Submission by the Interactive Advertising Bureau (IAB) Australia

Protecting consumers from unfair trading practices -

Consultation Regulation Impact Statement

The Treasury

November 2023

Contents

About IAB Australia

The Interactive Advertising Bureau (IAB) Australia Limited www.iabaustralia.com.au is the peak trade association for digital advertising in Australia.

IAB Australia was established in 2005, incorporated in 2010 and is one of 47 IAB offices globally. IAB globally is the leading trade association for developing digital advertising technical standards and best practice.

Locally there is a financial member base of approximately 180 organisations that includes media owners, platforms, media agencies, advertising technology companies as well marketers. The board has representation from the following organisations: Carsales, Google, Guardian News & Media, Meta, News Corp Australia, Nine, REA Group, Seven West Media, Yahoo.

IAB Australia's charter is to grow sustainable and diverse investment in digital advertising in Australia by supporting the industry in the following ways:

- Advocacy
- Research & resources
- Education and community
- Standards

The Charter includes a focus on standards that promote trust, steps to reduce friction in the ad supply chain; and ultimately improve ad experiences for consumers, advertisers and publishers.

Executive Summary

- IAB thanks the Government for the opportunity to make this submission on behalf of the digital advertising industry.
- The digital advertising ecosystem plays a central role in Australia's economy and society. It is a significant funding component of the internet, enabling the delivery of free online content, products and services to all Australians. It grows businesses, supports 450,000 jobs, contributes $94 billion to GDP and provides $55.5 billion annual consumer benefits.
- Consumers highly value this. According to analysis commissioned by IAB Australia, the average Australian consumer is willing to pay $544 annually to access currently free ad-supported digital services and content. For consumers on annual incomes below $50,000, the value they attribute to content and services that are currently free was roughly double that of consumers with annual incomes of over $80,000.
- IAB Australia recognises the need for a strong and comprehensive consumer protection regime that addresses unfair trading practices; that effectively balances consumer protection with market efficiency and productivity; and that avoids duplication or unnecessary complexity.
- However, IAB Australia is not convinced that the examples of unfair trading practices contained in the CRIS are not already comprehensively covered by existing laws and law reform processes.
- The ACL already prohibits a broad range of unfair conduct, regardless of the business model, technology or type of commercial practice involved. In addition, a number of other laws also regulate conduct identified as problematic in the CRIS, including privacy laws, laws regulating the use and disclosure of data and various industry codes and laws addressing unfair contract terms in standard form consumer contracts. Notably, as part of the current whole-scale review of the *Privacy Act 1988*, the Government has agreed-in-principle to make a number of changes to address consumer concerns in relation to data sharing and personalised advertising (practices specifically mentioned in the CRIS), including through a new requirement that all collections, uses and disclosure of personal information should be 'fair and reasonable'; and amendments to notice and consent mechanisms to increase transparency in relation to use of personal information.
- The final report of the review of the ACL conducted by Consumer Affairs Australia and New Zealand (CAANZ) and published in 2017 found that the value of an additional general unfair trading prohibition was uncertain; that the extent to which unfair practices were already captured by existing provisions, including misleading or deceptive conduct, unconscionable conduct, unfair contract terms, pyramid selling and unsolicited selling, was unclear; and that further assessment was required in relation to the extent and degree of overlap to avoid any unnecessary duplication.
- The same report found that there is 'a high level of convergence' between the ACL and consumer policy frameworks in comparable jurisdictions. IAB agrees with this assessment and notes that the Australian regime protects a broader range of conduct compared to overseas equivalents in some respects (in particular in relation to B2B conduct), and provides significant penalties.
- Given this context, IAB is not convinced that the changes proposed in options 2-4 are necessary. Without a more comprehensive analysis being undertaken in relation to any perceived gaps and whether the existing provisions of the ACL would apply to those gaps, the introduction of an unfair trading practices prohibition would introduce significant legal uncertainty and cost for business for no clear consumer benefit.

1. Introduction

1.1 Economic value of digital advertising

The digital advertising ecosystem plays a central role in Australia's economy and society. It funds the delivery of free online content, products and services to all Australians, grows businesses, supports 450,000 jobs and contributes $94 billion to GDP. Over 70% of total advertising is now online.[1]

Digital advertising supports industry sectors including retail, finance, automotive, FMCG, technology and real estate, amongst others. It is an essential enabler of growth across Australia's digital economy. Total Australian digital advertising expenditure has increased from $3.1 billion in 2021 to now $14.2 billion, with the industry posting a growth rate of 2% in 2020, 36% in 2021 and 9% in 2022.[2]

It also sustains and promotes growth of small and medium sized businesses (SMEs) which contributes significantly to the health of the Australian economy. SMEs receive 61 per cent of the sector's benefits.[3] 44% of digital advertising spend ($5.7n) comes from the SME segment of the economy.[4] These businesses can now reach domestic, and international, consumers wherever their business is in Australia, much more easily and at a relatively lower access cost.

1.2 Value of digital advertising to consumers and society

In addition to benefits to the economy, the digital advertising industry provides significant benefits to consumers and Australian society at large.

For Australian consumers, digital advertising has fuelled an expanding online ecosystem of information, news and entertainment content, as well as social and search services, free of charge.

Consumers highly value this. According to analysis commissioned by IAB Australia, the average Australian consumer is willing to pay $544 annually to access currently free ad-supported digital services and content.[5] This equates to provision of a benefit of $8.8 billion to consumers annually in ad-supported digital content and services – and approximately $1100 per household.

The ad-supported online ecosystem also provides significant benefits to society more broadly. It connects communities, supports democracy through free access to news content, provides increased access to job opportunities, education and financial information in addition to entertainment content and supports a thriving second-hand marketplace.

According to a recent consumer survey, 78% of survey respondents indicated that digital content and services enable them to more easily stay in contact with friends and family. This was as high as 81% in regional areas. Importantly, for consumers on annual incomes below $50,000, the value they attribute to content and services that are currently free was roughly double that of consumers with annual incomes of over $80,000.[6]

[1] PwC, *Online Advertising Expenditure Report*, 2023. See: https://iabaustralia.com.au/research-and-resources/advertising-expenditure/
[2] Ibid.
[3] PwC, *Ad'ing Value: The impact of digital advertising on the Australian economy and society*, 2022, 4-5.
[4] Ibid.
[5] Ibid
[6] Ibid

1.3 Approach taken in this submission

The Consultation Regulation Impact Statement (CRIS) describes unfair trading practices as '*particular types of commercial conduct which are not covered by existing provisions of Australia's consumer laws.., but nevertheless can result in significant consumer and small business harm*'.[7]

IAB Australia agrees that changes to the law should only be introduced where there are clear gaps in the existing regulatory framework such that commercial conduct giving rise to significant consumer harm is not currently captured by existing provisions.

However, IAB does not agree with the CRIS that '*Evidence suggests that a large and growing range of commercial practices and business models fall into this category, including in the digital economy*'.[8] As outlined in this submission, this evidence is not clear from the CRIS.

It is not clear from the CRIS that the existing regulatory framework and current law reform processes that are under way would not capture unfair trading practices that arise from evolving commercial practices and business models, including the examples of unfair practices that have been highlighted in the CRIS regarding targeted advertising and sharing of data. We agree with the Australian Consumer Law Review Final Report that, to effectively balance consumer protection with market efficiency and productivity, duplication and unnecessary complexity in the law should be avoided.

In this submission, we set out:

- Our understanding of the problem in light of the findings of the Australian Consumer Law Review Final Report.
- Existing consumer protection laws that apply to unfair trading practices under the ACL.
- Other laws that regulate unfair trading practices identified in the CRIS.
- How Australian law compares with equivalent international laws.
- The risk of legal uncertainty if an additional unfair trading practices provision was introduced.
- Conclusion on the options proposed in the CRIS.

[7] CRIS, Introduction, 4.
[8] Ibid.

2. The problem – understanding the gaps in existing consumer law provisions

2.1 Previous Australian consumer law review findings

The ACL was reviewed by Consumer Affairs Australia and New Zealand (CAANZ) in 2015 to assess its effectiveness, including the ACL's flexibility to respond to new and emerging issues.

That review, which has led to this review process, recommended exploring how an unfair trading prohibition could be adopted within the Australian context to address potentially unfair business practices.[9] However, in doing so it noted that: [10]

> *"At this stage, it is unclear the extent to which these practices are already captured by existing protections contained in the ACL, including misleading or deceptive conduct, unconscionable conduct, unfair contract terms, pyramid selling and unsolicited selling. As such, the value of an additional general unfair trading prohibition is uncertain at this point in time.*[11]

The CAANZ Final Report went on to emphasise the need to further assess the extent and degree of overlap between a general unfair trading practices prohibition and existing ACL protections,[12] with a view to avoiding unnecessary duplication. When commenting on appropriate levels of regulation it noted:

> *Effective consumer protection policy needs to balance the objectives of consumer protection, market efficiency and productivity, while avoiding unnecessary regulation or complexity.*[13]

We agree with CAANZ. In our view, before any of options 2-4 can be supported, an assessment of the extent and degree of overlap between an unfair trading practices prohibition and existing ACL protections is required. We support a more comprehensive assessment being undertaken. In the absence of such an assessment, the degree of legal uncertainty surrounding such a provision being introduced into the ACL is unknown and we would be concerned that it would be significant.

Without such an assessment, our view is that option 1 is the most appropriate course of action at this point in time. Option 1 could be supplemented with additional guidance from the ACCC in relation to the application of the existing ACL provisions to new and evolving business practices where there is uncertainty.

2.2 Examples of business practices identified in the CRIS

The CRIS provides the following examples of potentially unfair trading practices:[14]

- Inducing consumer consent or agreement to data collection through concealed data practices;
- Exploiting bargaining power imbalances in supply chain arrangements, including by unilaterally varying supply terms at short notice;
- Omitting or obfuscating material information which distorts consumers' expectations or

[9] Consumer Affairs Australia and New Zealand (CAANZ), Australian Consumer Law Review Final Report, March 2017, 2.3. See: ACL_Review_Final_Report.pdf (consumer.gov.au)
[10] Ibid.
[11] Ibid, 51.
[12] Ibid.
[13] Ibid, 10.
[14] CRIS, 9.

understanding of the product or service being offered;

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

However, we are not convinced that these practices fall outside of existing laws or are not being dealt with by other law reform processes.

While business models and commercial practices are constantly evolving, the ACL prohibits conduct regardless of the business model or commercial practice involved. A new unfair trading practices prohibition is not required to capture new technologies, practices or business models. If the practice of concern meets the relevant threshold of conduct proscribed under the relevant provision of the ACL, it is captured.

A new unfair practices prohibition would therefore simply lower the threshold for what is considered to be unfair conduct, over and above what is currently considered as unfair under numerous provisions of the ACL and create considerable uncertainty (likely until a decision is made by the courts). We do not think this is necessary to capture the potentially unfair practices identified in the paper and we address how some of these practices would be captured under existing laws in section 3 below.

In addition, we do not think lowering the existing threshold for unfair conduct is necessary to bring our law in line with the approach taken in the overseas jurisdictions referred to in the CRIS. As we set out in section 5 below, the law in these jurisdictions, while framed quite differently to our law, is equivalent if not less comprehensive in some respects, in the protections it provides.

3. Existing Australian Consumer Law

In this section we set out the existing regulatory framework that applies to unfair trading practices and how this would apply to the conduct identified in the CRIS that is relevant to the digital advertising industry.

3.1 Unfair trading practices under the ACL

The unfair trading practices regime contained in the Australian Consumer Law (ACL), includes a suite of provisions to address unfair trading practices, which together capture a broad range of conduct.

It was strengthened from the previous consumer protection provisions of the *Trade Practices Act,* and has been reviewed and amended since that time to ensure it is effectively adapting to evolving markets.[15] For example, in 2018, penalties for breaches of the ACL were increased from a maximum

[15] For example, see Changes to the Australian Consumer Law | Consumer Law.

of $1.1m to the higher of $10m, three times the benefit obtained or 10% of company turnover, to align with competition law breaches. And, from 27 October 2022, maximum penalties for breach of consumer law prohibitions are the greater of $50m, three times the benefit obtained or 30% of adjusted turnover during the breach period.[16] These are substantial penalties, especially when compared to other jurisdictions.

As the CRIS sets out, the existing unfair trading practices regime includes provisions proscribing misleading and deceptive conduct, false and misleading representations, unconscionable conduct, unfair contract terms, misuse of market power, as well as bans on specific practices such as pyramid selling.

3.2 Misleading & deceptive conduct

Section 18 of the ACL prohibits misleading and deceptive conduct. It captures any conduct that is, or is likely to, mislead or deceive consumers, regardless of the intention of the business, and regardless of whether it occurs in person, in writing, in advertising, or through social media or another platform. It exists in addition to the more specific prohibitions on false and misleading representations (captured by s 29).

Contrary to the view expressed in the CRIS, is our understanding that section 18 covers omissions or the obscuring of material information where that leads to a likelihood that a consumer will be misled as a result. As the ACCC has noted, misleading or deceptive conduct can include:

- Leading someone to a wrong conclusion.
- Creating a false impression.
- Omitting or remaining silent on important information.
- Making false claims about products or services.

The ACCC's Advertising and Selling Guide indicates that this is intended to capture a wide range of conduct, including a range of online advertising techniques that can potentially be misleading, and including but not limited to:[17]

- Misleading price claims.
- Information in fine print and qualifications must not conflict with the overall message of the ad.
- Bait advertising – for example, promoting prices on products that are not available or only available in very small quantities.
- Making claims about "whether goods are in stock or when they may be applied, including estimates about delivery timeframes".
- Making claims about the need for the goods or services.
- Misleading consumers in relation to their rights, warranties or remedies.

While the CRIS provides that this provision "*rarely imposes a positive duty on businesses to disclose information*" and "*will not always address practices that involve a business obscuring or omitting material information or using data or negative choice architecture linked to a product or service which causes consumers to make unintended or undesirable transactional decisions or hinders the exercise*

[16] See https://www.accc.gov.au/media-release/accc-welcomes-new-penalties-and-expansion-of-the-unfair-contract-terms-laws

[17] See https://www.accc.gov.au/consumers/advertising-and-promotions/false-or-misleading-claims#toc--advertising-techniques-that-can-mislead-

of their consumer rights"; it is our understanding that such an obligation would arise if a court found the omission to be misleading or deceptive.

A number of the practices identified in the CRIS as examples of unfair trading practices would on the face of it appear to be covered by this provision. For example:

- Omitting or obfuscating material information which distorts consumers' expectations or understanding of the product or service being offered,[18] would be captured where the omission or obfuscation is likely to mislead consumers in relation to the product or service being offered. Where that is not the case, for example, because consumers' expectations in relation to a product or service were distorted for reasons other than the conduct of the business, it would not be appropriate to hold the business responsible for that. As has been reiterated in recent case law, there needs to be a sufficient nexus between the conduct and the misleading impression or misconception.[19] In our view this is a reasonable approach; businesses should only be held responsible where their conduct leads to a consumer being misled – rather than confusion which their actions did not cause.
- Similarly, non-disclosure of key contract terms in advertisements and/or providing ineffective or incomplete information to consumers when obtaining consent or agreement to enter into contracts,[20] is clearly conduct that is intended to be captured by s 18 and such conduct has been found to be in breach of this provision and its predecessor.[21] Conduct that is likely to mislead consumers in relation to their contractual or legal rights, is also captured, as stated by the ACCC.[22]
- Another example, raised in the CPRC report referenced in the CRIS, is the use of scarcity cues online.[23] In our view, the law applies in the same way to scarcity cues as to other conduct – where these are inaccurate or give a misleading impression, they would be captured by existing law. Where they are presented accurately however, they provide information which is helpful to and valued by consumers. The use of this example highlights the need to distinguish between practices that may be either harmful or helpful, depending on the context in which they are used and how they are presented.

3.3 Unconscionable conduct

Sections 20 and 21 of the ACL prohibit unconscionable conduct by businesses towards consumers or other businesses.

The CRIS notes that unconscionable conduct relates to conduct that is 'particularly harsh or oppressive' as a result of the circumstances surrounding the conduct. The ACL provides that in determining whether conduct meets this threshold, a court can consider:[24]

- The relative bargaining strength of the parties.

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[18] CRIS, 9.
[19] For example see *Telstra Corporation Limited v Singtel Optus Pty Ltd [2020] FCA 1372*; https://www.claytonutz.com/insights/2020/october/context-is-all-court-confirms-test-and-principles-for-false-misleading-or-deceptive-conduct
[20] CRIS, 9.
[21] For example: *ACCC v Dell Australia Pty Limited [F2023] FCA 588*; *ACCC v Trivago N.V. [2020] FCA 16 (FCA); ACCC v Meta Platforms Inc. [2023] FCA 842; ACCC v Booktopia Pty Ltd [2023] FCA 194.*
[22] https://www.accc.gov.au/consumers/advertising-and-promotions/false-or-misleading-claims
[23] Consumer Policy Research Centre, *Duped by design*, 15.
[24] ACL, section 22.

- whether any unreasonable (including unnecessary) conditions were imposed on the consumer.
- whether the consumer was able to understand the documentation provided.
- the use of any undue influence or pressure tactics.
- the price or other terms on which the consumer could have bought the same or equivalent goods or services from another business.
- whether the business was prepared to negotiate.
- whether the business acted in good faith.

The CRIS provides that "*statutory unconscionable conduct is limited in its ability to address unfair practices because it is not the same as unfair conduct and it requires a high threshold of misconduct to be met. As a result, there are cases where courts have determined that conduct falls short of the high threshold, even though that conduct would be considered by many as unfair and was likely to result in significant consumer detriment*".[25]

While unconscionable conduct requires a threshold of misconduct above simply 'unfair' conduct, it is otherwise broad in terms of the circumstances which it may apply to. For example, unconscionable conduct can apply in relation to a consumer's particular circumstances, as well as systemic conduct, it can apply regardless of the intention of the person engaging in the conduct,[26] and regardless of whether an individual 'victim' is identified; and it can apply to conduct regardless of whether a contract is in place.[27]

In addition, the Federal Court has also indicated that, while exploitation of some vulnerability or disadvantage will often be a feature of unconscionable conduct, it is not an essential element in establishing that a party has engaged in statutory unconscionable conduct – rather, conduct should be assessed for whether it is outside of '*the norms of acceptable commercial behaviour, so as to offend conscience*'.[28]

Based on this interpretation, a number of the practices that the CRIS identified as concerning, could in our view be captured by statutory unconscionable conduct if the conduct was considered to fall outside of acceptable commercial behaviour. For example, conduct that amounts to 'exploiting or ignoring behavioural vulnerabilities of consumers' should on the face of it fall within the scope of the existing provision. Whether conduct is ultimately captured will depend on the circumstances of the particular case.

The cases identified in the CRIS highlight how interpretations of the required threshold have differed in application to specific scenarios. However, this would also be the case if the threshold was lowered. We do not think the most appropriate way to resolve a lack of clarity around the existing threshold, is to lower the threshold or build in further ambiguity with the introduction of concepts like 'fairness'. This will only create more legal uncertainty and ultimately poorer outcomes for consumers.

3.4 Unfair contract terms

Section 23 of the ACL provides that terms of standard form consumer contracts or small business contracts will be void if they are unfair.

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[25] CRIS, 14.
[26] For example see https://www.accc.gov.au/business/selling-products-and-services/unfair-business-practices
[27] See https://www.accc.gov.au/system/files/482_Business%20Snapshot_Unconscionable%20conduct_FA2.pdf;
[28] See https://cgw.com.au/publications/does-statutory-unconscionable-conduct-require-some-vulnerability-or-disadvantage/

S 24(1) provides that contract terms will be considered unfair if they:

- cause a significant imbalance in the rights and obligations of the parties under the contract;
- are not reasonably necessary to protect the legitimate interests of the party who gets an advantage from the term; and
- would cause detriment (whether financial or other), if enforced.

Section 25 provides a non-exhaustive list of examples of unfair terms, and allows additional terms to be prescribed unfair by regulation.[29]

Some of these examples overlap with the list of practices that the CRIS raises as concerning – for example, terms that allow unilateral changes to the terms of a contract;[30] and all or nothing clickwrap consents that are unfair under s24(1)(a)-(c), particularly if they are not transparent or clearly presented, which a court is required to take into account in determining whether or not a contract term is unfair.[31]

We agree with the CRIS that the unfair contract terms provisions would not address unfair conduct that occurs prior to entering into contracts. Such conduct is intended to be captured by other provisions of the ACL - including misleading and deceptive conduct and unconscionable conduct provisions. While, as the CRIS points out, the unfair contract terms do not cover the application of fair terms in an unfair manner explicitly, they do provide that terms may be unfair in a range of specific circumstances set out at s 25(a)-(m) and allow for additional terms – including terms that *have an effect of a kind* (s 25(n)), to be prescribed as terms that may be unfair by the regulations. Importantly, the list in s25 is not exhaustive. Other terms that have been challenged as unfair include terms requiring a customer to submit to the jurisdiction of a foreign court in the event of a dispute, a non-disparagement clause, a class action waiver clause, exclusivity clause, short credit terms etc.

We therefore are not convinced that a broad unfair trading practices provision is required to deal with this scenario.

We note that recent changes introduced by the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) mean that these provisions now apply to a much broader range of contracts (due to the expansion of the definition of 'small business' and changes to how 'standard form contracts' are assessed), and attract much higher penalties – the greater of $50 million; three times the value of the benefit obtained that is reasonably attributable to the breach or 30% of adjusted turnover, as well as greater enforcement powers for courts.

3.5 Additional specific unfair trading practices

We note that in addition to the above provisions that apply to a broad range of unfair trading practices, the ACL also proscribes a number of specific unfair practices including in relation to unsolicited supplies,[32] pyramid schemes,[33] multiple pricing,[34] referral selling,[35] and harassment and coercion.[36]

[29] ACL, s 25 (n).
[30] ACL, s 25(d) and also (a) – (n).
[31] ACL, s 24(1)-(3).
[32] ACL, s 39.
[33] ACL, s 45.
[34] ACL, s 47.
[35] ACL, s 49.
[36] ACL, s 50.

In summary, while none of the above provisions individually is a 'catch-all' for all unfair conduct; when taken together, the ACL is comprehensive in addressing unfair trading practices, regardless of the technologies, practices or business models used.

4. Other laws that regulate trading practices identified in the CRIS

In addition to the ACL, there are a number of other laws that also regulate the conduct identified as problematic in the CRIS.

4.1 Privacy Act 1988

The issues of sharing of personal information and use of data for personalised advertising as potentially unfair trading practices are raised a number of times in the CRIS.

It is worth highlighting at the outset that these activities are on the whole beneficial to consumers. Targeted advertising is not harmful or unfair per se. To the contrary, it often leads to consumer benefits such as access to free information, content and services.

It is also worth highlighting that the OAIC's recently published '*Australian Community Attitudes to Privacy Survey*', found that, if they receive ads, over half (53%) of Australian adults would prefer those ads to be targeted and relevant to them. This increased from just under half (48%) in 2020.[37] In addition, a 2021 IPSOS Consumer Survey found that advertising – where access to online content and services remains free to consumers - is the most supported model for commercial activities.[38]

IAB agrees that these activities should be conducted consistently with consumers' expectations in relation to privacy. However, these issues are already under specific consideration as part of the whole-scale review of the Privacy Act that is currently underway. Amongst over 100 proposals that the Government has accepted at least in principle are: [39]

- that new definitions of targeting and trading of personal information should be introduced and that these activities should be subject to obligations under the Act.
- that a new requirement that all collections, uses and disclosures of personal information be 'fair and reasonable' be introduced.
- Increased transparency through improved notice and consent mechanisms.

These obligations would be in addition to the existing requirements of the Act which are extensive and include requirements for open and transparent management of PI (APP 1), collection of solicited PI (APP 3), dealing with unsolicited PI (APP 4), when and in what circumstances an entity can disclose PI that it holds (APP 6) and protection of PI from misuse, interference, loss, unauthorised access, modification and disclosure (APP 11).[40]

[37] See https://www.oaic.gov.au/engage-with-us/research-and-training-resources/research/australian-community-attitudes-to-privacy-survey
[38] IPSOS, *Digital Data Exchange: The Consumer View, Consumer perceptions of data privacy, data monitoring and value exchange*, October 2021.
[39] See https://www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF
[40] *Privacy Act 1988*, Schedule 1.

In instances where PI is collected, used or disclosed as a result of unfair pressure or tactics, manipulation or lack of transparency, whether that arose as a result of certain online designs or otherwise, this would risk falling foul of the 'fair and reasonable' requirement.

Given the Privacy Act review is currently considering these issues, the Department has put forward law reform proposals to deal with them, and the Government has accepted them in-principle, subject to undertaking a regulatory impact analysis to ensure the right balance is struck on issues of use of personal information, we do not think that this review should apply potentially overlapping or inconsistent regulations to the same activities. Any further regulation to the same activities is at least premature at this point in time.

4.2 Spam Act 2003

In addition to the Privacy Act, the Spam Act also regulates the relationship between businesses and consumers.

Specifically, the Spam Act regulates commercial electronic messages including emails and SMS. Businesses cannot send marketing messages without a consumer's permission. To send marketing messages, organisations are required to obtain either express or inferred consent. This is designed to protect individuals from unwanted commercial content, ensuring that their electronic space is not overrun by intrusive marketing tactics. ACMA has imposed significant penalties for breaches.[41]

The Spam Act also prohibits the supply, acquisition or use of address-harvesting software – that is, software that can be used to search the internet for electronic addresses to compile, as well as electronic address lists produced using address-harvesting software.[42]

As part of the Government's response to the Privacy Act Review Report, it has also agreed in-principle that individuals should have an unqualified right to opt-out of their personal information being used or disclosed for direct marketing purposes (proposal 20.2), subject to refining the definition of direct marketing. The Government has indicated it will give further consideration to how to best harmonise the requirements across the *Privacy Act 1988*, *Spam Act 2003* and *Do Not Call Register Act 2006*.

4.3 Consumer data right

It is also worth noting that the Consumer Data Right (CDR) has been introduced to give banking and energy consumers and small businesses greater choice and control over their data and how it is shared across the digital economy, in ways that benefit them. For example, it enables consumers to share their data with other service providers to compare products and services, or to find offers that better match their needs.

The CDR rules provide consumers the right to direct a data holder to provide their data to an accredited data recipient and sets out rules for how that must occur, including stringent obligations on 'designated data holders'. For example, there are strict consent requirements, and bundling of consents *'with other directions, permissions, consents or agreements'….*is prohibited.[43]

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[41] For example see: https://www.acma.gov.au/investigations-spam-and-telemarketing#:~:text=The%20law%20protects%20you%20from,the%20Do%20Not%20Call%20Register; Https://www.minterellison.com/articles/acma-further-raises-the-spam-act-stakes

[42] *Spam Act 2003*; Sections 20-22.

[43] *Competition and Consumer (Consumer Data Right) Rules 2020*, s 4.10(b)(ii); see: https://www.accc.gov.au/by-industry/banking-and-finance/the-consumer-data-right#toc-about-the-consumer-data-right

4.4 Other laws and industry codes that regulate unfair practices in relation to data

As noted in the CRIS, various laws and industry codes provide rules or minimum standards for handling data by businesses, both economy-wide and in specific sectors. These include for example:

- The *Telecommunications Act 1997* imposes restrictions on the use and disclosure of telecommunications and communications-related data.[44]
- The *Telecommunications (Interception and Access) Act* regulates the disclosure of telecommunications data including data collected and retained under the data retention scheme.[45]
- Data matching requirements under the *Privacy Act*, the *Data-matching Program (Assistance and Tax) Act 1990* and relevant guidelines regulate data-matching.[46]
- State and Territory privacy laws, which generally cover public sector agencies in those States or Territories.[47]
- The *Freedom of Information Act 1982* gives consumers the right to request access to government-held information about them or decisions that impact them.[48]
- Numerous federal and state laws regarding the use of tracking devices, listening devise and workplace surveillance and/or unauthorised optical surveillance.[49]
- Various industry codes of practice, applicable to sectors across the economy, have obligations in relation to privacy, treatment of data and/or fair consumer practices. [50]

In summary, while, as the CRIS points out, evolving market trends arising from the digital economy have altered the risks posed to consumers from unfair trading practices,[51] the legislative framework has also evolved to address these risks through a range of specific provisions in laws, regulations and codes.

5. International law comparisons

The ACL's substantive provisions set out above, combined with provisions in relation to significant penalties and enforcement, mean that the ACCC, consumers and small businesses can take effective action to ensure that Australian business practice is not oppressive, exploitative or unfair.

In comparing Australia's consumer protection regime, the Australian Consumer Law Review described it as having 'a high level of convergence' with comparable jurisdictions.[52] While the CRIS suggests that

[44] *Telecommunications Act 1997*, Part 13.
[45] *Telecommunications (Interception and Access) Act 1979*, Part 5-1A.
[46] *Privacy Act 1988,* s 13; *Data-matching Program (Assistance and Tax) Act 1990.*
[47] A comprehensive list is available on the OAIC website here.
[48] See: https://www.oaic.gov.au/freedom-of-information
[49] For example; *Surveillance devices Act 2004* (Cth); *Surveillance Devices Act 1999* (Vic); *Workplace Privacy Act 2011* (ACT); *Surveillance Devices Act 2007* (NSW); *Workplace Surveillance Act 2005* (NSW); *Surveillance Devices Act 1998* (WA); *Surveillance Devices Act 2016* (SA); *Surveillance Devices Act 2007* (NT); and others.
[50] For example, Internet industry Code of Practice; Australian Press Council Standards; Free TV Code of Practice; various sector specific codes, for example, the General Insurance Code of Practice.
[51] CRIS.
[52] See: ACL_Review_Final_Report.pdf (consumer.gov.au), 107.

overseas jurisdictions capture a broader range of unfair conduct than that captured under the ACL, we do not think that this is a fair assessment.

As the analysis of comparative jurisdictions on pages 19-20 of the CRIS suggests,[53] in a number of respects, the Australian regime protects a broader range of conduct than overseas equivalents. In others, the differences appear to be due to different legislative frameworks and drafting approaches.

For example, the jurisdictions identified in the CRIS all have substantial thresholds to be met under their equivalent unfair trading practices law:

- Under the EU Directive, the 'unfair commercial practices' provision captures conduct that is '*likely to* ***materially distort*** *the purchasing behaviour of the average consumer*'. However, the EU Directive does not have an 'unconscionable conduct' provision – the unfair commercial practices provision applies instead. As the CRIS points out, under the EU Directive, unfair commercial practices are grouped under four main categories including misleading actions, misleading omissions, aggressive commercial practices and harassment, coercion and undue influence. To determine whether a commercial practice is likely to meet the threshold of 'materially distorting the economic behaviour of the average consumer', the standard will be assessed from the perspective of the average member of that group. By contrast, unconscionable conduct can take into account the specific circumstances and context of the conduct concerned.[54]

- Similarly, under the *US Federal Trade Commission Act*, there is no 'unconscionable conduct' provision. Instead, there is a 'deceptive commercial practices' provision which defines an act or practice as unfair when it '*causes or is likely to cause* ***substantial injury*** *to consumers*, *cannot be reasonably avoided by consumers, and is not outweighed by countervailing benefits to consumers or to competition*'. This narrows down the conduct that is captured – and as the CRIS highlights, enables unfair conduct to be weighed against broader benefits to consumers and competition. The ACL does not require substantial injury to consumers and does not allow for a similar weighing exercise to occur.[55]

- In Singapore, under the *Consumer Protection from Unfair trading Regulations 2008*, the 'unfair practices' provision covers a range of conduct that is already captured by our law, as well as the following, which, as the CRIS notes, is not dissimilar to unconscionability under our law:[56]
    - Takes advantage of a consumer if the supplier ***knows or ought reasonably to know*** the consumer is not in a position to protect their own interests or reasonably able to understand the transaction or any related matter.
    - Engages in certain specific practices, including taking advantage of a consumer by including harsh, oppressive or excessively one-sided conditions ***so as to be unconscionable***, or exerting undue pressure/influence to enter the transaction.

In addition, it is worth noting that,

- when compared to the ACL, the EU Directive proscribes business to consumer conduct only, whereas Australian law proscribes both business to consumer as well as business to business

[53] CRIS, 19.
[54] CRIS, Appendix A.
[55] Ibid.
[56] CRIS, 20.

conduct – making our law broader in scope. Similarly, the US does not capture business to business conduct under all of the consumer protections provisions of the FTCA (for example, it does not appear to capture B2B conduct for misleading or unconscionable conduct).[57]

- Australia's regulatory model enables consumers to access a number of low cost and easy-to-access options for redress through avenues such as the ACCC, OAIC, Fair trading bodies, various ombudsmen etc; which provide a comprehensive enforcement framework. This approach also sends a clear message to business about the risk of non-compliance. By contrast, the US approach emphasises enabling consumers to protect their own self-interest, with law enforcement being overwhelmingly private party based.[58]
- The Australian regime is supported by strong law enforcement and very significant penalties, which exceed some equivalent overseas approaches. For example, the CMA in the UK does not currently have the power to impose penalties for breaches of consumer protection laws,[59] and in the US, at the federal level, unfair or deceptive act or practices are subject to a statutory penalty of US$50,120 per violation if the FTC can demonstrate (1) the perpetrator of the unfair or deceptive practices had actual knowledge that their conduct was in violation of the FTC ACT, and (2) the FTC had already issued a written decision that such conduct was unfair or deceptive.[60]

Therefore, IAB does not accept that the bar for unfair trading practices is lower than under equivalent overseas jurisdictions, based on the information provided in the CRIS.

6. Risk of legal uncertainty if additional unfair trading practices provision introduced

Regardless of the form it takes, our view is that, introducing an unfair trading practices prohibition into the ACL, in addition to the existing prohibitions, would create significant legal uncertainty.

As the CRIS points out, '*unfairness is an inherently subjective concept*', and '*a reform which is poorly framed or ill-defined could create uncertainty, stifle innovation and competition, and be difficult to enforce'*.[61] The existing AU case law will provide limited if any direction and there will be a significant period of time before jurisprudence is developed.

In our view, the approach taken in overseas jurisdictions will be highly unlikely to be of any assistance to resolving any uncertainty that arises from a new provision inserted into the ACL, for reasons including:

[57] For example see Australian Consumer Law summary.
[58] Ibid.
[59] Note: Breaches of the Consumer Protection from Unfair Trading Regulations 2008 may be enforced through criminal prosecution by local authority Trading Standards services, and "unlimited fines" may be imposed on summary conviction in the Magistrates Court (in England and Wales). However, the fines imposed to date have been modest. For example, in 2019, a second-hand car dealer based in Keighley was ordered to pay £53,567 for secondhand vehicle sales that misled consumers, including by withholding important information. See: https://www.nationaltradingstandards.uk/news/car-dealership-fined-50k-for-consumer-breaches/. In 2023, following a lengthy investigation by Bristol City Council, a rogue landlord who created false identities and fake letting agencies as part of an elaborate web of misinformation designed to exploit his tenants was fined £12,000 and ordered to pay the council's £25,000 of costs. See: https://news.bristol.gov.uk/press-releases/b167ce0b-64a1-4139-8bfa-b35d06cd2ab5/rogue-landlord-hit-with-37-000-of-fees-for-exploiting-tenants
[60] Proscribed under section 18(1)(B) of the *Federal Trade Commission Act of 1914*.
[61] CRIS, 19.

- Australian courts are required to consider Australian legal principles and supplementary material in their interpretation. Overseas case law would carry less weight.[62]
- Options 2-4 would apply significantly differently to the provisions in other jurisdictions. As outlined above, in the EU and Singapore:
    - 'unfair commercial practices' and 'unfair practices' are umbrella terms/provisions which encompass a broad range of unfair conduct including misleading and deceptive conduct, false claims, undue influence etc which are already covered separately under the ACL; and
    - there is no equivalent to 'unconscionable conduct'.

  By contrast, options 2-4 propose to include a separate provision proscribing unfair trading practices, over and above the existing provisions, including unconscionable conduct. This risks lowering the bar for unfair trading practices in Australia relative to the jurisdictions provided as comparisons in the CRIS.
- Under EU law, regulators are able to make binding decisions and issue prescriptive guidelines on the operation of EU law, which States agree to apply in a consistent way,[63] this is not the case in Australia where the ACCC's guidance cannot bind Australian courts. Therefore, while in the EU, clearer guidance on interpretation of their unfair practices regime may be able to be provided, that would not be the case here.

In summary, we are not convinced that any of options 2-4 would avoid unnecessary regulation and complexity, as the previous ACL review has indicated is required for effective consumer protection policy.[64] Duplication and complexity of laws can result in businesses and consumers not fully understanding their rights and obligations under the law, which can lead to compliance and opportunity costs, reduced investment incentive and reduced confidence in markets. This should also be considered in the context of any proposed reforms.

7. Conclusion

IAB Australia thanks the Treasury for the opportunity to make this submission.

Our members strongly support a comprehensive consumer protection regime that effectively balances consumer protection with market efficiency and productivity; that avoids duplication or unnecessary complexity; and that is generally consistent with international approaches.

However, we not convinced that the amendments proposed in options 2-4 are necessary to achieve this, based on the CRIS, without a more comprehensive analysis being undertaken in relation to any perceived gaps and whether the existing provisions of the ACL would apply to those gaps.

We look forward to working with the Government to ensure Australia's consumer protection regime remains fit for purpose.

[62] *Acts Interpretation Act 1901*, s 15AB.
[63] For example see https://edpb.europa.eu/role-edpb_en
[64] See: ACL_Review_Final_Report.pdf (consumer.gov.au), 10.