as those that contain false information and are therefore untruthful in any way or likely to deceive the average consumer, including in relation to the nature of the product, the characteristics of the product, the price of the product, the need for a service and the consumer's rights. Article 7 describes misleading omissions as where a commercial practice omits materials that the average consumer needs to know in order to take an informed

transactional decision and that omission causes them to undertake a transaction decision they would not otherwise have taken. In Australia, these examples would already be regulated by the prohibition against misleading or deceptive conduct (section 18) and the specific provisions relating to false or misleading representations (section 29).

(ii) Article 8 prohibits aggressive commercial practices, being a practice which impairs the average consumer's freedom of choice or conduct due to harassment, coercion, physical force or undue influence, and that causes the consumer to undertake a transactional decision they would not otherwise have undertaken. Article 9 prohibits use of harassment, coercion and undue influence, including through the use of physical force or threatening or abusive language or behaviour. In Australia, this conduct would already be regulated by the prohibition against unconscionable conduct (sections 20—22) and the prohibitions against unsolicited consumer agreements (Part 3–2, Division 2), harassment and coercion (section 50) and offering rebates, gifts, prizes (section 32).

(c) The EU Directive was introduced to harmonise divergent consumer protection regimes in the different member states, many of which had different legal traditions and concepts designed to protect consumers. See in particular Recitals 3 to 6 of the EU Directive which note:

(i) (Recital 3) 'The laws of the Member States relating to unfair commercial practices show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market'.

(ii) (Recital 4) 'These disparities cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests and create many barriers affecting business and consumers'.

(iii) (Recital 5) 'These obstacles can only be eliminated by establishing uniform rules at Community level which establish a high level of consumer protection and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market and to meet the requirement of legal certainty'.

(i) (Recital 6) 'This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors'.

The risk of divergent protection does not exist in Australia, where, since the adoption of the Australian Consumer Law in 2010, we have had a uniform national standard for consumer protection. This strongly suggests that the EU's approach to legislating (where general catch-all provisions are combined with proscriptive prohibitions) is not appropriate for the Australian context.