



interactive games & entertainment association

Submission to The Treasury

Response to Consultation Regulation Impact Statement: Protecting consumers from unfair trading practices

November 2023

IGEA acknowledges and pays respect to the past and present Traditional Custodians and Elders of this land and the continuation of cultural, spiritual and educational practices of Aboriginal and Torres Strait Islander peoples. We would like to extend our acknowledgments to the indigenous people from countries overseas and recognise their strength, wisdom and creativity.

1. Introduction & Overview

The Interactive Games & Entertainment Association (IGEA) welcomes the opportunity to provide a submission to the Australian Government's *Consultation Regulation Impact Statement (CRIS): Protecting consumers from unfair trading practices (UTP)*, led by The Treasury. The CRIS considers the introduction of a possible unfair trading prohibition under the Australian Consumer Law (ACL) on the premise that unfair trading practices are not covered by existing provisions of Australia's consumer law and can result in significant harm to consumers and small businesses.

1.1 About IGEA

IGEA is the industry association representing and advocating for the video games industry in Australia, including the developers, publishers and distributors of video games, as well as the makers of the most popular gaming platforms, consoles and devices. IGEA also organises the annual Games Connect Asia Pacific (GCAP) conference for Australian game developers and the Australian Game Developer Awards (AGDAs) that celebrate the best Australian-made games each year. IGEA has over a hundred members, from emerging independent studios to some of the largest technology companies in the world.

Video games are a beloved Australian activity and provide significant benefits for Australian game players, the wider community and the economy. Video game developers and publishers are the innovators, creators and business leaders reimagining entertainment and transforming how we learn and play. Two in three Australians play games, mainly for enjoyment and relaxation, and games are increasingly being used for serious and educational purposes, including by governments. Video games provide a digital outlet for Australian art, culture, stories and voices, and Australian-made video games are among Australia's most successful and valuable cultural exports. Our medium also brings kids into STEM and helps them build technology skills that will feed Australia's workforce needs.

The video game industry is a major contributor to the Australian digital economy. According to our data, video games are worth around \$4.21 billion annually in Australia,¹ while Australian-made games brought in \$284 million in largely export revenue last year.² Moreover, because the video game sector uniquely sits at the intersection of entertainment, the arts and technology, video game companies hire a wide range of artistic, technical and professional roles and are thus a wellspring of high-quality sustainable careers, and are an engine for growth in the Australian national economy. Indeed, Australian game developers are internationally renowned and ours has the potential to be one of Australia's most important future growth industries, as well as an integral component of the Government's vision for Australia to be a top 20 digital economy and society by 2030.

¹ [Australians subscribe to video game growth - IGEA](#)

² <https://igea.net/2022/12/australian-game-development-industry-records-job-boom>

1.2 Overview

Overall, we support the intention behind the proposed UTP reforms. The consultation is an opportunity to review whether the existing arrangements provide effective consumer protection to enable online trust. If well-designed, our regulatory framework should be fit for purpose, proportionate and flexible to respond to a continually evolving digital environment.

In this regard, the video game industry takes consumer protection extremely seriously, offering high levels of safeguards so players and parents can enjoy video games in a fun and responsible way. The industry adheres to strict domestic and international data and consumer protection laws, supplemented with an age-appropriate video game content labelling scheme, along with other measures. The industry also leads in empowering players and parents with easy-to-use tools, including for managing playtime, spending, online privacy, and access to age-appropriate games. The industry's serious commitment and responsibility to these protections are built around global industry best practices.

However, we would caution against introducing reforms that overreach and create regulatory uncertainty and complexity to the current Australian consumer protection landscape, without a proper assessment of the problems and potential solutions, based on firm policy evidence.

We note that several areas require further clarification regarding UTP (e.g. regarding the scope of "dark patterns" and "unfairness") before further consideration is given to assessing the options. It is also unclear whether there is firm policy evidence that demonstrates UTP is a systemic issue and that current consumer protections are inadequate in Australia. Therefore, our strong preference would be to maintain the status quo.

As a matter of good regulatory practice and policy design, any regulatory measure should be well-defined, reasonable and clearly scoped, provide sufficient flexibility that is future-proofed for evolving technologies, and be supplemented by relevant industry guidance to enable sufficient regulatory clarity and certainty.

Should the Government be determined to proceed with its proposed reforms, we would welcome further government consultation and engagement with industry. If there is an opportunity, IGEA would be especially happy to facilitate a meeting with our industry members on specific aspects of these proposed reforms.

For the remainder of this submission, we discuss the existing legislative and regulatory arrangements, the need for further clarity regarding the proposed reforms, our preferred option and alternative solutions.

Below is a summary of our recommendations to this consultation.

Topic	Recommendations
Existing legislative and regulatory arrangements	A more comprehensive assessment be undertaken to whether the range of consumer protections (not limited to ACL) are sufficient, and whether the proposed introduction of UTP reforms overlap with existing legislative and regulatory arrangements.
Need for further clarity in the proposed UTP reforms	<p>Robust policy evidence gathering should extend beyond stakeholder opinion. Behavioural studies would be useful for informing proposed consumer related regulatory reforms.</p> <p>Before proceeding further with any proposed UTP reforms, further clarity is required on the scope, including in relation to "unfairness" and "dark patterns".</p> <p>In the absence of clarity regarding the scope of "dark patterns", the existing consumer protection regime should be considered adequate. Further consideration could be given to developing regulatory guidance regarding lawful and unlawful advertising, online disclosure, and privacy practices in user design interfaces.</p>
Preferred option	<p>We strongly prefer Option 1 in the CRIS to maintain the status quo.</p> <p>Should the Government be determined to introduce UTP provisions, we strongly recommend that further industry consultation be undertaken around the design, including specific details, to enable a fuller understanding and proper cost-benefit assessment of any proposed approach.</p>
Alternative solutions	Beyond Option 1, alternative solutions should be considered, especially non-regulatory measures in the first instance before contemplating regulatory options. For example, this could include consumer behavioural studies in UTP in the digital environment to properly understand the issues, and specific guidance on best practices relating to UTP.

2. Existing legislative and regulatory arrangements

Australia has a range of robust safeguards in place that ensure consumers are properly protected against unfair practices. In consideration of the CRIS, it is not clear that a case has been made to support further amendments to the current consumer protections framework.

The CRIS acknowledges that ACL protections exist that cover misleading or deceptive conduct, unconscionable conduct, unfair contract terms, and specific trading practices. Despite this, the CRIS provides examples; in some instances, court cases entailed the

consumer affairs regulator seeking legal action on consumer related issues that the court dismissed for various reasons.

The CRIS explains that these examples relate to conduct that caused significant consumer harm, but:

- *is not misleading or deceptive or likely to mislead or deceive, but which nevertheless distorts consumer choice (for example, because businesses obscure or omit pertinent information)*
- *does not reach the threshold of unconscionable conduct*
- *may result in financial or other detriment but relates to:*
 - *matters that do not form part of a standard form contract, or*
 - *actions relating to entering into terms and conditions, rather than their content*
- *exists alongside a contractual relationship but is not referable to contractual rights and therefore not captured by the unfair contract terms provisions, and/or*
- *is not a specific practice currently prohibited by the ACL.*

The above list suggests a proposed UTP provision aims to address a lower threshold of consumer harm and a wider range of issues. However, it can be argued that given it is the jurisdiction and matter for the courts to interpret legislation and decide on the final judgment (rather than the regulator), there is no guarantee that introducing a new UTP provision will change the direction of future court cases.

In addition to the current ACL protections, it should be recognised that various consumer protections are available, including under privacy, data stewardship and online safety legislations and regulations. It is important to determine whether these current protections collectively provide sufficient consumer protections, and whether the proposed UTP reforms would create regulatory overlap with existing arrangements. We also note that the Government is currently reviewing some of these areas.

On this point, many examples of conduct raised in the CRIS relate to data collection and use will be addressed under the Privacy Act Review. Further, misleading omissions are arguably already covered under the ACL's prohibition against misleading and deceptive conduct.

Recommendation:

- **A more comprehensive assessment be undertaken to whether the range of consumer protections (not limited to ACL) are sufficient, and whether the proposed introduction of UTP reforms overlap with existing legislative and regulatory arrangements.**

3. Need for further clarity on the proposed UTP reforms

3.1 Policy evidence gathering

Notwithstanding the current protections available to consumers in Australia, the proposed UTP reforms are based on the premise that regulators, consumer groups, small business representatives and others have identified a range of UTP causing significant and growing consumer harm through various inquiries. It also suggests that the ACL does not currently prohibit many UTP.

Any business should highly value customer opinions based on experience, feelings, preferences and views – it is a domain for businesses to address as part of their standard customer experience and engagement to improve their goods and services. However, to determine whether UTP reforms are warranted to protect consumers, it is unclear whether there is firm policy evidence (beyond opinions) to determine UTP is a systemic issue (both in terms of materiality and depth) that is occurring in practice in Australia.

Therefore, we strongly urge the Government to exercise caution in assessing the responses to the consultation that support reforms without firm policy evidence. Otherwise, there would be a missed opportunity for a genuine assessment of potential regulatory gaps in the existing consumer protection arrangements.

3.2 Scope of unfairness and harm

On defining “unfairness” (and associated “harm”), public expectations of unfairness may vary, and how that may be interpreted in the law may differ. Indeed, the consultation acknowledges that the definition of unfairness is inherently subjective. We understand that similar stakeholder concerns around the definition of unfairness have arisen in previous consultations, including the more recent Unfair Contract Terms (UCT) reforms. The interpretation of “unfairness” in the UCT context could be pertinent to this consultation.

For consistency, there should be alignment in the interpretation of unfairness in other legislations and regulations. As the UCT reforms have only recently commenced operation, the approach to unfairness under the UCT provisions is still open to interpretation in Australia and remains untested.

In the absence of a proper definition or guidance for “unfairness”, there is a risk of introducing more significant regulatory uncertainty and a potentially wider scope of application for an undefined term through the proposed UTP reforms.

3.3 Dark patterns and digital engagement practices

The CRIS raises the issue of “dark patterns”, noting the Australian Competition and Consumer Commission (ACCC) defines “dark patterns” as “elements of user interfaces which have been designed to make it difficult for users to express their actual preferences, or which nudge users to take certain action that may not be in their best interests”.

The CRIS also refers to a consumer survey about consumer opinions, and other expressed stakeholder concerns regarding dark patterns. The ACCC also raised concerns about dark patterns during its series of Digital Platform Inquiry consultations.

With respect to the video games industry, the CRIS provides an example from the US regarding an enforcement action order against a video game distributor and publisher for breaching section 5 of the US Federal Trade Commission (FTC) Act, which prohibits unfair or deceptive acts or practices in or affecting commerce. The company, in this case, received a significantly large penalty.

While we cannot comment on individual cases, the video game industry (as a whole and globally) takes consumer protection extremely seriously, offering high levels of safeguards, while players and parents can enjoy video games in a fun and responsible way. The industry adheres to strict domestic and international data and consumer protection laws, supplemented with age-appropriate video game content labelling scheme, along with other measures. The industry also leads in empowering players and parents with easy-to-use tools, including for managing playtime, spending, online privacy, and access to age-appropriate games. The industry's serious commitment and responsibility to these protections are built around global industry best practices, according to the following pillars: age-appropriate pre-contractual information; safety by design in online environments; tools to enable players, parents, and caregivers to set the permissions that are appropriate for them or their children; and enabling consumer redress and efficient and proportionate enforcement.

While the ACCC offers a proposed definition for "dark patterns", there is no clear or agreed definition for what a "dark pattern" is and when it would be considered "unfair". As with the term "unfairness", these are subjective and open to interpretation.

This issue is not limited to Australia. Overseas, the concept of a "dark pattern" is vague, overly broad, and inconsistently defined or applied. This presents a significant challenge to meaningfully distinguish between practices that can be highly beneficial to consumers and the market (e.g. accessible free games with ads), and unlawful practices such as misleading or deceptive conduct. Therefore, the Government should be extremely cautious in attempting to define dark patterns, as it would unlikely produce meaningful value and outcomes.

In the absence of clarity regarding the scope of dark patterns, we believe the existing consumer protections should adequately address consumer concerns associated with dark patterns, such as misleading or deceptive conduct.

Additionally, further regulatory guidance could be produced based on existing material regarding lawful and unlawful advertising, online disclosure, and privacy practices, for example. These could be applied in the context of user design interfaces.

Recommendations:

- **Robust policy evidence gathering should extend beyond stakeholder opinion. Behavioural studies would be useful for informing proposed consumer related regulatory reforms.**

- **Before proceeding further with any proposed UTP reforms, further clarity is required on the scope, including in relation to “unfairness” and “dark patterns”.**
- **In the absence of clarity regarding the scope of “dark patterns”, the existing consumer protection regime should be considered adequate. Further consideration could be given to developing regulatory guidance regarding lawful and unlawful advertising, online disclosure, and privacy practices in user design interfaces.**

4. Preferred option

For the above reasons, we strongly prefer Option 1 in the CRIS to maintain the status quo. Beyond Option 1, we suggest further consideration be given to non-regulatory options (see Section 5 below).

However, if the Government is determined to introduce reforms, we strongly recommend that further industry consultation be undertaken around the design, including specific details, of any given approach. This will enable a fuller understanding and proper cost-benefit assessment.

For instance, Option 3 to introduce a general prohibition could be preferable to Option 4 (a combination of general and specific prohibitions), subject to certain caveats. We understand that Option 3 would ensure that “unfairness” is defined more clearly and narrowly in a comparable way to the US FTC Act’s definition. On the other hand, the CRIS suggests that Option 4 is comparable to the approach taken to unfair trading in the EU, the UK and Singapore. As Australia’s international trade is closely tied to many overseas markets, it is essential that any proposed regulatory reforms in Australia are coherent with its global trading partners.

Should Option 3, for example, be considered further:

- **Any general prohibition must be well-defined, reasonable, and scoped** such that organisations can easily understand the behaviours that they are expected to avoid, to avoid both uncertainty and excessive litigation over its meaning. It is also important for the general prohibition to be targeted at preventing specific and identified harms to consumers rather than arising out of a general mistrust of the conduct of large businesses.
- **Option 3 provides a general prohibition that could maintain more flexibility** for companies to conduct business across the range of channels and media now known and developed in the future (e.g. bricks & mortar, online, mobile, metaverse). Leaving the law more general is also more future proof, particularly when technology is moving faster than ever and it is impossible to anticipate what is coming next, legislation inevitably falls behind. Flexibility allows businesses to take a commonsense approach in Australia, in contrast to the greater regulatory challenge of shoehorning innovative new products into existing laws written when they were not contemplated.
- **Corresponding guidance should be published to provide clarity and certainty in lieu of a list of specific prohibitions.** This guidance can be updated readily as markets and technologies evolve. In contrast, specific prohibitions require companies to tailor experiences to specific markets, which is time-consuming, expensive, and introduces compliance risk.

Recommendations:

- **We strongly prefer Option 1 in the CRIS to maintain the status quo.**
- **Should the Government be determined to introduce UTP provisions, we strongly recommend that further industry consultation be undertaken around the design, including specific details, to enable a fuller understanding and proper cost-benefit assessment of any proposed approach.**

5. Alternative solutions

While the options presented in the CRIS have been reduced to either amend regulation or not amend regulation, other non-regulatory measures have yet to be put forward. As a matter of best practice, any proposed regulatory measures should be grounded through a rigorous problem identification stage, supported by firm policy evidence, followed by consultation on a range of options targeted at the identified problem(s).

For example, while it is not unusual to undertake stakeholder surveys, it is unclear whether rigorous policy analysis included behavioural studies in UTP in the digital environment. These would help inform whether current regulatory measures are effective in practice, especially concerning consumer behaviour.

For instance, a behavioural assessment could determine that regulatory and enforcement authorities must be sufficiently resourced to protect consumers and ensure that businesses are provided proper guidance to swiftly implement their legislative and regulatory obligations.

Should it be determined that there is systemic non-compliance with existing law, we strongly support further guidance as a first step, before considering amendments to the current consumer protection framework. This should encourage proactive business conduct to address potential unfair practices and facilitate effective implementation of the consumer protection laws, as opposed to relying on later stages where infringements of the law may arise.

Recommendation:

- **Beyond Option 1, alternative solutions should be considered, especially non-regulatory measures in the first instance before contemplating regulatory options. For example, this could include consumer behavioural studies in UTP in the digital environment to properly understand the issues, and specific guidance on best practices relating to UTP.**