SHOPPING CENTRE COUNCIL OF AUSTRALIA

Protecting Consumers From Unfair Trading Practices – Consultation Regulatory Impact Statement

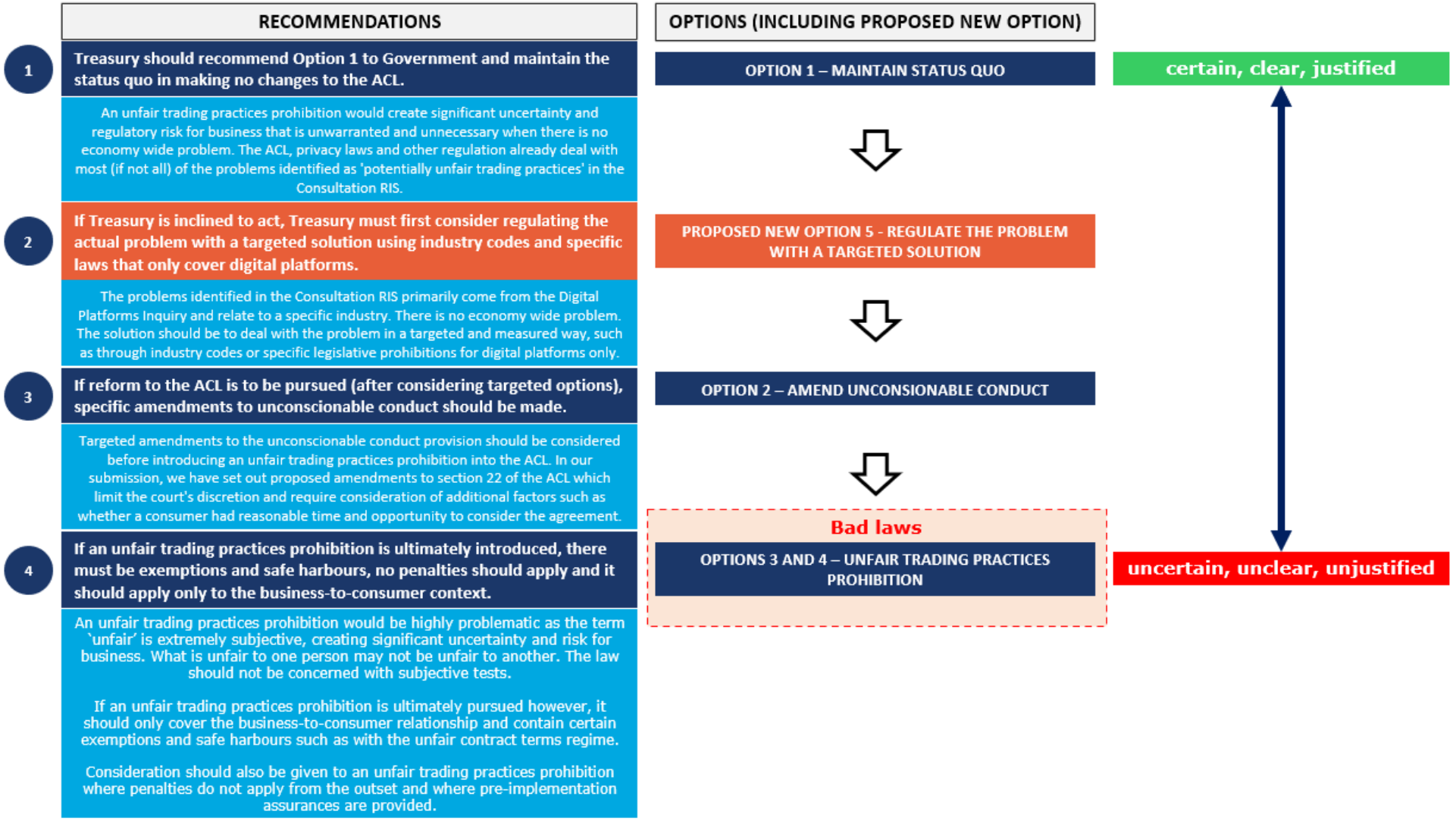
Submission by the Shopping Centre Council of Australia

29 November 2023

Contents

Recommendations

In order of preference, and on the basis of the reasoning and evidence presented in this submission, Treasury should recommend the following:



Executive summary

The Shopping Centre Council of Australia (SCCA) welcomes the opportunity to make a submission in response to the *Protecting Consumers From Unfair Trading Practices – Consultation Regulatory Impact Statement* (Consultation RIS).

As set out in our recommendations, the core points of our submission are:

1. we are concerned that any adoption of an unfair trading practices prohibition would head in the direction of being a 'bad law'. As such, the status quo should be maintained.

2. the problems identified in the Consultation RIS primarily arise from the *Digital Platforms Inquiry* and relate to one specific sector. There is no economy wide problem that requires an economy wide solution. Instead, a more targeted and focused response is warranted if any action is to be taken.

3. If reform of the Australian Consumer Law (ACL) is to be pursued despite the fact that the status quo is our preferred option and there are more targeted solutions, the existing unconscionable conduct provisions (sections 20 – 22A of the ACL) are the appropriate place in which amendments to better regulate conduct can be made without the need for a new prohibition.

4. If Treasury does ultimately pursue an unfair trading practices prohibition (as set out in options 3 and 4 of the Consultation RIS), there are a number of unintended consequences that must be accounted for and a number of adjustments to be considered before an unfair trading practices prohibition with significant penalties is inserted into the ACL.

The above four (4) points are made and explained in more detail throughout our submission, however, we summarise and highlight the key arguments that relate to each point below.

1. Maintain the status quo – an unfair trading practices prohibition would be 'bad law'

The subjectivity of 'unfairness'

One of the SCCA's biggest concerns with the introduction of an unfair trading practices prohibition is the highly subjective nature of the term 'unfair' and the significant uncertainty and risk that the subjective nature of the term 'unfair' creates for businesses, consumers and the economy more broadly.

> *"Unfairness is an inherently subjective concept…"*
>
> *- Consultation RIS – page 19*

To Treasury's credit, this is acknowledged in the Consultation RIS as one of the risks of introducing an unfair trading practices prohibition into Australian law.

Our submission highlights a history of evidence where government has (wisely) resisted calls to introduce notions of fairness in order to regulate business conduct on the basis that the term 'unfair' is highly subjective, lacks a concrete definition, is open to attacks that it is opaque and would create significant uncertainty. Respectfully, these calls should continue to be resisted today.

Something regarded as unfair by one business or person may be regarded simply as robust commercial negotiation by another. What is unfair to you may not be unfair to me. This is the inherently subjective nature of the term 'unfair' and why such a term should not be the legal standard used to regulate conduct.

Commercial parties require laws that, in any given situation, ensure both parties seeking legal advice as to their rights and obligations can expect clear, confident and consistent answers from their advisers. Those laws should ensure neither party is tempted to embark on lengthy and expensive litigation in the belief that victory depends on winning the sympathy of the court or winning the lottery of which judge may be sitting on the bench.

For commercial parties to be able make decisions to invest and to conduct themselves generally, they want and need laws that provide certainty.

For businesses generally throughout Australia, the heightened uncertainty and risk that is associated with an unfair trading practices prohibition would make forward planning increasingly difficulty.

As such, we are deeply concerned that an unfair trading practices prohibition would simply become 'bad law'.

Bad laws create unnecessary complexity and uncertainty.

This is particularly the case for parties that have the burden of understanding and complying with such laws.

Proponents of such laws often have little experience in either applying or abiding by such laws, or the markets and associated regulatory regimes they apply to.

Little comfort can be drawn by Australian businesses from the proposition that over time the courts will develop a body of case law which will provide greater certainty as to the operation of the new law. By its very nature, the new law will result in court decisions that will necessarily be confined to the individual circumstances of each case.

In practice, this creates business and compliance risk, impacts investment certainty and leads to businesses not taking opportunities to grow or innovate. Uncertainty cannot and must not be dismissed as merely an inconvenience – it has significant flow on effects.

The ACL and other laws already cover the problem

Bad laws are created when legislation or regulation is made even though what is being regulated is already covered by existing law. This would be the case with an unfair trading practices prohibition.

We respectfully submit that most (if not all) of the conduct set out as examples of 'potentially unfair trading practices' in the Consultation RIS (which we expand on further in our submission) are indeed covered by other existing provisions of the ACL, privacy legislation and other laws. This includes the misleading and deceptive conduct provisions, the unconscionable conduct provisions, and the unfair contract terms regime in the ACL.

> *"…our existing competition law can embrace much of the community concerns, without needing an unfair practices prohibition to do all the work."*
>
> *- ACCC Chair, Ms Cass-Gottlieb, 2023*

In fact, the Australian Competition and Consumer Commission (ACCC) is already having success prosecuting such conduct under existing legislation.

Take for example, the way personal data is used, collected, and disclosed to consumers and the use of clickwrap agreements that may make it difficult for consumers to fully appreciate what they are agreeing to. Much of this behaviour is already captured by the ACL.

This conduct could amount to misleading or deceptive conduct (section 18 of the ACL), or false or misleading representations (section 29 of the ACL) depending on the circumstances.

In October 2019, the ACCC began proceedings against Google for making misleading representations to consumers by representing to some Android users that the setting titled "Location History" was the only Google account setting that affected whether Google collected, kept and used personally identifiable data about their location.

However, another Google account setting titled "Web & App Activity" also enabled Google to collect, store and use personally identifiable location data when it was turned on, and that setting was turned on by default.

The Federal Court found that Google had breached the ACL when it made misleading representations about the collection and use of location data in the manner outlined above, and recently ordered Google to pay $60 million in penalties for making the misleading representations to consumers.

By way of another example, the ACCC successfully pursued action against Meta subsidiaries for engaging in conduct liable to mislead in breach of the ACL. The two subsidiaries were each ordered to pay $10 million by the Federal Court.

The Court found that the two entities had engaged in conduct liable to mislead the public in promotions for the Onavo Protect app (a free app providing a virtual private network (VPN), as they failed to adequately disclose that users' data would be used for purposes other than providing Onavo Protect.

Furthermore, the terms regarding the use, collection and disclosure of personal data or any term in a clickwrap agreement could be challenged as an unfair contract term (section 23 of the ACL) if the relevant test is met and a standard form contract is in place.

We provide further examples throughout our submission, but what the above highlights is that an unfair trading practices prohibition is unwarranted and unnecessary when there are existing laws that are working to regulate the conduct.

In addition to there being existing laws, there have been and continue to be countless reviews into all areas of law. This includes the *Competition Review*, the *Privacy Act Review,* the *Franchising Review* and many others. As a sector, we have been involved in and contributed to many of these reviews.

With such a significant number of reviews and consultations occurring, it is often the case that these reviews and consultations do not "speak to each other," which further facilitates the creation of unnecessary 'bad laws.' Much of what is being discussed in the Consultation RIS, could be picked up in the review and update of privacy legislation.

Overseas examples cannot just be transferred into Australian law

One of the primary justifications set out in the Consultation RIS for why an unfair trading practices prohibition should be introduced in Australia is the fact that other jurisdictions such as the United Kingdom, European Union, United States of America and Singapore have such a prohibition.

The SCCA also does not accept the suggestions made in the Consultation RIS that Australia's existing laws may be deficient when compared to the consumer protection laws of other countries.

In highlighting that these jurisdictions have an unfair trading practices prohibition, the Consultation RIS fails to outline the political and/or historical context for why such a prohibition may exist or analyse whether these jurisdictions have other prohibitions that Australia may have which cover the conduct and behaviour that could be perceived as an unfair trading practice.

Overseas examples are neither relevant nor instructive to the Australian context. We have provided more detailed analysis in our submission.

As the interim report of Consumer Affairs Australia and New Zealand (CAANZ) in 2016 on the *Australian Consumer Law Review* concluded:

> *"On balance, CAANZ notes that there is likely to be a substantial degree of overlap between these international models and Australia's existing protections. Any new general prohibition within the ACL needs to be carefully considered and supported by evidence that there is a gap in the current law that needs to be addressed, and that an economy-wide approach would be the appropriate response."*

Therefore, we respectfully suggest that Treasury is cautious in relying on overseas examples as a justification for introducing an unfair trading practices prohibition into Australia, especially given our existing legal framework and the specific nature of the problem.

2. Regulate the problem. There is no economy wide problem that requires an economy wide solution.

A detailed review of the 'potentially unfair trading practices' identified in the Consultation RIS reveals that the vast majority of these concern digital transactions.

They often involve transactions where the actual transparent costs involved are slight but the real cost paid by the consumer (in terms of data sharing and thereafter being subject to dark patterns and nudge practices) is much greater and is not transparent.

Key indicia and features of these 'potentially unfair trading practices' include:

- Information asymmetry in favour of the supplier and to the detriment of the consumer;
- Power imbalances caused by the supplier controlling the interaction and the user interface; and
- The supplier taking advantage of the above in circumstances where, due to the sums involved and the nature of the transaction, consumers are most unlikely to spend the time required or have the capacity to protect their own interests.

The examples of 'potential unfair trading practices' set out in the Consultation RIS primarily arise from the *Digital Platforms Inquiry* and relate to the alleged conduct and practices of digital platforms.

The businesses and entities that were the subject of the *Digital Platforms Inquiry* and heavily referenced in the inquiry's Final Report include the likes of Google, Facebook, Amazon and Apple. The business models, practices and operations of these companies are very distinct from those in other sectors, including the retail leasing sector.

As such, it makes sense for implementation of any recommendation that arises from the *Digital Platforms Inquiry* to be targeted to digital platforms and those business that operate in the market for the supply of digital platform services. This would represent a measured and tailored response that could address the issues identified, as opposed to an economy wide unfair trading practices prohibition that captures all businesses, sectors and industries, including those where there is no problem.

As a highly regulated sector, it is our experience that a common theme of bad laws is that they are developed when the so-called policy problem is unclear or ill-defined, and/or when a law is extrapolated or applied beyond the actual problem on an economy wide basis. This results in vague, unclear, and ill-defined laws.

Also speaking from experience as a highly regulated sector, there are appropriate, measured and targeted ways in which a specific sector can be regulated to address certain concerns.

In the retail leasing industry for instance, each state or territory has a specific piece of legislation that governs and regulates retail leasing. While there are commonalities across each legislation, these state-based laws are tailored to their specific markets. This is an example of focused and tailored regulation that covers a specific industry.

By way of further example, there is now a *National Code of Practice for the Health and Fitness Industry* which consolidates and streamlines the state and territory codes and provides one point of reference for compliance, including by providing for full and proper disclosure, cooling off periods and refunds or deferment where sickness or disability arises.

The ACCC has itself acknowledged and recognised the utility of using codes to regulate specific industries. In the Final Report of the *Digital Platforms Inquiry*, the ACCC recommended that a code of conduct with the Australian Communications and Media Authority (ACMA) be developed to govern the commercial relationships between digital platforms and Australian news media businesses. Following this recommendation, the *Australian Code of Practice on Disinformation and Misinformation* was developed and launched in February 2021.

As such, industry specific codes of conduct could be developed for digital platforms (either voluntary or under the auspices of the ACCC) to regulate the collection, use and disclosure of user data and other conduct undertaken by digital platforms that concerns the ACCC and consumer advocates. This would be a significant step in helping to regulate this conduct without imposing an economy wide unfair trading practices prohibition.

Consideration could also be given to introducing specific legislative prohibitions that cover digital platforms only, which is where the problems arise.

In this regard we note that in the *Digital Platforms Inquiry Final Report,* the ACCC recommended that several specific legislative changes be introduced to address many of the unfair trading practices identified in that report. These recommendations involved a raft of amendments to the *Privacy Act 1988* (Cth). Specific legislation might also be introduced applying specifically and only to the range of digital transactions identified in the Consultation RIS as problematic.

That is why recommendation 2 of our submission is our proposed new Option 5, which is that a targeted and more focused solution be pursued that deals with the problems that have been identified. This process should not be used as a vehicle to pursue an economy wide unfair trading practices prohibition when no economy wide problem exists.

3. Amending unconscionable conduct

If Treasury decides that wider, more generic reform is required, then Treasury should consider option 2 of the Consultation RIS, being possible reforms to the exiting unconscionable conduct prohibitions before any consideration is given to an unfair trading practices prohibition being introduced into the ACL.

This again would be a far more reasonable and proportional approach to any perceived problems than the introduction of an unfair trading practices prohibition.

The basis for establishing unconscionable conduct lies in the ability to demonstrate to the court that one party has taken advantage of another party's disadvantage.

This concept fits neatly with the problems identified in the Consultation RIS and the *Digital Platforms Inquiry* which typically involve digital platform operators taking advantage of information asymmetries, controlling the interaction by way of controlling the user interface of the digital platform, and the fact that it would be unreasonable for the consumer in the circumstances of the deal being entered into or considered to take the time to either read or seek to understand the terms and conditions the supplier wishes to impose.

As such, amendments could be made to the unconscionable conduct provisions of the ACL to better catch the 'potentially unfair trading practices'. This includes amending section 22 of the ACL so that these are factors that the court must consider (as opposed to may) and including explicit reference to unfair trading practices in that section. We have set in our submission our proposed amendments to section 22 of the ACL and would be happy to work further with Treasury if this is ultimately the approach that is pursued.

Our amendments would empower the courts to explicitly consider whether in determining if the conduct was unconscionable, one party had more control over the commercial transaction by way of controlling the user interface than the other party and makes the lack of reasonable time and opportunity to review the agreement/contract a factor that the court must consider. This will have the effect of broadening the circumstances under which a court could find that a person was under a "special disadvantage."

In making the factors set out in section 22 factors that the court must consider, the courts discretion would be limited, and judges would be forced to consider all of these matters.

The SCCA opposes any proposal to amend the unconscionable conduct provisions of the ACL so as to in effect essentially replace the word 'unconscionable' with 'unfair.'

In 2008, a Senate Committee Report recommended against replacing the word 'unconscionable' with 'unfair' acknowledging that, whilst this may lower the threshold for courts, the Committee cautioned that such amendments:

> *"are sweeping in their application, affecting all commercial and consumer activity and would create obligations and uncertainties for legislatures, regulatory bodies and the courts."*[1]

Lawyer Kate French suggested in an article she wrote that we have referenced throughout our submission that:

> *"while unconscionable conduct is a high threshold to meet, lowering the standard to unfair may lower the bar too far, and may place too onerous a burden on business to comply."*[2]

4. Unintended consequences and alternative models

The SCCA opposes the introduction of a general prohibition on unfair trading practices or a combination of general and specific prohibitions against unfair trading practices into the ACL.

It is the reform that carries with it the largest costs and largest risks to Australia's market economy and should thus be treated as the reform of last resort.

No case has been established here for a reform of last resort particularly given that a number of the less invasive options are available.

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[1] Commonwealth of Australia, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974*, December 2008, page 43.

[2] Kate French, *Unconscionable conduct: An unconscionably high standard? An assessment of whether an unfair trading practices prohibition should be introduced to capture conduct engaged in by digital platforms,* Australian Journal of Competition and Consumer Law, 29(4), 241–257, November 2021, page 256.

If an unfair trading practices prohibition is ultimately pursued, there are number of factors that need to be considered.

Unintended consequences

Throughout the submission, we outline many significant unintended consequences that could result from the introduction of an unfair trading practices prohibition.

Respectfully, these consequences need to be carefully considered and assessed by Treasury before any option other than Option 1 (the status quo) or a targeted response (proposed new option 5) is recommended to and pursued by Government.

The increased uncertainty and regulatory risk that would result from the introduction of an unfair trading practices prohibition is very concerning and must be taken into account.

We accept that law reform and regular review of legislation is an important part of the legislative process, however, before pursuing legislative change, Government needs to ask whether there is a legitimate and overwhelming reason for change and whether that change will provide significant benefits that outweigh the risks.

There must be clear evidence of a significant problem before any changes are enacted, and if a significant problem is identified, any change that is pursed to address the problem must be approached in a systemic and proportionate manner. Any moves towards widespread government-led regulatory measures must start from the position of minimising distortion and any unintended consequences the intervention could produce.

Careful consideration must be given to what is genuinely unfair conduct and what is part and parcel of general business practice. There are nuances associated with much of the conduct undertaken by businesses.

The use of 'unfair' as the standard to be applied in assessing conduct is extremely problematic given the inherently subjective nature of the term. This will generate a significant number of unintended consequences for business, and the uncertainty that follows will be detrimental to business investment, innovation, productivity and job creation.

As an example, while our sector is primarily involved with retail leasing, there are many other aspects that form part of our sector. This includes construction and development, supply agreements, cleaning and security service arrangements, IT systems and energy and electricity networks, amongst other things. As such, we are extremely important to a thriving, growing economy that creates jobs and opportunities for small business. An unfair trading practices prohibition could have significant negative impacts on all aspects of our sector.

Businesses will be forced to focus on minimising risk and trying to deal with another avenue of potential litigation, much of which could be vexatious and disingenuous.

Any discussions on the potential introduction of an unfair trading practices prohibition should include consideration of how existing laws and regulations can be better enforced, rather than automatically be focused on the need to introduce new legislation and regulation.

It would be extremely unwise to pursue legislative change that would impose more costs on already compliant and upstanding businesses. This would be a fundamental policy failure. The pursuit of unnecessary regulatory change in one area could also produce a different problem elsewhere.

This is acknowledged in the Consultation RIS with reference to the fact that the introduction of an unfair trading practices prohibition would increase costs for business and, if the new prohibition were poorly framed, it would create uncertainty for both business and consumers and have an adverse effect on innovation, competition and efficiency. Ultimately, consumers will be the party that is negatively impacted the most if unnecessary regulatory change is pursued without proper accounting for and mitigation against the unintended consequences.

Industry specific exclusions and safe harbours

If an unfair trading practices prohibition is inserted into the ACL, specific exclusions or safe harbours should be included to account for the fact that some conduct that could be considered unfair may be permissible under other commonwealth or state or territory legislation.

The SCCA has a successful history of working with Treasury and the ACCC. This included working on the inclusion of a new exemption into the ACL, namely subsection 26(1)(c)-(e) of the ACL. This subsection was recently introduced so that under the Unfair Contract Terms regime (UCT regime), section 23 of the ACL

would not apply to a term of a contract to the extent that the term is required, or expressly permitted by a law of the Commonwealth or of a State or Territory.

In effect, this means that if a term is included in a contract that is allowed by law, that term will not be able to be challenged as an unfair contract term under the UCT regime. Subsection 26 expressly includes an example from our sector.

The ACL also contains other examples of exemptions or carveouts for particular industries and contracts. Section 28 of the ACL operates to exclude the UCT regime from applying to certain contracts (e.g. a contract of marine salvage or towage) and section 28A has recently been introduced into the ACL which excludes the UCT regime from applying to certain contracts connected with financial markets.

If an unfair trading practices prohibition is ultimately pursued, Treasury should give due consideration to exemptions and carveouts in a similar manner to the existing exemptions set out above.

Capture business-to-consumer interactions only

If Treasury does ultimately recommend that an unfair trading practices prohibition is inserted into the ACL, we respectfully implore Treasury to recommend that such a prohibition **only captures the business-to-consumer relationship** and does not extend to the business-to-business relationship.

Having an unfair trading practices prohibition that extends to business-to-business relationships and arrangements would be extremely problematic and create an even more significant amount of uncertainty and burden for businesses than if a prohibition was introduced that only covered business-to-consumer arrangements.

The SCCA strongly opposes the introduction of an unfair trading practices prohibition that captures business-to-business relationships.

Businesses, small and large, are in a position to make well-informed decisions about what arrangements and agreements they should enter into. Business entities, unlike consumers, already have sufficient knowledge, have access to specialist and legal advice, and have sufficient bargaining power to resolve matters and deal with their counterparts without intervention by government. In the case of small businesses, which on some occasions might not have equal bargaining power, they are usually already protected by extensive government regulation.

Extending protections to small businesses is contrary to the rationale that underpins the differential treatment of consumers and businesses. Businesses are in a much stronger position to identify and protect their own interests compared to consumers, and businesses have far more bargaining power when it comes to capability, advice and knowledge in comparison to consumers.

The particular issues faced by consumers in engaging and contracting with business do not similarly apply to cases of engagement and contracting between businesses.

Most of the examples set out in the Consultation RIS really relate to interactions between businesses and consumers.

Any benefit potentially afforded to more vulnerable businesses by applying consumer style protections to businesses would be considerably outweighed by the corresponding decline in certainty and freedom of contract in commercial dealings between businesses, and the wide-ranging negative implications for business operations that would stymie innovation and investment.

Extending an unfair trading practices prohibition to cover small businesses will be an additional regulatory burden that could have the unintended consequence of making businesses respond by preferring to only deal with larger businesses who are not afforded the unfair trading practices protection and other ACL protections.

No penalties

If an unfair trading practices prohibition is pursued, consideration should be given to initially introducing an unfair trading practices prohibition that does not include penalties.

This would resemble the approach taken with the introduction of the UCT regime, where it was initially the case that there were no penalties for a breach of the UCT regime. If there was non-compliance with the UCT regime, the non-compliant term would be rendered void with the remainder of the contract still in force (but no penalties were applied).

This provided considerable protection to consumers and small businesses without the imposition of significant penalties on companies that were in breach (often unintentionally).

Treasury could also give due consideration to the US model where breach of section 5 of the Federal Trade Commission Act does not automatically result in penalties being applied, rather companies are required to provide an undertaking that they will change their behaviour. If they do not change their behaviour, then a penalty will be imposed on the company for breach.

Pre-implementation assurance

If an unfair trading practices prohibition is pursued, a significant amount of consultation needs to occur throughout all phases of the implementation process so that all consequences can be fully appreciated by Treasury and that experts from each industry are able to contribute and inform the process.

Comprehensive and detailed guidelines must accompany the introduction of any unfair trading practices prohibition.

Finally, there should be significant lead-in time between when an unfair trading practices prohibition is passed by the Parliament and when the law ultimately comes into force. 18 months should be the minimum lead in time provided to allow businesses to prepare.

Ultimate conclusion

Based on our comprehensive analysis, our primary recommendation is Option 1 – the status quo should be maintained.

Option 1 is the only option that does not create significant issues for businesses and is the option that Treasury should recommend to Government.

We respectfully submit that the conduct outlined in the Consultation RIS as examples of 'potentially unfair trading practices' is conduct that is already captured by existing provisions of the *Competition and Consumer Act 2010* (Cth) (CCA), ACL, other laws and the common law.

If Treasury remains inclined to act, it may be that what is needed is our proposed new Option 5, which is a targeted and tailored solution that specifically deals with the problems identified in the Consultation RIS.

Our overarching view is that Options 3 and 4 in the Consultation RIS lack objective certainty and clarity (offending principles of the rule of law and separation of powers) and would introduce significant risk and uncertainty for business.

The need for such certainty is a fundamental bulwark of an efficient free market economy in which market participants can operate with confidence that the contractual relationships which underpin their respective businesses will be binding and enforceable. It is an extremely worrying development that legislation which has the potential to significantly erode the confidence and certainty would be propounded for no apparent compelling reason.

Businesses should be able to obtain a high degree of surety that their practices and general conduct are appropriate and compliant with the ACL and other laws. This would be significantly more difficult under Options 3 and 4 as 'unfairness' is an undeniably subjective term and measure of behaviour.

We are deeply concerned that in practice, an open-ended 'catch all' prohibition would lead to unpredictable determinations of 'unfairness' being made through speculative litigation and/or by the ACCC through their enforcement activities.

The Principles for Introducing Legislation

In October 2005, the then Prime Minister and the Treasurer announced the establishment of the Regulation Taskforce. This Taskforce's remit was to identify actions to address areas of Australian Government regulation that are 'unnecessarily burdensome, complex, redundant, or duplicate regulations in other jurisdictions'.

In January 2006, the Regulation Taskforce produced its report *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*. In this report, the Regulation Taskforce set out its six "Principles of good regulatory process" which relevantly included the following four principles:

- *Governments should not act to address 'problems' through regulation unless a case for action has been clearly established. This should include evaluating and explaining why existing measures are not sufficient to deal with the issue.*
- *A range of feasible policy options — including self-regulatory and co-regulatory approaches — need to be assessed within a cost-benefit framework (including analysis of compliance costs and, where relevant, risk).*
- *Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted.*
- *There needs to be effective consultation with regulated parties at the key stages of regulation-making and administration.*

Since 2006, the above four principles of the Regulation Taskforce have been affirmed on numerous occasions and by numerous bodies. For instance, the Productivity Commission, in its *Inquiry Report into The Market for Retail Tenancy Leases in Australia* in 2008, said:

> *"All regulation introduced should be the minimum necessary, to avoid an excessive compliance and administrative cost burden for businesses and governments respectively."*[3]

The SCCA accepts that law reform and the regular review of legislation is an important part of the legislative process, however, consistent with the above principles we submit that before pursuing legislative change, Government needs to ask whether there is a legitimate and overwhelming reason for change and whether that change will provide significant benefits that outweigh the risks.

There must be clear evidence of a significant problem before any changes are enacted, and if a significant problem is identified, any change that is pursed to address the problem must be approached in a systemic and proportionate manner. Any moves towards widespread government-led regulatory measures must start from the position of minimising distortion and any unintended consequences the intervention could produce.

This is an extremely important point and highlights the fact that Government should only intervene when there is a clear and well-defined policy problem that requires Government solution/intervention and that any response should be proportionate, otherwise the consequences could be detrimental for businesses and the broader economy. Government should not make policy that will simply increase regulatory risk and burden for business when there is not a policy problem but rather a perception by some of an issue.

Here, Treasury must ensure that as part of its consultation process, the problem is well understood and defined (if there is a problem) and the problem is addressed in a targeted and tailored manner that does not lead to unintended consequences such as the stifling of business innovation, creation and investment.

[3] Commonwealth of Australia, *The Market for Retail Tenancy Leases in Australia*, March 2008, page 96.

Structure of this Submission

Consistent with the Regulation Taskforce's "Principles of good regulatory process", this submission follows the structure and is divided into the sections set out below.

Defining and understanding the problems

We start this submission by seeking to define and understand the problem said to exist.

This we seek to do by:

1. spelling out the various problems identified in the Consultation RIS that are said to need addressing;
2. looking at a number of the source documents referred to in the Consultation RIS to gain a better understanding of and to better spell out these said problems;
3. attempting to identify and summarise the key underlying causes of these problems that might need to be addressed; and
4. considering the breadth of the said problems and whether they extend beyond digital platforms.

Assessing whether these problems are already satisfactorily covered by regulation

We next seek to assess whether the said problems identified in the Consultation RIS are already satisfactorily covered by existing laws or whether there are in fact gaps in regulation.

This we seek to do by considering whether and the extent to which the said problems are already covered by the CCA, ACL, other legislation and the common law.

In this section we also given some consideration to the laws that apply in other countries and how the existing regulation in Australia compares to those laws.

Setting out the relevant policy design considerations

We then seek to list and succinctly explain the policy design considerations that ought to form part of the appropriate framework against which the range of feasible options for addressing any gaps in the existing regulation ought to be assessed (adopting the approach taken by Treasury in its agenda for the roundtable discussions). These include:

1. competition law and consumer protection policies;
2. freedom and sanctity of contract doctrines;
3. the Rule of Law doctrine;
4. the Separation of Powers doctrine; and
5. policies directed to ensuring that offences which are potentially subject to serious penalties require a guilty mind, a presumption of innocence and an elevated standard of proof.

Drawing a picture of what good regulation should be aiming for

We then seek to draw a picture, having regard to the above policy design considerations, of what the market with good regulation should look like and how it should work and thus what Treasury and the Government ought to be aiming for with any regulatory reforms. In seeking to present a picture of what the market with good regulation should look like we draw, in particular, on the SCCA's and its members' experiences with retail leases legislation throughout Australia and with voluntary industry codes. We also have regard to the use of industry approved standard contracts and a number of the best and most successful provisions in the ACL and CCA.

In this section we seek not only to identify what has been shown to work but also to distil when and why.

Assessing the options for reform

We then seek to assess each of these options by reference to the policy design considerations referred to in our submission, with regard to the picture drawn of what a market with good regulation should look like and within a cost-benefit framework. Following the lead taken by Treasury in its Consultation RIS we in part do this by looking at "indicative case examples and anecdotes" and by relying on the assessments of others in previous reports in which similar reforms have in the past been considered. As part of this assessment of the options we again give some consideration to the laws that apply in other countries.

Considering the width and coverage of any reforms

In this penultimate section of our submission, we consider the appropriate width and breadth of the options for reform. We look at the possibility of having carve outs for specific industries and the introduction of safe harbours (which might apply to industry participants who meet certain criteria or to certain standard form contracts). We look at these options for carve outs and safe harbours both in the context of any proposed reforms and also as regards the existing provisions of the ACL.

Conclusion: identifying the option for reform with the greatest net benefits

We conclude our submission by stating the option for reform that we consider "*generates the greatest net benefit for the community, taking into account all the impacts"* and which we therefore consider should be adopted.

Defining and understanding the problem

In this section we seek to spell out the various problems ('potentially unfair trading practices') which Treasury has identified in its Consultation RIS. We also give consideration in this section and in other parts of our submission to the industry breadth of these said problems and whether they extend beyond one particular industry.

At page 9 of the Consultation RIS, Treasury helpfully lists some examples of 'potentially unfair trading practices' that it suggests might not be currently satisfactorily covered by current laws. In Appendix A of this submission, we have sought to quote the other parts of the Consultation RIS which further identify the 'potentially unfair trading practices'.

In Appendix B to this submission, we have quoted, with a view to gaining a better understanding of and better spelling out these said problems, numerous parts of the source materials and reports which are referenced in the Consultation RIS. In Appendix B, we have also extracted in shaded boxes many of the solutions advocated, in those source materials and reports, for addressing these problems which we respectfully suggest Treasury should consider before imposing an economy wide unfair trading practices prohibition.

Having regard to the contents of Appendices A and B, below we have amended and slightly reordered the examples of the 'potentially unfair trading practices' set out on page 9 of the Consultation RIS with a view to better and more fully defining those examples. Our amended list of 'potentially unfair trading practices' which Treasury suggests might not be currently satisfactorily covered by current laws is as follows:

1. Inducing uninformed consumer consent or agreement to data collection, including data concerning the consumer's demographics, activities, interests and location, through concealed and other data practices. This may be done through:
    a. the provision of seemingly 'free' services or products but which have onerous contractual terms associated with accessing these 'free' services;
    b. the user being informed that their experience with the current website will be somehow curtailed or diminished if they do not consent to broad ranging cookies being used;
    c. the user being forced to create a customer profile to proceed on the website when this is not necessary;
    d. an app suggesting that it requires access to the user's location data for its effective operation when this is not typically required and the real motive is data collation;
    e. the platform supposedly giving the user a number of 'options', none of which include not consenting;
    f. burying the options for changing consent in the user's 'privacy settings' which are then difficult to change and which can keep reverting to the default settings.
2. Offering only all or nothing 'clickwrap' consents that result in harmful and excessive tracking, collection and use of data, and do not provide consumers with meaningful control of the collection and use of their data. These consents may:
    a. give the user no opportunity, or no real opportunity, to negotiate the terms of the consent given (with the options presented being similarly onerous and opaque);
    b. deliberately contain overly lengthy and complex terms and conditions in the expectation that very few users will ever read them and even less properly understand what is being agreed to (particularly given the time and financial constraints of the typical user); or
    c. not give the user a 'do not track' option.
3. Sharing the data collected about a consumer across websites and across platforms to allow the creation of that consumer's psychological online profile (including vulnerabilities) that then leads to targeted and discriminatory advertising and marketing practices, personalised offers or pricing for individual consumers without their knowledge or explicit consent. This practice also exposes the consumer to an increased risk of data breaches and exposure to cyber-crime (including identity theft).
4. Using opaque, exploitative, coercive, misleading and deceptive data-driven targeting or other interface design strategies to undermine consumer autonomy (such as through the use of dark patterns and nudge practices). These strategies are designed to make it difficult for users to express their actual preferences and to act in their own best interests and which manipulate consumer choice and experience and include:
    a. forcing the consumer to do something in order to access a specific functionality;

b. framing, presenting some information/products prominently and obscuring other information/products deceptively as if reflecting the consumer's choice when really it is the platform provider's choice that is being presented;
c. nagging and confirm shaming;
d. presenting fake, unrepresentative or unverifiable ratings and testimonials;
e. representing real or fake temporal, quantitative and quantitative limits on deals to create a sense of urgency that may or may not be real;
f. hiding, disguising or delaying the provision of information relevant to the consumer's decision such as costs (including delivery costs and insurance) or the consumer's existing rights to consumer guarantees which exist (irrespective of the 'additional' warranty being offered at substantial cost).

5. Exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the 'choice architecture' of products or services (digital or otherwise).
6. Adopting business practices or designing a product or service in a way that dissuades, including through obstruction, a consumer from exercising their contractual or other legal rights (such as by making it a difficult and time-consuming process to opt out or cancel goods or services or to switch to a different service provider).
7. Omitting or obfuscating material information which distorts consumers' expectations or understanding of the product or service being offered.
8. Non-disclosure of contract terms including hidden costs and other financial obligations (at least until after the contract is entered into).
9. Exploiting bargaining power imbalances in supply chain arrangements, including by unilaterally varying supply terms at short notice.

Key indicia and features of the 'potential unfair trading practices' listed above include:

- A lack of transparency;
- Information asymmetry in favour of the supplier and to the detriment of the consumer;
- Power imbalances with the consumer having a lack of clear alternatives and options and with the supplier controlling the interaction and the user interface;
- The supplier taking advantage of the fact that consumers (with the nature of the transaction involved and the sums involved) are most unlikely to not spend the time required to read the terms proposed by the supplier or to otherwise gain a proper knowledge and understanding of what the transaction in fact involves; and
- Real undisclosed costs.

It is noteworthy that most of these 'potentially unfair trading practices' concern fast paced digital transactions where the actual transparent costs involved are slight but the real cost paid by the consumer (in terms of data sharing and thereafter being subject to dark patterns and nudge practices) is much greater and totally opaque.

In the list above, for instance, the first six issues concern these forms of transactions and the remaining three issues are also related to such transactions.

The transactions are a far cry from the sorts of transactions involved with retail leasing. Significantly none of the problems identified by Treasury in the Consultation RIS are identified as pertaining to the retail industry.

The 'potentially unfair trading practices' set out in the Consultation RIS and expanded on in our list above clearly relate to one particular industry, digital platforms. As such a more targeted solution to address the problem is required. An economy wide unfair trading practices prohibition is not the answer. Our submission explores this further throughout.

Assessing whether these problems are already covered by existing laws

In this section we seek to assess whether the 'potentially unfair trading practices' that Treasury suggests might not be currently satisfactorily covered by our current laws, are in fact satisfactorily covered by existing legislation and regulation.

As outlined throughout this submission, we submit that any policy response must be proportionate to the problem and must not unnecessarily duplicate laws and regulations that already govern the conduct or behaviour.

The introduction of laws that overlap with existing provisions is unnecessary and leads to increased compliance costs, creates uncertainty, and increases the complexity of law. This is especially problematic in the case of the ACL which should be as simple and streamlined as possible so that it is accessible to consumers and businesses.

The CCA, ACL, other legislation and the common law already provide broad and flexible protections against unfair trading practices. This includes provisions that prohibit:

- Misleading and deceptive conduct.
- Unconscionable conduct.
- Unfair contract terms.
- False and misleading representations.
- Pyramid schemes.
- Bait advertising.
- Cartel conduct.
- Misuse of market power.
- Certain pricing practices.
- Unsolicited sales practices.
- Using harassment and coercion in connection with business activities.

The ACL also contains a wide number of consumer guarantees and product safety laws.

The ACL is jointly administered and enforced by national, state and territory consumer agencies including the ACCC, relevant fair-trading agencies in each state and territory and ASIC.

In addition to the CCA and ACL, we have extensive and evolving privacy laws in Australia. Privacy laws are referenced in the *Digital Platforms Inquiry Final Report* as regulation that can be amended to address many of the 'potentially unfair trading practices'. In Appendix B, we have extracted many of the recommendations related to the amending of privacy legislation in order to address the 'potentially unfair trading practices.'

Existing ACL provisions

Below we examine the examples we have identified as being outlined in the Consultation RIS and that were highlighted in the *Digital Platforms Inquiry* and other reports as potential examples of conduct that could be considered unfair trading practices and which it has been suggested are not satisfactorily covered by existing regulation.

In undertaking this examination, we have had regard to and received the benefit of Kate French's excellent article published in the *Journal of Competition and Consumer Law*.[4] We strongly agree with Kate French's assessment and conclusions and have set out some of the comparative analysis throughout our submission.

1: Inducing uninformed consumer consent or agreement to data collection, including data concerning the consumer's demographics, activities, interests and location, through concealed and other data practices

Items 1a to 1e of the list set out above would appear to be clear cases of misleading and deceptive conduct already captured by section 18 of the ACL (including potentially by reason of the trader failing to disclose

[4] Kate French, *Unconscionable conduct: An unconscionably high standard? An assessment of whether an unfair trading practices prohibition should be introduced to capture conduct engaged in by digital platforms,* Australian Journal of Competition and Consumer Law, 29(4), 241–257, November 2021, page 252-255.

that which they might reasonably be expected to disclose to enable the user to fully appreciate what they are agreeing to (as discussed further below)). They are all, including 1f, also likely to be covered by the unconscionable conduct provisions (also discussed at greater length below). With the supplier/platform provider controlling the interaction and user interface, and the user unaware as to what the supplier/platform provider really require to provide the user with a satisfactory experience, there is a relevantly real disparity between "the bargaining positions of the supplier and the customer" (a disadvantage or vulnerability), which the supplier/platform provider in the above examples seeks to take advantage of.

2: Offering only 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

The offering of such consents would be covered by the unconscionable conduct provisions, as would example 2b (which might also constitute misleading and deceptive conduct). Taking into account a user's rights to privacy under the privacy laws and otherwise, failing to give the user the option of not consenting to the use of their data and not informing them that they have this right might itself be misleading and deceptive conduct. Any consent entered is, in any event, likely then caught by the existing unfair contract term provisions of the ACL (section 23 and 24). As set out in section 24(1) of the ACL a term in a consumer contract or small business contract is unfair, if:

- It would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- It is not reasonably necessary to protect the legitimate business interests of the party who is advantaged by the term; and
- it would cause financial or other detriment if the clause were to be applied or relied on.

The consumer law contains a presumption (section 24(4) of the ACL) that a term is not reasonably necessary to protect legitimate interests, placing the onus on the business to establish why the clause is necessary.

It is hard to imagine these consents not being found to be standard form contracts given that such clickwrap agreements are typically entered in circumstances where each one of the matters set out in section 27(2) apply and given the presumption in section 27(1) for a contract to be presumed a standard form contract unless the party seeking to rely on the contract proves otherwise. Typically, the agreements entered into would also meet the definition of a consumer contract or a small business contract (where the upfront price payable under the contract does not exceed $300,000). Further, it can readily be seen that such agreements are being found to "cause a significant imbalance in the parties' rights and obligations", to be "not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the terms", and them causing "detriment (whether financial or otherwise) to a party if it were to be applied or relied on". If a particular clickwrap agreement does not meet these requirements, then it is not self-apparent why that agreement might be said to be unfair.

Under section 24(2) of the ACL, the court can take into account any such matters as it thinks relevant, but must take into account the extent to which the term is transparent (i.e. expressed in reasonably plain language, legible, presented clearly, readily available to any party affected by the term) and the contract as a whole.

Previously, unfair contract terms have only been rendered void if they were found to be in breach of the unfair contract term prohibition. However, recent changes mean that if a term is found to be unfair, significant penalties can be imposed on businesses and individuals who are in breach. This gives the unfair contract term prohibition significantly more teeth and makes a breach of the prohibition far more consequential, making it highly likely that more businesses will adjust their behaviour and the terms contained in their standard form agreements.

3: Sharing the data collected about a consumer across websites and across platforms to create that consumer's psychological online profile (including vulnerabilities) that then leads to targeted and discriminatory advertising and marketing practices, personalised offers or pricing for individual consumers without their knowledge or explicit consent

Depending upon the circumstances and the terms on which this information may have been collated and what this data includes, its sharing as described above may variously be in breach of privacy laws, be in breach of contract or be permitted only by reason of a contract (consent) that is liable to be avoided pursuant to the unfair contract terms provisions discussed above. When seeking any user's consent to the collation and sharing of this data for these purposes it is reasonable to expect that few traders and platforms will have made it explicitly clear that the user's data and its history of practices and interests are to be used in these undesirable ways. Even where the relevant user has signed a sufficiently broad consent, there will thus then still likely be reasonable prospects of the trader being liable for misleading and deceptive conduct with respect to that consent by reason of them only telling half-truths and them reasonably having been expected to

disclose a more fulsome truth in the circumstances. Where a trader collates confidential information from a consumer, it would ordinarily be expected for there to be an implied duty of care in equity owed to the consumer to protect and to take reasonable precautions to keep safe, in the interests of the consumer, that confidential information. Where any terms of a lengthy consent might seek to dramatically water down these rights, the trader might reasonably be expected to make this fact clear. The building of a psychological online profile deliberately to take advantage of vulnerabilities such as age, mental state or addictions would also seem to fall squarely within the purview of the unconscionable conduct provisions.

4: Using opaque, exploitative, coercive, misleading and deceptive data-driven targeting or other interface design strategies to undermine consumer autonomy (such as through the use of dark patterns and nudge practices)

Many of these practices and the examples that we have set out above would be caught by section 18 of the ACL. All of them, provided they are sufficiently egregious, would also be caught by the unconscionable conduct provisions.

5: Exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the 'choice architecture' of products or services (digital or otherwise)

This conduct would seem to fall squarely within the coverage of the unconscionable conduct provisions as described above and further outlined below.

6: Adopting business practices or designing a product or service in a way that dissuades, including through obstruction, a consumer from exercising their contractual or other legal rights (such as making it a difficult and time-consuming process to opt out or cancel goods or services or to switch to a different service provider)

This conduct, to the extent its warrants redress, would again be captured by misleading and deceptive conduct provision and the unconscionable conduct provisions.

7: Omitting or obfuscating material information which distorts consumers' expectations or understanding of the product or service being offered

8: Non-disclosure of contract terms including hidden costs and other financial obligations (at least until after the contract is entered into)

9: Exploiting bargaining power imbalances in supply chain arrangements, including by unilaterally varying supply terms at short notice

Items 7 and 8 would again appear to be clear cases of misleading and deceptive conduct and also would be covered by the unconscionable conduct provisions. The consumer guarantee provisions of the ACL are also likely to be relevant to holding the supplier to the expectations or understanding of the product or service being offered that the supplier creates with the consumer.

Item 9 can also very much (depending on the circumstances) be expected to be caught under the existing laws and regulation.

Significantly, section 25 of the ACL sets out some examples of the kinds of terms of a consumer contract or small business contract that may be unfair under the unfair contract terms provisions. Section 25(d) states as an example a term that permits, or has the effect of permitting, one party but not the other to vary the terms of the contract (i.e. unilateral variation).

Examples where existing ACL provisions have successfully been used

The cases that have progressed through the courts to date show that it is entirely possible for the ACCC or a consumer to bring a case under the existing provisions of the ACL, including in respect of conduct of the nature discussed above (i.e. the 'potentially unfair trading practices'), including where the applicable market is an emerging digital market.

In Appendix C to this submission, we refer to the ACCC's proceedings against Google, Meta subsidiaries, Booktopia, Trivago and Uber as examples of where the existing provisions of the ACL have worked well in Australia to regulate and deal with the conduct which the Consultation RIS suggests is currently not covered. Those existing provisions are not just fit-for-purpose in relation to more traditional and mature markets, they are working to deal with emerging markets including digital platforms.

Claimed deficiencies with the existing ACL provisions

In the Consultation RIS, no attempt is made to look at the 'potentially unfair trading practices' individually and see whether they are in fact caught by the existing ACL provisions or not (as we have sought to do). Rather the approach taken in the Consultation RIS is to identify a number of claimed or perceived short-

comings in the existing provisions and suggest that some of these identified 'potentially unfair trading practices' might not be caught by the existing provisions by reason of these claimed or perceived short-comings.

We submit that this is not an appropriate approach having regard to the principles for introducing legislation outlined in our submission and the significant impact that an economy wide unfair trading practices prohibition would have on businesses.

Rather, Treasury is obliged to undertake in some detail the approach we have undertaken above to determine that a 'case for action has been clearly established'.

In any event, looking at the claimed or perceived shortcomings identified by Treasury we do not agree that they are shortcomings. With misleading and deceptive conduct, for instance, the Consultation RIS suggests that section 18 of the ACL is potentially limited because:

> *"Misleading omissions are not expressly covered by this provision although silence may be considered misleading when there is a reasonable expectation that a fact, if it exists, will be disclosed; and*
>
> *The prohibition rarely imposes a positive duty on businesses to disclose information about their practices, even where non-disclosure causes significant consumer detriment. Accordingly, the prohibition 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 of their consumer rights."*[5]

The 2023 edition of *Miller's Australian Competition and Consumer Law Annotated* takes a different view. It states *"silence may amount to misleading a deceptive conduct in a variety of circumstances. Those circumstances are many and various"*[6]. We would go further and suggest that "misleading omissions", as opposed to all omissions, are always covered.

The essential question is whether, in all of the circumstances constituted by acts, omissions, statements or silence, there has been conduct likely to mislead or deceive[7]. Justices Gilmore and White stated that it is not possible to categorise all of the circumstance in which a reasonable expectation of disclosure may arise.[8] Such circumstances may exist, for instance:

- when either the law or equity imposes a duty of disclosure;
- when a statement conveying a half-truth only is made;
- when the respondent has undertaken a duty to advise;
- when a representation with continuing effect, although correct at the time it was made, has subsequently become incorrect; and
- where the respondent has made an implied representation.

To the extent that a consumer could have no reasonable expectation of the disclosure of some fact or piece of information and the omission of its disclosure is not misleading and is not otherwise caught by the unconscionable conduct provisions in the ACL, it is not self-evident how it can be said that the existing section 18 provision of the ACL is deficient in this regard.

The second of the claimed or perceived short-comings with the existing ACL provisions identified by Treasury relates to the unconscionable conduct provisions. The potential limitation identified with these provisions is 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."*[9]

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[5] Commonwealth of Australia, *Protecting consumers from unfair trading practices Consultation Regulation Impact Statement The Treasury*, August 2023, page 12.
[6] Russell V Miller, *Miller's Australian Competition and Consumer Law Annotated 2023 with Errata*, 28 February 2023.
[7] *Miller & Assoc Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357.
[8] *Addenbrooke Pty Ltd v Duncan* (2017) 348 ALR 1.
[9] Commonwealth of Australia, *Protecting consumers from unfair trading practices Consultation Regulation Impact Statement The Treasury*, August 2023, page 14.

In support of this claim, the Consultation RIS makes reference to *Australian Competition and Consumer Commission v Medibank Private Limited* [2017] FCA 1006 in which Justice O'Callaghan dismissed proceedings brought by the ACCC against Medibank on the basis that:

> *"Ultimately, that evidence, which I unhesitatingly accept, demonstrates that the decision not to communicate with members (about which the applicant complains) was a decision made in the context of the exercise by the relevant committee of its business judgment. Some may agree with it, some may disagree with it, but, in my view, there was nothing remotely unconscionable about it."*

The Consultation RIS also makes reference to the Full Federal Court's dismissal of the ACCC's appeal from this decision in which Justice Beach was *"prepared to conclude that [Medibank] acted unfairly"* but said *"this is not enough to establish statutory unconscionability"*. Further, the Consultation RIS makes reference to *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2021] FCA 1493 where the Federal Court and the Full Federal Court respectively found that Mazda's conduct was not unconscionable because:

- it was not 'sufficiently divergent from the community standards of acceptable business practices; and
- did not involve a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience…'.

Reference is also made to *Pitt v Commissioner for Consumer Affairs* [2021] SASC 24 where the South Australian Court of Appeal held that it had not been established that Mr Pitt's conduct was so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that was offensive to conscience, and that he had not acted unconscionably.

As we discuss at much greater length later in this submission, we do not see the unconscionable conduct provisions as deficient because they fail to allow the successful prosecution of a business (accompanied by the possible imposition of substantial penalties) in circumstances where the ACCC or a judge, exercising their own subjective views, considers the relevant conduct unfair but determines that the conduct does not *"involve a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience"*. We regard this a virtue of the existing provisions rather than a weakness.

Rhetorically we ask, adopting the words of Justice O'Callaghan, why should a trader be guilty of an offence for making a *"business judgment"*, which *"some may agree with, some may disagree with"*, and which *"there was nothing remotely unconscionable about…"*?

The third of the claimed or perceived short-comings with the existing ACL provisions identified by Treasury relates to unfair contract terms provisions. The potential limitations with these provisions are said to be that:

> *"They do not address unfair conduct that occurs prior to entering into contracts, or in the parties' dealings while the contract is in place, including when a business applies an otherwise fair contract term in an unfair manner.*
>
> *From a small business perspective, an unfair application or interpretation of an otherwise fair contract term may result in unfair conduct. For example, a contract between a large and small business may require the small business to indemnify the large business if losses result from conduct or circumstances within the control of the small business. The large businesses insists that certain conduct is 'within the control' of a small business, and therefore captured by the term, even when the circumstances and conduct make that an unreasonable interpretation or application of the contract. In these circumstances, the small business's options are to acquiesce to the larger business's demands, commence costly legal proceedings or lose a key supplier or acquirer."*[10]

While these are limitations with the unfair contract terms provisions of the ACL, they do not represent gaps more generally in the ACL or the CCA. Such conduct would clearly already be covered by the misleading and deceptive conduct provisions in the ACL, the unconscionable conduct provisions (if it meets the applicable threshold discussed above) and potentially the misuse of market power provision in section 46 of the ACL.

Section 18 of the ACL might even apply to the post contract example given in the Consultation RIS, in addition to the unconscionable conduct provisions, if the large business had from the outset no intention of

[10] Commonwealth of Australia, *Protecting consumers from unfair trading practices Consultation Regulation Impact Statement The Treasury*, August 2023, page 18.

sticking to the terms of the contract bargained, such that its conduct in entering in the contract may be accurately stigmatised as misleading and deceptive.[11] Given that the large business will be taken from the outset to have promised into the future to be bound by the terms of the contract, it may be for that large business (and not the small business) to prove that there were reasonable grounds then of assuming it would in due course honour the terms of the contract.

Reasons for the ACCC suggesting that there are gaps in the existing regime

We respectfully suggest that the ACCC's push to introduce a new unfair trading practices prohibition in a significant part emanates from its frustration about its inability to successfully litigate matters that fall within the unconscionable conduct prohibitions set out in sections 21 and 22 of the ACL.

This is particularly post the High Court of Australia's decision in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18 (*Koblet*).

The ACCC's frustration is no justification for the introduction of an unfair trading practices prohibition that would be detrimental to business and the broader economy. Even if an "unfairness" test lower than the "unconscionable" test were introduced, there is no reason to suspect that the ACCC would not continue to be frustrated by the unsuccessful cases it brings.

As Kate French concludes in her article:

> *"The introduction of an unfair trading prohibition may also result in as much uncertainty as to what conduct is precisely prohibited as currently exists in relation to unconscionable conduct. Both unfair and unconscionable require a subjective assessment by the courts of what is and is not against the standards of society."*[12]

There is no guarantee that just because the adjective has changed from "unconscionable" to "unfair" that the court would conclude any differently in cases such as *Kobelt*. Just because the adjective has changed does not mean that the judicial reasoning will.

Similarly, not all of the examples that some may perceive to be conduct that is unfair would (or should) necessarily be prohibited under any new conduct prohibition.

Conclusion: Unfair trading practices are covered by the ACL

As highlighted by the examples in Appendix C and the reasoning set out above, the conduct listed in the Consultation RIS and derived from the *Digital Platform Inquiry* as justifying the introduction of a new unfair trading practices prohibition are already covered by existing provisions of the CCA and ACL, making an entirely new economy wide unfair trading practices prohibition unnecessary.

The ACCC Chair, Ms Cass-Gottlieb has herself recognised and agreed that:

> *"…our existing competition law can embrace much of the community concerns, without needing an unfair practices prohibition to do all the work."*[13]

This is explicit acknowledgement from the ACCC that the existing competition law framework can be used to address much of the conduct set out in the Consultation RIS. Despite this, the ACCC continues to argue that the existing competition law framework contains gaps that require an unfair trading practices prohibition to be included in the ACL.

Contrasting the ACL with overseas legislation

One of the primary justifications set out in the Consultation RIS for why an unfair trading practices prohibition should be introduced in Australia is the fact that other jurisdictions such as the United Kingdom, European Union, United States of America and Singapore have such a prohibition.

In highlighting that these jurisdictions have an unfair trading practices prohibition, the Consultation RIS fails to outline the political and/or historical context for why such a prohibition may exist or analyse whether these jurisdictions have other prohibitions that Australia may have which cover the conduct and behaviour that could be perceived as an unfair trading practice.

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[11] *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd (2005)* ATPR 42-042.
[12] Kate French, *Unconscionable conduct: An unconscionably high standard? An assessment of whether an unfair trading practices prohibition should be introduced to capture conduct engaged in by digital platforms,* Australian Journal of Competition and Consumer Law, 29(4), 241–257, November 2021, page 256.
[13] Gilbert + Tobin, *Unfair Trading Practices: ACCC Chair Gina Cass-Gottlieb at G+T*, 21 February 2023.

Below we briefly look, with the assistance of Speed and Stracey Lawyers, in a limited way, at the laws that exist in the United States of America, European Union, United Kingdom, and Singapore and which are referred in the Consultation RIS.

United States

In the Consultation RIS, it is noted that in the United States section 5 of the *Federal Trade Commission Act* (FTC Act) contains a general prohibition against 'unfair or deceptive acts or practices in or affecting commerce' and that the FTC Act defines an act or practice to be unfair when it:

1. causes or is likely to cause substantial injury to consumers;
2. cannot be reasonably avoided by consumers; and
3. is not outweighed by countervailing benefits to consumers or to competition.

In the Consultation RIS it is noted that under the FTC Act a consumer includes "all persons engaged in commerce, including banks" and as such "may impact business customers as well as individual customers". In the Consultation RIS it is further noted that 'substantial injury' usually involves monetary harm, but can also include, in certain circumstances, unquantifiable or non-monetary harm and that substantial injury can occur where an act or practice causes a small amount of harm to a large number of people, or if the injury raises a significant risk of concrete harm (not trivial or merely speculative harm).

In terms of the second requirement that the injury cannot reasonably be avoided, our research suggests that the purpose of the requirement is to ensure that the focus is on the method by which the consumer's agreement was procured, rather than on whether the consumer made a good bargain. That is, if the consumer simply made a bad bargain through inadvertence or carelessness, the provision will not have been breached.

In contrast, if the consumer would have been required to obtain legal advice to avoid harm because the other party did not provide an adequate disclosure of the risk of harm, the provision will be breached.

This is consistent with the description of s 5 of the FTC Act in the FDIC Consumer Compliance Examination Manual – June 2022, which is as follows:

> *"An act or practice is not considered unfair if consumers may reasonably avoid injury. Consumers cannot reasonably avoid injury from an act or practice if it interferes with their ability to effectively make decisions or to take action to avoid injury. This may occur if material information about a product, such as pricing, is modified or withheld until after the consumer has committed to purchasing the product, so that the consumer cannot reasonably avoid the injury. It also may occur where testing reveals that disclosures do not effectively explain an act or practice to consumers. A practice may also be unfair where consumers are subject to undue influence or are coerced into purchasing unwanted products or services."*

The underlined parts of the above quote highlight the similarities with the laws in Australia. By reason of this requirement (i.e. that the substantial injury cannot be reasonably avoided by consumers), it is doubtful that section 5 of the FTC Act may cover many of the consents given to data usage where the consumer simply did not spend the time and read the applicable terms for an online transaction or when visiting a particular website. This appears to be the position generally in the US, with the courts (like in Australia) enforcing these types of contracts as long as the consumer has some opportunity to read and decline the terms, either by not buying the product or service, or in some cases by returning the product once the consumer is provided with the terms 'in the box.'[14]

Clayton Utz recently published an article that looked at section 5 of the FTC Act and observed that:

> *"most cases brought in the US by the Federal Trade Commission under that section 5 relate to misrepresentations, specific unfair practices (which are part 3-1 of the ACL) or unfair contract terms, all of which can already be brought under the current provisions of the ACL."*[15]

When looking at section 5 of the FTC Act it is important to bear in mind that unlike Australia's CCA, the FTC Act has never featured a private right or action, nor a state government right of enforcement.

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[14] : see *ProCD, Inc v Zeidenberg,* 86 F.3d 1447 (7th Cir. 1996); *Hill v Gateway 2000, Inc.,* 105 F.3d 1147 (7th Cir. 1997); *Forrest v Verizon Communications, Inc.,* 805 A.2d 10007 (DC App. 2002).

[15] Clayton Utz, *The ACCC is calling for a new ban on unfair trading practices in business – why, and what it would mean,* 16 September 2021.

According to Congress, the key function of the Fair Trade Commission established under the FTC Act was to identify unfair forms of competition.[16] *"Congress struck an intentional balance when it enacted the FTC Act. It allowed the Commission to proceed against a broad range of anticompetitive conduct, but it did not establish a private right of action under section 5."*[17]

It is also by reason of the breadth of the term "unfair or deceptive acts or practices in or affecting commerce" and the fact that the FTC was to determine what constitutes such acts or practices as it went along that we suspect it was not given the power to issue penalties without first having issued a cease and desist order and for there to have been non-compliance with that order (as discussed further below).

In part due to the fact that section 5 of the FTC Act has never featured a private right or action, nor a state government right of enforcement and a recommendation of the *Council of State Governments* and the *Commissioners on Uniform State Laws* that effective regulation of unfair and deceptive acts could not occur without state aid and private lawsuits, each of the 50 states in the United States has passed their own acts which for the most part are modelled on the FTC Act but which provide for state and private enforcement. Since these statutes prohibit "unfair or deceptive acts or practices," they are commonly called UDAP statutes. The types of statutes and the particulars of these statutes vary considerably from state to state. Further these statutes vary widely in the types of relief they offer to injured consumers.

Not all purchasers of goods may sue under state UDAP statutes. For instance, most states exclude business plaintiffs from the statutory coverage. Some states allow only "natural persons" to sue, thereby excluding corporations and associations. A few states allow retailers or "business buyers" a private remedy as "consumers." As one text states *"coverage of purely business-to-business disputes… could be viewed as contrary to the original goal of the state UDAPs, which was to provide consumers with better and more equal access to justice for marketplace injuries"*.[18]

It is beyond the scope of this submission, for us to look deeper at these state UDAP statutes.

As referred to above, under the FTC Act the FTC cannot impose penalties unless and until if first issues a cease and desist order and there has been non-compliance. Specifically in *AMG Capital Management v FTC* 593 U.S (2021), the US Supreme Court held that the FTC could not obtain a civil penalty without first seeking a cease-and-desist order. The civil penalty is imposed by a Court under s 5(l) of the FTC Act for the breach of a cease-and-desist order.

It is in part as a result of this fact that it has been said that in the United States the *"real teeth in the enforcement of consumer protection is usually found in private litigation, where plaintiffs use state and [other] federal laws, as well as class actions, to seek redress for fraudulent practices and statutory violations found in the marketplace"*[19]. In the United States, class actions play an important part in the enforcement of consumer protection laws. This is all very different to the position in Australia.

In the Consultation RIS, reference is made to three enforcement action taken by the US Federal Trade Commission (FTC): Epic Games[20], Vonage[21] and Google and iHeartMedia[22]. Four further US cases, ABCmouse, Dating services, Retina-X, and Dating apps, were also identified by the Consumer Policy Research Centre in its December 2020 Research and Policy Briefing entitled '*Unfair Trading Practices In Digital Markets – Evidence And Regulatory Gaps*'. In that report, with reference to these cases, it was said: *"The case law under section 5 of the FTC Act has resulted in findings of contravention in cases involving some conduct that would be unlikely to contravene any Australian law".*

In Appendix D to this submission we have a look at each of these seven US enforcement actions and conclude, contrary to the above, that all of those seven cases involved conduct that is already covered by Australian law.

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[16] *Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Fair Trade Commission Act*, Commission File NO. P221202.
[17] *Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Fair Trade Commission Act*, Commission File NO. P221202.
[18] *Consumer Protection Law in a Nutshell*, Dee Pridgen, 5th Edition 2020.
[19] *Consumer Protection Law in a Nutshell*, Dee Pridgen, 5th Edition 2020.
[20] Federal Trade Commission, *FTC Finalizes Order Requiring Fortnite maker Epic Games to pay $245 Million for Tricking Users into Making Unwanted Charges* (Press Release, 14 March 2023).
[21] Federal Trade Commission, *FTC Action Against Vonage Results in $100 Million to Customers Trapped by Illegal Dark Patterns and Junk Fees When Trying to Cancel Service* (Press Release, 3 November 2022).
[22] Federal Trade Commission, *FTC, States Sue Google and iHeartMedia for Deceptive Ads Promoting the Pixel 4 Smartphone* (Press Release, 28 November 2022).

European Union

In the Consultation RIS it is noted that there exists multilayered protection in the European Union under the *Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market* (UCPD).

Under this Directive, consideration is first given to whether the relevant conduct is caught by a blacklist of specific unfair commercial practices. If the applicable commercial practice is not mentioned in the "blacklist", it is then evaluated to see whether it constitutes "misleading" or "aggressive" practices. If it does not then consideration is finally given to whether it infringes a trading standard of "professional diligence" and "materially distort or are likely to materially distort the transactional decision of the average consumer".

Further, in the Consultation RIS it is noted that the United Kingdom contains laws similar to the European Union's UCPD enshrined in the *Consumer Rights Act 2015,* the *Enterprise Act 2002* and part 2 of the *Consumer Protection from Unfair Trading Regulations 2008* (CPR).

The EU Directive must be understood in its specific context. It was introduced to harmonise divergent consumer protection regimes in the different EU Member States. Member States were required to transpose the terms of the directive into national law. The stated aim of the Directive was to facilitate EU integration and harmonise consumer protection across the EU. The purpose of the 'black list', in particular, was to ensure that each of the EU Member States maintained a consistent minimum standard of consumer protection.

The Competition & Consumer Committee, Business Law Section of the Law Council of Australia, in its submission to *Consumer Law Review* dated 23 June 2016, set out in a comprehensive table each of the 'black listed' conduct in the UCPD and compared it against one or more of the prohibitions contained in the ACL. The Law Council of Australia found that each form of 'black listed' conduct in the UCPD was already then covered by the ACL.

More recently, Clayton Utz concluded in their publication:

> *"We have considered the list of 31 specific practices under Annex 1 of the EU Directive against provisions in the ACL which can be used to capture the specific unfair practice. Our analysis shows that most (if not all) of the specific practices on that list can already be regulated using an existing ACL provision."*[23]

Misleading actions are referred to in Article 6 of the UCPD and, as stated in the Consultation RIS, are where a commercial practice contains false information, is untruthful or in any way deceives or is likely to deceive the average consumer. Such conduct is comprehensively covered by section 18 of the ACL (amongst other provisions).

Misleading omissions (Article 7) are where a commercial practice omits material information that the average consumer needs to know in order take an informed transactional decision, and that omission causes (or is likely to cause) them to undertake a transactional decision they would not have taken otherwise. Examples of such material information include the main features of the product and the price of the product inclusive of taxes or the means of price calculation. A misleading omission will also occur where a trader hides material information or provides it in an unintelligible, unclear, untimely or ambiguous manner.

Silence may also amount to misleading a deceptive conduct in a variety of circumstances under section 18 of the ACL. *"Those circumstances are many and various"*[24] and include, like with Article 7, where the consumer has a reasonable expectation of the disclosure of some fact or piece of information if it exists and where, by reason of that reasonable expectation, the omission of its disclosure is misleading.

Aggressive commercial practices are referred to in Article 8 of the UCPD and harassment, coercion and undue influence are referred to in Article 9. In Australia we have laws in contract and equity that similarly address coercion, undue influence and unconscionable conduct (where a consumer's freedom of choice is impaired by the same) and which we would suggest cover substantially all, if not all, of the same ground.

In terms of the general prohibition against unfair commercial practices, Article 2(h) defines professional diligence as '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'.

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[23] Clayton Utz, *The ACCC is calling for a new ban on unfair trading practices in business – why, and what it would mean*, 16 September 2021.
[24] Russell V Miller, *Miller's Australian Competition and Consumer Law Annotated 2023 with Errata*, 28 February 2023.

The phrase 'to materially distort the economic behaviour of consumers' is defined in Article 2(e) to mean: using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to make a transactional decision that they would not have taken otherwise. In general, commercial practices which are likely to 'materially distort the economic behaviour' will only exist where the target audience includes a clearly identifiable group of consumers who are particularly vulnerable (e.g. by reason of mental or physical infirmity or age). The distortion to the average consumer would then be assessed from the perspective of the average member of that vulnerable group. In this regard the 'average consumer' test under the UCPD has much in common with the 'ordinary or reasonable consumer' test adopted in Australia in relation to s 18 of the ACL.

By reason of the above and the fact that it is based around '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', the general prohibition against 'unfair commercial practices' in the UCPD has much in common with the unconscionable conduct provisions in the ACL. As discussed above, the unconscionable conduct provisions in the ACL apply where there is a divergence from the community standards of acceptable business practices. Whether there has a sufficient departure from these norms of acceptable commercial behaviour in Australia depends on whether the departure is 'against conscience' or offend the conscience whilst under the UCPD it must 'materially distort the economic behaviour of consumers'. We suggest that in practice there would be very little difference in operation between the general prohibition against 'unfair commercial practices' in the UCPD and the existing unconscionable conduct provisions in the ACL.

In their submission during the Australian Consumer Law Review process in 2016, Baker and McKenzie made several points addressing this topic and highlighting various problems with justifying the transposition of the unfair trading practices prohibition of the EU and UK into Australian law that are still relevant today:[25]

- The EU Directive had the objective of harmonising consumer protection laws across EU member states. Australian jurisdictions have already achieved harmonisation by individually passing legislation adopting the ACL. The context and reasoning behind law reform is an important consideration.
- The UK strongly supported the EU-wide ban on unfair commercial practices as they did not previously have such a general principle in their national consumer protection legislation. This is in stark contrast to Australia which has had broad consumer protection laws for many years.
- The EU and UK laws only apply to business-to-consumer relationships, which differs from the ACL prohibitions that apply economy wide and have extended to business-to-business arrangements.
- *"There is likely to be a high degree of overlap between the EU concept of unfairness, and the Australian prohibitions against various unfair practices and in particular the general prohibition against misleading or deceptive conduct as well as the specific prohibitions against certain types of misleading representations or conduct."*[26]
- Drawing on their experience in London and Europe, Baker and McKenzie noted that: "*the general concept of "unfair commercial practices" is widely regarded as not having added a great deal to consumer protections… because most (if not all) practices that would be "unfair" would also constitute "misleading practices" or "aggressive practices""*.[27]

Unlike Australia's misleading and deceptive conduct provision, remedies are only available with the UCPD in relation to business-to-consumer transactions, not business-to-business transactions.

[25] Baker and McKenzie, *Submission by Baker & McKenzie in response to Issues Paper March 2016*, 30 May 2016.
[26] Baker and McKenzie, *Submission by Baker & McKenzie in response to Issues Paper March 2016*, 30 May 2016, page 11.
[27] Baker and McKenzie, *Submission by Baker & McKenzie in response to Issues Paper March 2016*, 30 May 2016, page 11.

In the Consultation RIS, reference is made to five enforcement action taken in the Europoean Union and the United Kingdom: Samsung Electronics Italia[28], Wind Tre & Vodafone Italia[29], Facebook[30] Hotel booking sites[31], Apple Inc[32]. Two further cases, described as Sixthcontinent Europe S.r.l. and Secondary ticketing websites, were also identified by the Consumer Policy Research Centre in its December 2020 Research and Policy Breifing referred to above. Again, it was suggested that there were findings of contravention in these cases involving some conduct that would be unlikely to contravene any Australian law.

In Appendix D, we have a look at each of these seven European Union/UK enforcement actions and conclude, contrary to the above, that all of those seven cases involved conduct that is already covered by Australian law.

Singapore

In the Consultation RIS, it is noted the *Consumer Protection (Fair Trading) Act 2003* (CPFTA) at section 6 contains a general prohibition against 'unfair practices' if a supplier of goods or services has engaged in an act or omission before, during or after a consumer transaction through the following broad categories of conduct:

- misleading or deceptive conduct;
- false claims; and
- taking advantage of consumers.

Each of these broad categories mirror and are covered substantially, if not entirely by, existing provisions in the ACL including most notably sections 18 and 21.

In the Consultation RIS reference is made to three enforcement actions taken in Singapore: Lenovo Singapore & Want Join Information Technology[33], Mobile Air[34] and Fashion Interactive[35].

In Appendix D to this submission we have a look at each of the three Singaporean enforcement actions referred to above and conclude that all three of those cases involved conduct that is already covered by Australian law.

Having regard to all of the above, it is our view that the interim report of Consumer Affairs Australia and New Zealand (CAANZ) in 2016 on the *Australian Consumer Law Review* was correct to conclude that:

> *"On balance, CAANZ notes that there is likely to be a substantial degree of overlap between these international models and Australia's existing protections. Any new general prohibition within the ACL needs to be carefully considered and supported by evidence that there is a gap in the current law that needs to be addressed, and that an economy-wide approach would be the appropriate response."*[36]

The Australian Consumer Law Review Final Report delivered in March 2017 found that the value of introducing an unfair trading practices prohibition was *"uncertain at this point in time"*.[37] We respectfully contend that

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[28] Autorità Garante della Concorrenza e del Mercato, *Italan Competition Authority fines Samsung 3.1 million euros for misleading and aggressive commercial practices in promoting products* (Press Re-lease, 25 January 2017) (English translation); Eleftheria Papadimitriou, 'Protection of Users' in Ioannis Iglezakis, Legal Issues of Mobile Apps: A Practical Guide (2020, Kluwer Law International).
[29] Consiglio di Stato (Council of State, Italy), Autorità Garante della Concorrenza e del Mercato v Wind Tre SpA, formerly Wind Telecomunicazioni SpA (C-54/17) and Vodafone Italia SpA, formerly Vodafone Omnitel NV (C-55/17) (Court decision, 13 September 2019).
[30] Autorità Garante della Concorrenza e del Mercato, 'Facebook fined 10 million Euros by the ICA for unfair commercial practices for using its subscribers' data for commercial purposes' (Press Release, 7 December 2018) (English translation); ACCC, Digital Platforms Inquiry (Final Report, June 2019), p. 440.
[31] Competition and Markets Authority, *Hotel booking sites to make major changes after CMA probe* (Press Release, 6 February 2019).
[32] Competition and Markets Authority, *Apple pledges clearer information on iPhone performance* (22 May 2019); Competition and Markets Authority, *Apple iPhones: consumer protection case* (22 May 2019).
[33] Competition and Consumer Commission Singapore, *Lenovo Singapore and Want Join Provide Undertakings to CCCS in View of Past Unfair Practices Involving Screen Refresh Rate of Certain Models of Lenovo Legion Y540 Gaming Laptop* (Press Release, 14 April 2022).
[34] Today Online, *Jover Chew gets jail, fine for 'audacious' cheating schemes* (Media article, 30 Novem-ber 2015); The Straits Times, *Case turns to court to bring Mobile Air to heel* (Media article, 13 Novem-ber 2014).
[35] Competition and Consumer Commission Singapore, *E-Commerce Retailer Fashion Interactive Ordered to Cease Unfair Trade Practices and Stop Using "Subscription Traps"* (Press Release, 17 Janu-ary 2020).
[36] Commonwealth of Australia, *Australia Consumer Law Review: Interim Report*, October 2016, page 116.
[37] Commonwealth of Australia, *Australia Consumer Law Review: Final Report*, March 2017, page 51.

the same conclusion should be reached now and in fact there is not significant value in introducing such a prohibition now.

To the extent that it might be suggested that there are theoretical differences between the laws in Australia and the laws applied in overseas jurisdictions this is not enough to establish a clear case for action (particularly in the absence of clear examples where Australian laws have shown to be deficient).

Summary of the problem

Taking into account all of the above, we observe that the rationale for change is not well founded or explained.

We also observe that the Consultation RIS draws primarily from the ACCC's 5th interim report of the *Digital Platform Services Inquiry*, and references issues that largely pertain to these platforms. This is not a strong basis for legislative change that would extend well beyond this. Many of the examples of 'unfair' practices put forward by the Consultation RIS do not relate or are not transferable to sectors beyond the digital platform sector.

The SCCA takes exception to the citing of overseas legislative examples as a rationale for Australia to follow suit and views this reasoning as simplistic. The existing prohibitions within the ACL already cover the conduct cited in EU, UK, Singaporean, and US prohibitions. This line of argument also obfuscates and disregards the context of different regulatory and legislative contexts and should be dismissed.

Policy Design Considerations

In this section (and more comprehensively in Appendix E) we seek to set out and explain a number of general policies and doctrines (policy design considerations) which we suggest are relevant to assessing the various options for addressing any problems identified by Treasury in its analysis.

These include:

1. competition law and consumer protection policies;
2. freedom and sanctity of contract doctrines;
3. the Rule of Law doctrine (such as laws being capable of being known to everyone so that everyone can comply, no one being subject to any action by any government agency other than in accordance with the law and all persons being presumed to be innocent until proven otherwise);
4. the Separation of Powers doctrine (such as requires there to be an independent, impartial, open and transparent judiciary that applies the laws and not the individual judges own idiosyncratic views of the merits of the parties' positions); and
5. policies directed to ensuring that offences which are potentially subject to serious penalties require of a guilty mind, a presumption of innocence and an elevated standard of proof which the crown alone bears.

Freedom and sanctity of contract

The freedom of contract doctrine is a doctrine which states that individuals should be free to bargain among themselves without government interference.

The sanctity of contract doctrine is a doctrine that states parties of free will ought to be bound by the terms of the contract as framed by them.

Freedom and sanctity of contract are essential features of a free market economy.

They are generally applicable features of good public policy, and as a matter of good practice and policy, governments should not restrict commercial enterprise, freedom of contract nor interfere with the sanctity of contract unless a case for action has been clearly established and there is a clear net benefit to the community.

Rule of Law

The rule of law is a fundamental principle of our society. Laws should be such that people will understand them and be guided by them.

Any new law must be capable of being known to everyone, so that everyone can comply. This is especially important in the case of the ACL which should be as simple and streamlined as possible so that it is accessible to consumers and businesses alike.

A broad ranging unfair trading practice prohibition would ignore this doctrine by introducing the highly subjective notion of 'unfairness' into the ACL rather than clear and consistent standards that can easily be understood and adhered to.

The Rule of Law Wheel at Appendix F explains this further.

Separation of Powers

The Separation of Powers doctrine states that the legislative, executive and judicial powers of government should be vested in three different institutions of government.

The SCCA suggests that it is consistent with the Separation of Powers doctrine for any new regulation to set down clear standards which are capable of being interpreted and applied correctly and consistently by judges.

As such, we suggest that it is inconsistent with the Separation of Powers doctrine and with the roles and functions appropriately served by the judiciary for new regulation to impart on the judiciary matters of subjective merit and board discretion which require arbitrary or prerogative judgment. That is particularly the case where the judgment requires regard to matters of policy or judgment today as to the commercial merits of decision voluntarily entered into past by participants in the relevant market (having regard to and looking after their own interests).

Therefore, an unfair trading practices prohibition that is inherently subjective would be inconsistent with the Separation of Powers doctrine.

Policies requiring the presumption of innocence, a guilty mind and an elevated standard of proof

In Australia, there are a number of policies that require the presumption of innocence, a guilty mind and that the prosecutor satisfies elevated standards of proof where significant penalties are sought to be imposed.

In making reference to the above policies, we are well aware that these policies are generally understood to apply to criminal offences and that it has not been suggested by Treasury or anyone else of whom we are aware that any general unfair trade practices prohibition introduced ought to be a prohibition that attracts criminal sanctions. As was said, however, by the Australian Reform Commission in ALRC Report 129:

> *"9.7 There can be a blurring of distinctions between criminal and civil penalties, such that some civil laws may effectively be criminal in nature."*

An unfair trading practices prohibition that attracts penalties would not adhere to these policies as in effect, a criminal sanction (such as business ending penalties) would be imposed for a civil breach. This is examined in more detail later in our submission and in Appendix E.

Summary

Having regard to what is set out above and in Appendix E, the policy design considerations that should be used to assess regulation are that regulations should:

- *"be clear and certain in their expression and operation so that people can with certainly comply with the same;*
- *be based on principles of equity, fairness and justice whilst yet being justiciable and sufficiently certain;*
- *be consistent with the separation of power doctrine by setting standards that judges can apply through legal reasoning and with regard to precedent rather than standards that afford the judiciary substantial discretion exercising their own idiosyncratic conception and modes of thought;*
- *not restrict commercial enterprise and competition, freedom of contract nor interfere with the sanctity of contract unless a case for action has clearly been established and in any event no more than necessary; and*
- *not unnecessarily add to the complexity of our laws."*

The above policy design considerations seek to recognise the fact, as identified by the Productivity Commission, that whilst markets are the most efficient way of allocating resources, good regulation can contribute significantly to preventing or counteracting markets working in such ways as result in adverse economic and social outcomes. Inappropriate or poorly designed and implemented regulation, however, *"can act as a handicap by imposing excessive costs on businesses, limiting competition, stifling efficient investment and changing business behaviour"*. Ultimately, the costs of poor regulation are borne by taxpayers and consumers.

Drawing a picture of what markets with good regulation look like

In this section we seek to draw a picture, having regard to the policy design considerations set out in our submission, of what markets should look like and how they should operate with good regulation and thus what Treasury and the government ought to be aiming for with any regulatory reforms aimed at filling any gaps identified in the existing regulation. We go into more detail at Appendix G.

In seeking to present this picture we draw, in particular, on the SCCA's and its members' experiences as well as the experiences of the ACCC and of market participants before the courts.

What a given market should look like and how it should operate varies depending on the products and services involved and the value and price of those products and services. There is no perfect one size fits all model.

Scenario 1:

Where, for instance, the value of the good or service is low you are likely to want to see very little time and cost wasted on negotiation, on the parties trying to grapple with and understand the terms and conditions of the transaction or on the buyer investigating the qualities of the good or service being offered.

You consequently want the terms and conditions for such transactions (including the terms of any consents) to be largely standardised across the relevant industry on everything except price and time of delivery and you want those standardised terms and conditions to be balanced, concise and reasonable having regard to both sides of the transaction's legitimate interests.

Ideally these standardised terms and conditions will have been drafted and settled upon by qualified and experienced persons representing those two sides (ideally mediated by an independent third party who also an eye to the wider welfare of society) such that all the parties then have to do, when entering into a transaction, is to agree on price and particular factors such as colour.

Scenario 2:

Where the value of the good or service being traded may be high but where the time allowed for entering into the contract is tight (such as is the case with trades in shares and in derivatives (where the price payable is dynamic and market driven)), you similarly want the terms and conditions largely standardised across the industry except as to price (and for those standardised terms and conditions to be balanced and reasonable).

Scenario 3:

Where the value of the good or service being traded is high but the nature of the transaction is pretty common but not necessarily to the parties involved (who may themselves have very limited experience), you similarly want the terms and conditions largely standardised across the industry but readily subject to variation and amendment.

Take for instance contracts for the sale of domestic land used by mums, dads and first home buyers. Ideally what you want, and what is in fact typically used, are standard form contracts that have painstakingly been prepared over many years by say the Law Society of New South Wales (with a view to being fair and balanced document having regard to the legitimate interests of both the purchaser and the vendor). Special conditions, which appear as clear additions, may then be added to this standard form contract.

In the shopping centre industry, we similarly have the Casual Mall Licensing Code of Practice that does this.

Scenario 4:

Where the value of the good or service being traded is high, the arrangement between the parties is expected to continue over the medium to longer term (where things can and do often change both foreseeably and unforeseeably) and where the market participants on both side typically have a reasonable amount of experience and expertise, you want there to be greater scope for the terms and conditions to be negotiated and sculptured to the particular demands of the parties looking after their own interest (unrestrained by preconceived undirected view of fairness).

Any regulation of this category of transactions should be focused on requiring minimum industry practices and in setting clear minimum terms and conditions rather than standards which might otherwise confine what the particular might legitimately agree to fully cognisant of their own best interests). Above those minimum terms suppliers should be able to compete on the terms they offer and negotiate.

What Treasury should be aiming for

Whilst what a given market should look like and how it should operate varies depending on the products and services involved and the value and price of those products and services, as illustrated above, in most markets of which we conceive of the use of reasonable balanced standardised contracts (at least as a basis from which negotiation might, or might not, then take place) should generally be encouraged including by any regulations.

Correspondingly, any proposed regulation that in seeking to regulate unfair trading practices may serve to discourage or not provide any safe harbour for the use of reasonable balanced standardised contracts should be carefully considered and viewed with some scepticism by Treasury. Take for instance any proposal to extend the existing unfair contract terms provisions found in sections 23 to 28 of the ACL.

Section 23(1) of ACL provides that:

> *"(1) A term of a consumer contract or small business contract is void if:*
>
> *(a) the term is unfair; and*
>
> *(b) the contract is a standard form contract."*

Section 24 of the ACL then defines what unfair means. Section 27 of the ACL further defines what is meant by a standard form contract.

This regulation serves to discourage the use of standardised contracts by singling them out for regulation, presuming them to be standard form contracts and presuming them to contain terms and conditions which are not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by them. This regulation, as such, works against markets operating as pictured above.

This is because no real attempt is made in these provisions to distinguish between standardised contracts that were drafted entirely by one party looking only after their own interest and contracts are that wholly or substantially based on contracts/codes that were drafted and settled upon by qualified and experienced persons representing both sides interests, such as the ISDA Master Agreement, the Law Society Sale of Land Contract and the Casual Mall Licensing Code referred to in Appendix G.

Rather perversely, if extended to cover sale of land contracts, these provisions would serve to encourage the increased use of be-spoke special conditions in addition to Law Society's standard terms and such special conditions would be less readily challengeable than the Law Society's standard terms. Yet it is such special conditions that buyers in the market know they need to be wary of and not the Law Society's standard terms. In such a case it should not be presumed that the Law Society's standard terms are not reasonably necessary in order to protect the legitimate interests of the party who is advantaged by them and it should not be for that party to prove why the Law Society considered that term fair and reasonable.

Any regulation introduced needs to encourage (and provide a safe harbour for) these good standard form contracts of the nature outlined above.

In stating this, we appreciate that section 26(1) of ACL provides that:

> *"(1) Section 23 does not apply to a term of a consumer contract or small business contract to the extent, but only to the extent, that the term:*
>
> *(a) defines the main subject matter of the contract; or*
>
> *(b) sets the upfront price payable under the contract; or*
>
> *(c) is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory."*

Notably section 26(1) does not exclude standardised terms that were drafted and settled upon by qualified and experienced persons representing both sides interests such as the terms in the ISDA Master Agreement or the Law Society Sale of Land contract.

To encourage markets to operate, or to continue to operate, as they should any proposed regulation needs to distinguish between:

- contracts that have been drafted and settled upon by qualified and experienced persons representing both sides interests and those that have not; and
- emerging markets and mature markets (where any broad overarching legislation has the potential to undermine the established and satisfactorily settled legislative framework).

Assessing the options for reform

As we have set out in our recommendations, the options for reform are the four included in the Consultation RIS and our proposed new option 5. Namely:

1. Maintain the status quo (Option 1 in Consultation RIS);
2. The introduction of a targeted and tailored solution (Proposed new Option 5). This could be:
    a. industry specific codes to regulate digital platforms (Proposed Option 5A and 5B); or
    b. the introduction of specific legislative prohibitions to address the 'potentially unfair trading practices' that are not covered by existing regulation and only relate to digital platforms (Proposed New Option 5C);
3. Amend unconscionable conduct in the ACL (Option 2 in Consultation RIS); and
4. Introduce a general prohibition on unfair trading practices (Option 3 in Consultation RIS) or a combination of general and specific prohibitions on unfair trading practices (Option 4 in Consultation RIS). If this is the option that is ultimately pursued we advocate that there needs to be exclusions and safe harbours and there must be no penalties and only cover business-to-consumer transactions.

Consistent with the principles for introducing legislation discussed earlier in this submission, Treasury should only move on and need to consider one of the later options where a less invasive option has been rejected as not satisfactorily addressing any specific problems identified by Treasury that are not already satisfactorily regulated.

We have set out and examined the options for reform in this section in order of our recommendations and preference.

Option 1 – Maintain the Status Quo

On the basis that there are no identified problems which are not already adequately addressed by existing legislation, the fact that overseas examples cannot and should not be transposed into Australian law, the fact that there are no economy-wide problems that require an economy-wide solution and that "fairness" is a highly subjective and problematic term for regulating conduct (as further outlined later in this submission), the option of maintaining the status quo (Option 1 of the Consultation RIS) best aligns with good legislative practice and is the most proportionate and reasonable response.

As stated at the outset of this submission, new regulation should only be introduced where a case for action has been clearly established. Here no such case has been established.

To the extent that there may presently be a lack of fair, reasonable and balanced standard form contracts being used in various emerging e-commerce markets (where the value of the good or service is low and where you are likely to see very little time and cost wasted on negotiation or on the parties trying to grapple with and understand the terms and conditions of the transaction), efforts should be directed to encouraging the development of such standard form contracts including in conjunction with relevant industry associations. In line with the picture described earlier of how such markets should operate, far from being demonised, the balanced standardised standard form contract should be encouraged (particularly in markets where the value of the good or service is low).

This encouragement might occur through education, by identifying to industry the existing laws and penalties that regulate the applicable industries and how those laws might best be complied with. It might also occur through the drafting and publication by government of suggested standard form contracts applicable to these emerging markets (which might be able to be used together with a government accredited logo). It might even go as far as the ACCC developing its own software, like the mandatory choice screen recommended by the ACCC in its *Digital Platform Services Inquiry Third Interim Report*.

Such encouragement might also be achieved, as discussed above, by providing safe harbours to the existing provisions of the ACL which concern and impose penalties on unfair contract terms (sections 23 - 27 of the ACL) for contacts which have been drafted and settled upon by qualified and experienced industry representatives representing both sides of the transaction with a view to producing a contract that is balanced and reasonable having regard to both sides' legitimate interests. Currently these existing ACL provisions provide a fair amount of stick but very little carrot.

Option 5A – Introduce industry specific codes

If Treasury does not agree that the status quo should be maintained but rather is satisfied that the ACL and other existing legislation does not, and could not reasonably be expected to, cover the 'potential unfair trading practices' identified in the Consultation RIS then Treasury needs to first consider the most targeted and tailored solution, being to address the specific industry / behaviour by codes of conduct.

This represents a more focussed and measured response than pursuing legislative reform in the form of an unfair trading practices prohibition.

As discussed above, the examples of 'potential unfair trading practices' set out in the Consultation RIS primarily arise from the *Digital Platforms Inquiry* and relate to the alleged conduct and practices of digital platforms.

The businesses and entities that were the subject of the *Digital Platforms Inquiry* and heavily referenced in the inquiry's Final Report include the likes of Google, Facebook, Amazon and Apple. The business models, practices and operations of these companies are very distinct from those in other sectors, including the shopping centre and retail leasing sector.

As the Final Report itself notes:

> *"the ACCC's Inquiry has focussed on the three categories of digital platforms identified in the Terms of Reference: online search engines, social media platforms and other digital content aggregation platforms."*[38]

As such, it makes sense for implementation of any recommendation that arises from the *Digital Platforms Inquiry* to be targeted to digital platforms and those business that operate in the market for the supply of digital platform services and, in contrast to the introduction of an economy wide unfair trading practices prohibition, would represent a far more measured and tailored responses that could address the issues identified.

Industry specific codes of conduct could be developed or further developed for digital platforms (either voluntary or under the auspices of the ACCC) to regulate the collection, use and disclosure of user data and other conduct undertaken by digital platforms that concerns the ACCC and consumer advocates. This would be a significant step in helping to regulate this conduct without imposing an economy wide unfair trading practices prohibition that impacts all sectors and industries.

In the Final Report of the *Digital Platforms Inquiry*, the ACCC itself recommended that a code of conduct with the Australian Communications and Media Authority (ACMA) be developed to govern the commercial relationships between digital platforms and Australian news media businesses. Details of this recommendation are set out in Appendix B to this submission. Following this recommendation, the *Australian Code of Practice on Disinformation and Misinformation* was developed and launched in February 2021.

The code currently has 8 signatories: Adobe, Apple, Google, Meta, Microsoft, Redbubble, TikTok and Twitter and requires signatories to develop and report annually on measures to address disinformation and misinformation in Australia. ACMA is responsible for overseeing the operation of the code. What this demonstrates is that if a code of conduct could be developed between an Australian regulator and digital platforms in this context, another can and should be pursued to regulate certain conduct in the consumer law context that applies specially to digital platforms without impacting other sectors.

By way of a further example, in the fitness industry in Australia, there is now the *National Code of Practice for the Health and Fitness Industry* which consolidates and streamlines the many state and territory codes and provides one point of reference for compliance, including by providing for full and proper disclosure in consumer agreements, cooling off periods and refunds or deferment where sickness or physical incapacity arises.

Such a code (along with other measures such as the consumer guarantees in the ACL) helps to prevent practices in the fitness industry where gym operators give consumers lengthy fitness contracts that the unweary might sign quickly at lunch-time before undertaking a quick introductory gym session which they thought would only cost them a month's subscription, only to find out later that the contract provided them with no effective means of cancelling the contract for years (if ever).

The *Digital Platform Services Inquiry* established after the *Digital Platforms Inquiry* recently released an interim report in which the ACCC recommended (recommendation 3) the establishment of service specific

[38] Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report*, June 2019, page 4.

codes of conduct, where several codes would be developed, one for each single type of digital platform service. As the recommendation notes

> *"this would allow flexibility to tailor the obligations to the specific competition issues relevant to that service as these change over time. These codes would only apply to 'designated' digital platforms that meet clear criteria relevant to their incentive and ability to harm competition."*[39]

This is a far more measured and tailored approach that would seek to specifically deal with each digital platform service and regulate the perceived harmful conduct specific to them. In doing so, there is no economy wide prohibition that creates uncertainty and increases regulatory risk. Rather, there is a targeted solution that seeks to specifically target and address the issues of each digital service provider.

In promoting the positives of service-specific codes, the ACCC highlights that such codes are a model that are:

> *"clear and certain, to promote investment and innovation"*[40] and

> *"would provide the flexibility to account for material differences … [and allow for the development of] measures to appropriately target the conduct that poses the greatest risk to competition, whilst reducing the risk of unintended consequences."*[41]

The ACCC also notes that such an approach allows for prioritisation so that focus can first be on developing codes for services with the most immediate and significant risks to competition and where they will have the greatest net benefit.

As the *Digital Platform Services Inquiry* continues in recommendation 4:

> *"the framework for mandatory service-specific codes…should support targeted obligations based on legislated principles to address"*[42]

various conduct including unfair dealings business users (that could be expanded to include consumers) and other anti-competitive conduct.

The ACCC acknowledges that the codes should be developed with significant consultation with industry and other stakeholders and targeted at competition issues relevant to the type of service to which the code will apply.

In its *Digital Advertising Services Inquiry Final Report* dated August 2021, the ACCC similarly suggested the development and implementation of voluntary industry standards and practices to address a number of the issues identified in that report.

This demonstrates that the ACCC is aware of and acknowledges that there are other more measured approaches that exist to address the issues of concern that primarily arise in the digital platform's context than introducing an economy wide unfair trading practices prohibition that will have major implications and reduce business investment and certainty.

In addition to being targeted and tailored, once codes have been established, they are generally easier to update and review in order to respond to new and emerging concerns about conduct that might be considered anti-competitive. As such, they are a more efficient and expedient option to pursue then introducing and amending legislation.

Option 5B - Introduce cross-industry codes

If, notwithstanding our comments above, Treasury finds that there is substantive and compelling evidence that the perceived problematic conduct of digital platform services extends to other sectors and industries, a cross-industry code of conduct should next be considered to address any issue identified by Treasury as needing to be addressed.

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[39] Australian Competition and Consumer Commission, *Digital Platforms Services Inquiry: Interim Report 5: Regulatory Reform*, September 2022, page 16.
[40] Australian Competition and Consumer Commission, *Digital Platforms Services Inquiry: Interim Report 5: Regulatory Reform*, September 2022, page 11.
[41] Australian Competition and Consumer Commission, *Digital Platforms Services Inquiry: Interim Report 5: Regulatory Reform*, September 2022, page 11-12.
[42] Australian Competition and Consumer Commission, *Digital Platforms Services Inquiry: Interim Report 5: Regulatory Reform*, September 2022, page 17.

In stating this we note that the *Digital Platforms Services Inquiry Interim Report No.5* expresses that:

> *"while unfair practices are common in the supply of digital platform services, they also occur across the broader economy."*[43]

This is used as the basis to justify the need for economy wide measures such as an unfair trading practices prohibition. Despite this comment, the ACCC does not provide any evidence to substantiate this claim and proceeds to set out examples that specifically relate to digital platforms, stating that:

> *"during the course of its inquiries, the ACCC has observed distrust and dissatisfaction from many consumers and business users about the role and behaviour of digital platforms."*[44]

A similar comment was not made with respect to other sectors.

In the circumstances, before any cross-industry code is developed, further evidence needs to be gathered (if any exists) to justify the extension of a code of conduct beyond digital platforms. The evidence should be substantial and compelling before such a code is implemented.

Option 5C – Introduce specific legislative prohibitions for digital platforms

If Treasury does not agree that the status quo should be maintained and if Treasury is not satisfied that codes of conduct of the nature discussed above will be sufficient to address the 'potential unfair trading practices' it has identified (which is difficult to see how Treasury might be without first having implemented and waited to see whether such codes do in fact satisfactorily address those practices), then the next most targeted solution to be considered by Treasury is the introduction of specific legislative prohibitions that are directed to address those specific unfair trading practices of digital platform operators.

In this regard we note that in the *Digital Platforms Inquiry Final Report,* the ACCC recommended that a number of specific legislative changes be introduced to address many of the unfair trading practices identified in that report. These recommendations are set out in Appendix B to this submission and involved the following amendments to the *Privacy Act 1988* (Cth):

- 16(a) Update the 'personal information' definition;
- 16(b) Strengthen the notification requirements;
- 16(c) Strengthened consent requirements and pro-consumer defaults;
- 16(d) Enable the erasure of personal information;
- 16(e) Introduce direct rights of action for individuals;
- 16(f) Introduce higher penalties for breach of the Privacy Act.

The SCCA has no objection in principle, if first assessed according the principles outlined above as being appropriate and warranted, to the above amendments to the *Privacy Act 1988* (Cth) (noting that the SCCA has not sought to individually assess each of the same discussed above in the section concerning good regulation).

Further, drawing on the past positive experiences with the consumer guarantee provisions of the ACL (sections 51 to 63) and industry specific legislation such as the Retail Leasing legislation, it should be possible to introduce other specifically directed prohibitions and regulations to address each and every one of any other presently unsatisfactorily regulated 'potentially unfair trading practice' identified by Treasury.

Option 2 – Amend unconscionable conduct

Applying the principles for introducing legislation discussed above, Treasury should only need to consider further possible options for reform if it does not agree that the status quo should be maintained and if it concludes that neither specific codes of conduct nor specific regulation of the nature discussed above will be sufficient to address the 'potentially unfair trading practices' it has identified.

If Treasury comes to this conclusion (which is difficult to see how Treasury might come to this conclusion without having waited to see whether such codes and specific regulation can in fact satisfactorily address those practices) and it decides that wider, more generic reform is required, then Treasury should next consider option 2, being possible reforms to the exiting unconscionable conduct prohibition.

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[43] Australian Competition and Consumer Commission, *Digital Platforms Services Inquiry: Interim Report 5: Regulatory Reform*, September 2022, page 8.

[44] Australian Competition and Consumer Commission, *Digital Platforms Services Inquiry: Interim Report 5: Regulatory Reform*, September 2022, page 44.

This again would be a far more reasonable and proportional approach to any perceived problems than the introduction of new general prohibitions related to unfair trading practices into the ACL.

A consideration of the existing unconscionable conduct provisions in the ACL (and any consideration of the reforms that might usefully be made to those provisions) starts with section 20 of the ACL and an understanding of the history which led to the introduction of section 51AC of the *Trade Practices Act 1974* (Cth) (the predecessor to sections 21 and 22 of the ACL). Section 20 of the ACL provides:

> *"A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the underwritten law from time to time."*

In *Louth v Diprose* (1992) 175 CLR 621 at 637, Deane J conveniently summarised the requirements of the unwritten law to obtain relief against unconscionable conduct as follows:

> *"(i) a party to a transaction was under a special disability in dealing with the other party to the transaction with the consequence that there was an absence of any reasonable degree of equality between them and*
>
> *(ii) that special disability was sufficiently evident to the other party to make it prima facie unfair or "unconscionable" that the other party procure, accept or retain the benefit of, the disadvantaged party's assent to the impugned transaction in the circumstances in which he or she procured or accepted it."*

In terms of what constitutes a special disability, the seminal statement of the law is that of Justice Fullagher in *Bromley v Ryan* (1956) 99 CLR 363:

> *"The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other."*

In equity (and under section 20 of the ACL) a person will be under a special disadvantage if there are circumstances seriously affecting the ability of that person to make a judgment in his or her own best interests.[45]

In equity, a disadvantage more "special" than merely taking advantage of a superior bargaining position is required. For instance, in *ACCC v CG Berbatis Holdings Pty Ltd* [2003] HCA 18, Chief Justice Gleeson said:

> *"Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence. It is neither the purpose nor the effect of s51AA to treat people generally, when they deal with others in a stronger position, as though they were all expectant heirs in the nineteenth century, dealing with a usurer."*

Appreciative of the above, in 1998 section 51AC of the *Trade Practices Act 1974* (now sections 21 and 22 of the ACL) was introduced to address the very "*problem of small businesses facing power imbalances while dealing with larger commercial entities*".[46]

Section 21 of the ACL provides:

> *"A person must not, in trade or commerce, in connection with:*
>
> *(a) the supply or possible supply of goods or services to a person; or*
>
> *(b) the acquisition or possible acquisition of goods or services from a person;*
>
> *engage in conduct that is, in all the circumstances, unconscionable."*

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[45] *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.
[46] Philip Tucker, "*Unconscionability: The hegemony of the narrow doctrine under the Trade Practices Act*" (2013) 11 *Trade Practices Law 78* as cited in SA Franchises Report at [42].

It is now generally accepted that the term "unconscionable" in section 21 is to be interpreted more broadly than the interpretation developed by the courts of equity.[47] Certainly this was parliament's intention as set out in subsection 21(4) of the ACL.

Given that the legislative aim of section 51AC (and hence section 21) was to provide small business with effective remedies against unconscionable conduct in their dealings with "big business" and that there is specific reference in section 22(3) to "*the relative strengths of the bargaining positions of the supplier and the business consumer*", it seems clear that section 21 applies to suppliers of goods and services not only when dealing with someone under a "*special disability*" recognised by the unwritten law but also when dealing with someone in a weaker commercial position because of the legal and financial situation which they find themselves.

It has however recently been held that section 21 does not dilute the gravity of the equitable concept of unconscionable conduct, that is, a special disadvantage must still be present to establish that there was unconscionable conduct and mere imbalance in bargaining position will not be enough.[48]

The issue has therefore become what more than the mere use of a superior bargaining power is required to constitute unconscionable conduct since the mere taking advantage of a better bargaining power is the stuff of ordinary robust commerce and does not of itself convey unconscionable conduct.[49] As the High Court said in *ACCC v CG Berbatis Holdings:*

> *"unconscionable conduct is concerned with an inability to protect one's interests, not simply an inability to get what one wants".*

Further, as the ACCC has previously recognised, *'it is unlikely that simply having a stronger bargaining position will make conduct unconscionable. It appears that how the party in the stronger bargaining position uses that advantage will be the deciding factor. Therefore, the strength of the bargaining position may be examined in combination with other factors listed in section 51AC(3)(b)-(k). If it is the strength of one party's bargaining position that allows that party to behave in an oppressive fashion this may evidence unconscionable conduct.'*

In considering whether conduct is unconscionable, the focus is on the conduct of the stronger party in attempting to enforce or retain the benefit of a dealing with a person under a special disability which might include an inferior bargaining position. Typically the perpetrator needs to have been guilty of some sort of victimisation or exploitation of a vulnerability for their conduct to be held unconscionable. The concept of unconscionability in section 21 of the ACL looks to the conduct of the stronger party in attempting to take advantage of a disadvantaged person in circumstances where it would be inconsistent with equity or good conscience that he or she should do so.

The relevant conduct needs to be not in good conscience, irreconcilable with what is right and reasonable and be such as to attract a level of judicial reproach to support the grant of relief. It is conduct that is far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience.[50]

> *"Section 21 does not have the consequence that any breach of the norms underpinning commercial laws or those expressed in codes of conduct or prevailing business standards becomes a contravention of the ACL…. Rather, unconscionable conduct is characterised by a substantial departure from that which is generally acceptable commercial behaviour. It is a departure which is so plainly or obviously contrary to the behaviour to be expected of those acting in good commercial conscience that it is offensive."*[51]

The evaluation of conduct must be reasoned and enunciated by reference to the values and norms of society and to the range of reasonable commercial practices. The characterisation of conduct as unconscionable is not to be made by a process of personal intuitive assertions or idiosyncratic notions of commercial morality.[52]

As such the characterisation by the courts of conduct as unconscionable therefore sits comfortably with the Separation of Powers doctrine discussed above.

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[47] *ASIC v National Exchange Pty Ltd* [2005] FCAFC 226; (2005) 148 FCR 132; *ACCC v CG Berbatis Holdings Pty Ltd* [2000] FCA 1376 per French J; *Auto Masters Australia Pty Ltd v Bruness Pty Ltd* [2002] WASC 286; (2003) ATPR 46-229 per Hasluck J.
[48] *ACCC v Kobelt* (2019) 267 CLR 1 (per Gageler J).
[49] *Paciocco v Australia & New Zealand Banking Group Ltd* (2106) 333 ALR 569 (Keane J).
[50] *ACCC v Kobelt* (2019) 267 CLR 1 (per Gageler, Nettle, Gordon & Edelman JJ).
[51] *ACCC v Geowash Pty Ltd (No. 3)* (2019) FCA 72.
[52] *ACCC v Woolworths* (2016) ATPR 42-528 (Yates J).

The ACCC itself has said:

> *"conduct will only be considered unconscionable when it goes beyond the mere 'cut and thrust' of everyday business so that it is harsh or oppressive. Conduct which is merely 'unfair' will generally not be sufficient to establish that unconscionable conduct has occurred*".[53]

It is not necessary for the party who has benefited from a transaction challenged as unconscionable to itself have created the special disadvantage. It is sufficient if that party knows, or ought to have known, of the other party's handicapped situation and takes unfair of the opportunity presented.

Whether or not conduct is unconscionable is a decision to be made on the facts, having regard to all relevant circumstances reasonably foreseeable at the time of the alleged contravention.[54]

In determining whether conduct is "unconscionable" under section 21 of the ACL, section 22 of the ACL encourages (but does not require) regard to be had to the matters set out in section 22, including "*the relative strengths of the bargaining positions of the supplier and the customer…and whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services…".*

It is not permissible to take an atomistic approach, taking each of the factors in section 22(1) and consider them separately.[55] As the ACCC has said:

> *"It is also important to note that the court will determine whether a business has engaged in unconscionable conduct by considering all of the circumstances. In isolation, each of these factors may not amount to unconscionable conduct. However, when considered together the court may consider that the conduct was unconscionable."*[56]

Pecuniary penalties of up to $50 million in the case of a corporation and up to $2.5 million in the case of an individual may presently be imposed for contravention of the unconscionable conduct provision of the ACL.

Suggested amendments

In many ways the concept imbedded in what the courts have regarded as unconscionable (i.e. one party taking advantage of the other parties disadvantage) fits neatly with the problems identified in the Consultation RIS and the *Digital Platforms Inquiry Final Report* which involves those platforms and e-traders typically taking advantage of information asymmetries, them controlling the interaction and the user interface and the fact that it could be unreasonable for the consumer in the circumstances to take the time to either read or seek to understand the terms and conditions the supplier wishes to impose. As such, we suggest the following amendments to the unconscionable conduct provision:

22 Matters the court may have regard to for the purposes of section 21

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***supplier***) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the ***customer***), the court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the customer; and

(aa) whether one party controls the commercial interaction between the parties by reason of controlling the user interface;

(b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the customer was able to understand or might reasonably have been expected to read and understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics or unfair trading practices were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services…

[53] *A small business guide to unconscionable conduct*, ACCC, May 2005.
[54] *Australian Consumer Law* sections 21(1),(3).
[55] *ACCC v Medibank Private Ltd* [2018] FCAFC 235.
[56] *A small business guide to unconscionable conduct*, ACCC, May 2005.

The first of these amendments would make control, or a lack thereof, over the commercial interaction by reason of controlling the user interface a factor to be explicitly considered in determining whether or not the conduct was unconscionable (a disadvantage that may be taken advantage of). The explicit reference to control over the user interface recognises that this is a prominent component of the 'potentially unfair trading practices' identified in the Consultation RIS.

The second of these amendments would similarly empower the Courts to treat, as a special disadvantage that might unconscionably be taken advantage of, the fact that say the good or service being supplied was being supplied for free or for a minimal sum such that no reasonable purchaser might be expected to read a 20 page complexly drafted document setting out the terms and conditions of the supply to acquire it – being a fact that supplier would have been well aware of when including a provision that allows the business to collect and sell the consumer's data. Such an inclusion could also cover scenarios where a consumer purchases a product (e.g. a gym membership) and simply agrees to the terms and conditions without having the reasonable opportunity and time to read and consider the agreement.

The third of the above amendments inserts reference to unfair trading practices along with unfair tactics into the matters the court can consider to determine whether a party has acted unconscionably.

In making these factors that the court may consider, this will have the effect of broadening the circumstances under which a court could find that a person was under a "special disadvantage" (because of say the lack of time and opportunity they had to review the agreement; because of who controlled the commercial transaction) and therefore find that the unconscionable conduct prohibition was breached.

A simple amendment could be also made to introductory words to section 22 of the ACL by changing the provision so that instead of it setting out the "matters that the court may have regard to" for the purposes of determining whether a party has engaged in unconscionable conduct under section 21 of the ACL, the provision could be amended so that it sets out the "matters that the court must have regard to."

In making this simple amendment, the courts discretion will be limited, and judges would be forced to consider all of the matters set out in section 22 of the ACL. The risk, however, of making such an amendment might be to make proceedings brought under section 21 more costly to prosecute and for judgments to be delayed whilst the judge takes into account all of these factors, some of which the parties and the judge might otherwise reasonably have treated as irrelevant to the case at hand.

Treasury may wish to accept some or all of our suggested changes to the unconscionable conduct provision. We would be happy to discuss our suggestions further with Treasury.

Unconscionable, not unfair

The SCCA opposes any proposal to amend the unconscionable conduct provisions of the ACL that would dilute the gravity of the equitable concept of unconscionable conduct. Such an amendment would simply be a deceptive attempt, under another name, to introduce a new general prohibition on "unfair conduct".

If such a prohibition were to be introduced, it should squarely be called "unfair conduct" and not bear the name "unconscionable conduct". For the reasons set out in this section, Treasury should be very reticent to recommend the introduction of a new general prohibition on "unfair" conduct.

In 2008, a Senate Committee Report recommended against replacing the word 'unconscionable' with 'unfair' acknowledging that, whilst this may lower the threshold for courts, the Committee cautioned that such amendments:

> *"are sweeping in their application, affecting all commercial and consumer activity and would create obligations and uncertainties for legislatures, regulatory bodies and the courts."*[57]

Lawyer Kate French suggested in her article that;

> *"while unconscionable conduct is a high threshold to meet, lowering the standard to unfair may lower the bar too far, and may place too onerous a burden on business to comply."*[58]

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[57] Commonwealth of Australia, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974*, December 2008, page 43.

[58] Kate French, *Unconscionable conduct: An unconscionably high standard? An assessment of whether an unfair trading practices prohibition should be introduced to capture conduct engaged in by digital platforms,* Australian Journal of Competition and Consumer Law, 29(4), 241–257, November 2021, page 256.

Treasury may receive criticism of the suggestion to amend the unconscionable conduct provisions in the limited manner referred to above. This criticism is likely to be along the lines of submissions received in the past that:

> *"The problem with section [21] … is that the section has not been effective despite its broader remit.*[59]
>
> *…there have been few decided cases were a finding of unconscionable conduct has been made under section [21]. While conduct may be, in some cases, harsh, unfair or even oppressive, the unconscionability threshold, it seems, is rarely satisfied.*[60]
>
> *As the court's starting point for such inquiry is an aversion to setting aside bargains … where hard bargaining is the accepted norm, it seems the instances where unfair business conduct will be regarded as unconscionable will remain few.*[61]

The SCCA and its members suggest that Treasury should be very reluctant to accept or endorse these criticisms of the existing section 21. Certainly, Treasury should undertake its own critical analysis in accordance with the principles it identifies for regulation as suggested at the outset of this submission.

First, the success of section 21 should not be judged on the basis of the number of 'scalps' hanging from the ACCC's belt. The true success of a law is its success in changing behaviour so that 'scalps' are not necessary.

Businesses, including our members now spend significant resources on education and compliance courses for their staff to ensure that their staff are aware of their legal and ethical obligations in dealing with other commercial parties. No business wants to be accused of acting unconscionably.

As the Productivity Commission has found: "*while there is a relatively limited case history pertaining to unconscionable conduct claims, threat of action under unconscionable conduct provisions appears to have had an influence on market conduct*".[62]

The fact that there are relatively few cases run before the Courts under section 21 is also not surprising. It is good litigation practice, that ought to be encouraged, to first seek to rely on the other provisions of the ACL such as the misleading and deceptive conduct provision and for the unconscionable conduct provisions only to be used as a catch–all provision of last resort, where the particular conduct does not readily fall within one of the other more easily defined and proven provisions.

To prove misleading or deceptive conduct (where it exits) is relatively straight forward whereas to prove unconscionable conduct you need to consider (and hence a claimant is put to proof as to) all the circumstances. As one commentator has said:

> *"The review of authorities tends to suggest that allegations under the section are being used as a type of safety net or catch-all way of describing the conduct of a lessor over a range of spectra, some lawful conduct and some not. As shall be seen, the plea of unconscionability by retail lessees in most cases failed. In many instances, it appeared to be a last ditch effort to preserve the rights of lessees who were otherwise in breach of their own respective obligations or an attempt to resurrect rights (for example, option rights) which no longer existed."*[63]

Further as the ACCC has said:

> *"Unconscionable conduct provisions seek to prohibit actions that are unreasonable and offending of good conscience in the circumstances. Such behaviour is frequently listed as a source of dispute between tenant and landlord. However, once the facts of the case become evident, the dispute typically relates to a more straightforward matter such as rent arrears, maintenance or lease renewal. Disputes involving unconscionable conduct are not widespread and rarely proceed to court."*[64]

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[59] SA Franchises Report at [43]; see Frank Zumbo, "*Promoting Fairer franchise agreements: A way forward?*" (2006) 14 *Competition and Consumer Law Journal* [127]-[145].
[60] WA Franchises Report at [9].
[61] WA Franchises Report at [9].
[62] Productivity Commission Inquiry - Retail Tenancy Market; Submission by Shopping Centre Council of Australia p [178].
[63] *Unconscionability in commercial leasing - Distinguishing a hard bargain from unfair tactics?* by Sharon Christensen and WD Duncan.
[64] *The Market for Retail Tenancy Leases in Australia - Productivity Commission Draft Report* (2007).

Both a strength and weakness of the unconscionable conduct provisions is their breadth. As the ACCC said in its submission to the Productivity Commission:[65]

> *"… [Unconscionable conduct] generally presents as a complex web of interlinking accusations and claims (i.e. misleading and deceptive conduct, harassment and coercion, misrepresentations) and personal grievances that require intensive, time consuming investigations to untangle the legally relevant facts."*

In terms of the heart of the problem with unconscionable conduct (as perceived by the ACCC and consumer advocates), the SCCA does not agree that the current unconscionable conduct prohibition is being interpreted too restrictively or that this interpretation ought to be relaxed.

Rhetorically one asks, what is wrong with a business in Australia only been punishable by fines in the hundreds of thousands or millions of dollars where its conduct:

- goes "*beyond the mere 'cut and thrust' of everyday business so that it is harsh or oppressive;"* and
- involves *"a substantial departure from that which is generally acceptable commercial behaviour".*

Why should a trader in Australia be subject to such penalties where its conduct is not so far outside societal norms of acceptable commercial behaviour that its conduct does not warrant condemnation as conduct that is offensive to conscience?

Consistent with the Separation of Powers doctrine, the doctrines of freedom and sanctity of contract and the proper role of the judiciary, as Kate French outlines in her article:

> *"since the introduction of statutory unconscionability, the courts have shown a reluctance to intervene in commercial transactions except where conduct is particularly egregious. This has been in part due to the desire for commercial certainty and to prevent the courts from overriding contractual terms which have been agreed freely between parties. Courts have traditionally been unwilling to intervene or substantially alter agreements parties have entered into freely."*[66]

Courts (and governments) should continue to be reluctant to intervene in commercial arrangements.

The courts evaluation of conduct should continue to be reasoned and enunciated by reference to the values and norms of society and to the range of reasonable commercial practices. The courts should only intervene where the conduct at issue falls well outside those values, norms and that range of practices.

The characterisation of conduct as unconscionable should continue not to be made by a process of personal intuitive assertions or idiosyncratic notions of commercial morality.

The *Kobelt* decision is not a decision which favours the introduction of a laxer standard than unconscionable conduct. In that case there was a substantial divergence of opinion across the eleven judges who looked at the matter in relation to whether on the particular facts of the case Mr Kobelt's conduct was unconscionable conduct.

Four judges found that there was unconscionability due to the power imbalance, the lack of transparency and understanding of the transaction, the tying of the community members to the store and the creation of a prolonged dependence, that the conduct was not necessary to protect the legitimate interests of Mr Kobelt and that there were other alternative business models that could have protected these interests. Seven judges, including the majority of the High Court, disagreed.

Mr Kobelt was forced by ASIC to defend himself all the way to the High Court against a charge of unconscionable in circumstances where there could reasonably be such a divergence of opinion as to whether his conduct was unconscionable, particularly in circumstances where it was not contended that Mr Kobelt exerted undue influence over his Anangu customers or that he systematically acted in bad faith. Nor was there any evidence of general complaints being made by Mr Kobelt's customers. Mr Kobelt provided a service that satisfied a need for which there was not a ready alternative and there was even evidence that some customers found features of his system attractive.

The divergence of opinion in the *Kobelt* decision highlights the risks in introducing a prohibition into the ACL that is centred on an inherently more subjective and vague term than "unconscionable" such as "fairness".

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[65] Productivity Commission Inquiry - Retail Tenancy Market; Submission by Shopping Centre Council of Australia.

[66] Kate French, *Unconscionable conduct: An unconscionably high standard? An assessment of whether an unfair trading practices prohibition should be introduced to capture conduct engaged in by digital platforms,* Australian Journal of Competition and Consumer Law, 29(4), 241–257, November 2021, page 245.

Such a test would require judges to a greater degree to make their own subjective assessments and will only result in more outcomes that lack clarity, certainty and predictability. Just because the adjective might change does not mean that the judicial reasoning will.

All things considered, the amendments we suggest above to the unconscionable conduct prohibition, namely amendments to the factors set out in section 22 of the ACL and making them mandatory considerations, would be a reasonable and considered approach if Treasury does not accept that the status quo is the best option or that specific industry codes or regulation would be sufficient.

Options 3 and 4 – Introduce an unfair trading practices prohibition

It is only if Treasury does not agree that the status quo should be maintained and concludes that industry specific codes or regulation and the possible amendments to the unconscionable conduct provisions discussed above are unlikely to be sufficient that Treasury might then want to consider introducing a new unfair trading practices prohibition into the ACL. As discussed below, it is the reform that carries with it the largest costs and largest risks to Australia's market economy and should thus be treated as the reform of last resort.

A 'fairness' test for business practices is too subjective

As the Consultation RIS itself recognises, the term 'unfairness' is an inherently subjective and emotive term.

Fairness means different things to different people so what one person may deem unfair conduct, another may consider to be completely fair and reasonable and forming part of legitimate commercial activity and negotiation.

> *"Fairness is like a multifaceted gem. Its appearance can vary, depending on the angle of the beholder."*
>
> — Roshani Chokshi, Aru Shah and the Song of Death
>
> *"Everyone has his own idea of "playing fair."*
>
> — J. Budziszewski, What We Can't Not Know: A Guide
>
> *It's not fair!" is the mantra not of the poor and oppressed but of the rich and spoiled… When life is perpetually unfair in your favor, it is tempting to believe that you deserve it."*
>
> — Shawn Davis, The Talk: A Young Person's Guide to Life's Big Questions
>
> *" … our idea of fairness is self-centered"*
>
> — Tony Warrick
>
> *"Fairness is a term that is interpreted different ways. For the government, fair is whatever suits their needs."*
>
> — Kenneth Eade, The Spy Files
>
> *"Everyone cares about fairness, but there are two major kinds. On the left, fairness often implies equality, but on the right it means proportionality —people should be rewarded in proportion to what they contribute, even if that guarantees unequal outcomes."*
>
> — Jonathan Haidt, The Righteous Mind: Why Good People Are Divided by Politics and Religion
>
> *"What's fair ain't necessarily right"*
>
> — Toni Morrison, Beloved

Respectfully, we submit that a broad ranging unfair trading practices prohibition based on the word "unfair" would conflict with the Rule of Law and Separation of Powers doctrine discussed in this submission. Both of these doctrines require that all laws should set down clear and identifiable standards, which are capable of being interpreted and applied correctly and consistently by the courts, without wide judicial discretion on matter of subjective merit which require arbitrary or prerogative judgment.

A broad ranging unfair trading practice prohibition would conflict with these doctrines by including a vague term or terms which would give considerable discretion to judges to make determinations based on their own perceptions and personal notions of 'fairness', rather than clear and consistent standards. Judges applying their usual skill set and manner of thinking (with likely little relevant commercial experience or training) would not be well suited to adjudicating upon such a prohibition.

For the SCCA and its members, the heightened uncertainty and risk that is associated with a general unfair trading practices prohibition would makes forward planning increasingly difficulty. It would also encourage a far more cautious and risk-averse approach to decision making which would stifle innovation, creativity and

investment. We expect that such adverse consequences would be replicated in other industries across the Australian marketplace.

In Appendix H to this submission and below, we have sought to illustrate, through two examples, some of the practical effects of the uncertainty that would come with an unfair trading practices prohibition on our sector. We invite Treasury to carefully consider these examples.

It is not possible to more prescriptively define a 'fairness' test for business practices

It cannot be assumed that the problems associated with the term 'fairness' may be solved by inserting a more prescriptive definition of the word 'unfair'.

The concept of fairness is not capable of an unambiguous definition that is suitable for judicial determination and the imposition of penalties (especially in a business-to-business context).

Using the unfair contract terms regime as an example, consider the attempt in section 24 of the ACL which defines unfair as follows:

> *"(1) A term of a consumer contract or small business contract is unfair if:*
>
> *(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and*
>
> *(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and*
>
> *(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.*
>
> *(2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:*
>
> *(a) the extent to which the term is transparent;*
>
> *(b) the contract as a whole…"*

In a business-to-business commercial context (more so than in the context of simpler business to consumer standard form contract) the assessments of:

- whether there is a significant imbalance in the parties' rights and obligations arising under a contract between two or more businesses; and
- whether the impugned contractual term is one that is reasonably necessary to protect the legitimate interests of a party advantaged by it;

are by their very nature commercial evaluations which may involve the consideration and balancing of a broad range of complex commercial issues, interests, factors and nuances. They are not evaluations of the nature that judges are typically well qualified to make. Nor are they evaluations by which a person's conduct should be judged or penalised since they are not capable of being known to everyone, so that everyone can comply (since persons may legitimately have substantially divergent views on the same).

Take, for instance, a shopping centre retail lease which, as one of its 100+ terms, contains a provision for the relocation of a tenant to another location within the applicable shopping centre in the event of the landlord making a decision to proceed with a substantial redevelopment of that centre.

The assessment of whether this clause causes a significant imbalance in the parties' rights and obligations arising under a contract between two or more businesses would require regard to be had to all of the terms of the contract and potentially a commercial assessment of:

- the rent and outgoings payable under the lease;
- the term of the lease but for the relocation clause;
- what would be a market rent under a lease without a relocation clause and for this term;
- any notice requirements to be given under the lease prior to the tenant being required to relocate;
- any obligation on the landlord to pay relocation costs;
- any requirements obligations under the lease for the tenant to incur fitout costs both in the initial premises or the relocated premises;
- any contribution that the landlord might have made to these fitout costs;
- the actual fitout costs a tenant might reasonably be expected to operate for the applicable tenancies;

- any contributions the landlord might be obliged to make for any loss of trade while a tenant is being relocated;
- the quality and attributes of the existing leased premises (in terms of exposure to relevant customer traffic);
- the relative quality and attributes of any premises to which the tenant might be relocated;
- the rent and outgoings payable for the relocated premises relative to the original premises;
- the circumstances in which the landlord might seek to exercise the relocation clause (for what developments, effecting which premises, and at what stage of the development process);
- the tenants rights to quiet enjoyment under the lease and not to be subject to disturbance;
- the term of the lease if the relocation clause is exercised relative to the term of the lease;
- any rights of the tenant to elect to terminate the lease rather than be relocated
- the mechanisms under the lease for the resolution/mediation of any of the costs to be payable.

The assessment of whether the impugned contractual term is one that is reasonably necessary to protect the legitimate interests of a party advantaged by it would again require regard to be had to all of the terms of the contract (including any other terms of the contract which might be relied upon) and a commercial assessment of:

- most of the matters discussed above plus;
- the age and state of repair of the existing shopping centre;
- the need for the shopping centre to be redeveloped to remain current and attractive to customers;
- the terms and expiry dates of other tenancies within the centre;
- the interests of the other tenants at the centre and what needs to be done to retain them;
- the costs of any likely redevelopment;
- the likely profitability of such redevelopment;
- the likely costs incurred should there be delays with the redevelopment;
- any contracts the landlord might have with other tenants, builders etc for such redevelopment to take place
- any town planning constraints, including timing constraints, imposed on any proposed redevelopment,

To put a judge in a position to make these assessments, the parties would likely need to provide extensive evidence from industry experts across a diverse range of fields of expertise.

It would then be left to the judge, who likely has had no relevant experience in making a commercial decision to lease and run a shop or to operate and develop a shopping centre, to decide whether the applicable contractual clause causes a significant imbalance in the parties' rights and obligations arising under that contract and is reasonably necessary to protect the legitimate interests of a party advantaged by it. This is notwithstanding that the parties to the contract had already agreed to the applicable term and most likely themselves have far more applicable experience than the judge.

Yet under subsection 24(4) of the ACL, if applicable, the clause is to be presumed by the judge not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by it, unless that party proves otherwise. When you consider the above example, it is easy to appreciate why judges themselves have over the years been very reticent to interfere with the business judgment of directors and others (except where there have been clear conflicts, breaches of good faith and decisions made that no reasonable director might have made).

The uncertainty and risk generated by using the term 'unfair' in the unfair contract terms regime is even more amplified when using the standard of fairness to regulate and assess conduct. This is what an unfair trading practices prohibition proposes to do.

In many ways regulating and passing judgement through the lens of 'fairness' is much simpler with respect to written agreements and provisions than it is for general conduct. When assessing unfair contractual terms, the parties and the courts at least would be making an assessment about the words on a paper and apply judicial reasoning as to whether the term is unfair in the circumstances.

Judging conduct against a prohibition on 'unfair trading practices' would be a far more uncertain and problematic exercise and would create significant regulatory risk and uncertainty for business. As the regulatory risk for business increases, their ability to invest and innovate (i.e. generate jobs and productivity for the broader economy) becomes more and more difficult.

Need for certainty

Any new law which introduces a broad ranging unfair trading practices prohibition into the ACL will give rise to considerable uncertainty and confusion within the broader business community and create doubt as to the efficacy, enforceability and integrity of existing commercial arrangements.

Any laws that generate uncertainty and lack proper reasoning tend to simply increase red tape and regulatory risk without generating the supposed benefits that the regulation or law is meant to deliver.

Commercial parties want laws such that in any given situation both parties seeking legal advice as to their rights and obligations can expect the same clear and confident answer from their advisers with the result that they can plan with confidence and neither will be tempted to embark on long and expensive litigation in the belief that victory depends on winning the sympathy of the court.

This is why Australian legislatures have historically steered clear of using the term "fair" as a legal norm or standard (rather than leaving it a desirable principle underlying the law) in relation to commercial transactions.

By way of example, take the relocation clause discussed above and the conduct that this allows.

Unless a shopping centre owner and landlord has certainty that it can rely on a relocation clause and can be confident that they have conducted themselves in a 'fair' way during negotiations over the relocation clause and /or when they are undertaking the relocation process, an unfair trading practices prohibition makes it very difficult for that owner and landlord to operate with certainty and increases the risks associated with proceeding with any significant redevelopment of the shopping centre.

The shopping centre owner faces the prospect of having prepared to undertake such a redevelopment only to find the project is delayed while it waits for a court to determine whether they conducted themselves in accordance with a highly subjective and uncertain unfair trading practices prohibition.

In the interim, its local government planning consent might have expired, and it might find that its builder is no longer available or has gone bust (including because it had not been able to undertake this redevelopment that it had been planning on). The substantial upfront investment that would by then have been incurred by the shopping centre owner would have been put on hold for years without any satisfactory return for investors, including for the mum, dad and superannuation fund shareholders of the shopping centre owner.

The retailers generally at the centre may have suffered. Existing retailers at the centre may have suffered by reason of the centre not being able to be refreshed and it not drawing the customers it would otherwise have. Other retailers who had planned to enter the centre might have their own plans thrown into disarray and any costs associated with implementing those plans wasted. Jobs would also be lost for retail workers and shopping centre workers. Litigation may then ensue between these retailers and shopping centre owner.

Consumers will also have lost something by not having, in a timely fashion, access to a modern, redeveloped shopping centre and any increased or different product or service offering from that was proposed to be offered by the new retailers at the centre. The project managers, builders, architects and all the trades that they support would suffer by not being able to proceed with the redevelopment work that had been planned. Again, the shopping centre owner may face legal proceedings from these affected parties.

Having a law that gives someone the right to claim that the conduct undertaken by a business in negotiating a contract was 'unfair' or that allows a person to claim that the conduct the business undertook in the performance of that contract was 'unfair' can substantially impact not just the parties to that contract but many others whose well-being and interests depend on that contract proceeding.

In part, the above example shows that the existing definition in section 24 of the ACL is unsatisfactory because it is limited to a consideration of the legitimate interests of the party advantaged by the particular clause and does not take into account all of the interests of the other affected parties who have a vested interest in the complainant honouring the agreement that they signed. Notwithstanding this, the even greater concern is that the uncertainty is even more amplified when it comes to the regulation of conduct which is what an unfair trading practices prohibition would do.

Little comfort can be drawn from the proposition that over time the courts will develop a body of case law and precedents which will provide greater certainty as to the operation of the new law and its application to particular conduct. By its very nature the new law will result in court decisions that will necessarily be confined to the individual circumstances of each case and from which little future guidance will be able to be derived or guiding principle distilled.

Consider, for instance, the experience in Australia with unconscionable conduct. Despite unconscionable conduct being a concept known and applied by the courts for centuries and being conduct which the courts have said resembles an "*elephant*" in that *"it is impossible of simple or exhaustive definition …* [but] *is nevertheless easily recognisable when presenting itself*[67], in the *Kobelt* decision there was a substantial divergence of opinion across the eleven judges who looked at the matter in relation to whether on the particular facts of the case Mr Kobelt's conduct was unconscionable conduct. Four judges found that there was unconscionability whilst seven judges, including the majority of the High Court, did not.

Because any new broad ranging unfair trading practices prohibition will, like the existing unconscionable conduct provisions, require regard to be had to all the circumstances, any decision will be heavily dependent on the particular facts of the individual case such that past cases are unlikely to be of much precedential value. Such decisions are likely to be very subjective.

With the introduction of a more inherently subjective and unfamiliar broad ranging concept based on unfairness, it will only be the case that there will be more and more cases where parties are forced to defend conduct in circumstances where there is a legitimate divergence of opinion as to whether the applicable conduct was unfair.

With subjectivity comes uncertainty which is extremely problematic for business productivity, innovation and commercial activity.

A history of arguments against the term 'unfair' to regulate conduct

It is of course both academically and historically naïve to suggest that the introduction of laws based on fairness would be something new. Most laws in Australia already have an underlying policy objective of being fair.

The suggestion to introduce such a fairness law requires little thought or ingenuity. Why, as a suggestion, it should be rejected, involves more thought and realistic appraisal.

Over the millennia, after much considered thought and deliberation, it is somewhat comforting to note societies have instead elected to introduce more specific and clear laws that are intended to achieve fairness but where the relevant test is not fairness. This has required more work and a conscious decision by parliaments across the world to fulfil their legislative responsibility and to not abdicate the same to the courts (in the form of judicial discretion).

As one commentator has said:

> *"Most people would agree that it is undesirable for judges to decide that business conduct is unconscionable simply by reference to idiosyncratic or personalised notions of fairness and justice unguided by law, as some kind of misguided "individualised justice", "discretionary remedialism", or abandonment of "principle" for "pragmatism"."*[68]

In Australia, the inclusion of 'fairness' as a legal norm/standard in transactions between businesses has been thoroughly examined on many occasions and there is good reason why it has not been introduced.

Since the enactment of the *Trade Practices Act 1974* (Cth), there have been a significant number of major reports or proposals to amend the law to strengthen the regulation of unfair business practices.

On the introduction of a general prohibition against unfair conduct like that contained in the USA, the *Swanson Committee Report* of 1976 concluded that:

> *"The Committee considers that a general prohibition of 'unfair' conduct, as contained in the U.S. Federal Trade Commission Act, could, under Australian conditions, result in a considerable degree of uncertainty in commercial transactions. Accordingly, we are strongly of the view that a like prohibition should not be incorporated into the Trade Practices Act at this time."*[69]

In 1979, the *Blunt Committee* stated that it saw a law prohibiting 'unfair' business conduct as going further than, and not being compatible with, the provisions of Part IV of the *Trade Practices Act 1974*. This was

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[67] *Babcroft Pty Ltd v Goebel Pty Ltd*.
[68] *The expansion of fairness-based business regulation - unconscionability, good faith and the law's informed conscience* by Bryan Horrigan (2004) 32 ALBR 159.
[69] Commonwealth of Australia, *Trade Practices Act Review Committee Report to the Minister for Business and Consumer Affairs*, August 1976, page 67.

because those provisions regulate conduct according to its competitive effect and not, as a law based on 'fairness' would, on its morality.

In 1997 the *Reid Committee*, inconsistently with the other committees referred to in our submission, concluded that:

> *"6.57 The Committee believes that it is necessary to amend the Trade Practices Act 1974 to provide a general statutory standard of fairness in commerce broader that the present equitable doctrine of unconscionability."*[70]

> *"6.73 …The Committee recommends that Part IVA of the Trade Practices Act 1974 be amended by repealing the existing Section 51AA and incorporating a new provision proscribing unfair conduct in commercial transactions. …"*[71]

In relation to the concerns raised about such an amendment creating uncertainty and any unfairness standard being taken advantage of the *Reid Committee* said:

> *"6.40 …The presumption would remain that a contract and a transaction should stand unless it could be demonstrated that there are good reasons to the contrary. This would remain a significant hurdle. The costs and the risks involved in such an action would remain as significant barriers to vexatious actions. Further, the remedies the courts are likely to order would be the minimum necessary to remove the perceived unfairness."*

It is clear from the above, that the *Reid Committee* was not considering introducing a general unfair trading prohibition where, upon challenge, a contract was presumed to be a standard form contract and a contractual clause was to be presumed not to be reasonably necessary to protect the legitimate interest of the party seeking to rely upon it. Nor was the *Reid Committee* considering a situation where substantial penalties might flow from a breach of that prohibition.

In response to this report, the government of the day elected to persist with the term 'unconscionable conduct' rather than 'unfair conduct' as proposed by the *Reid Committee*.

In 2004, the majority of the *Economics Reference Committee* (in its report flowing from its Small Business Review) stated:

> *"3.28 …Unfortunately, however, 'unfairness' remains a legally ambiguous concept. Its dictionary definition leads directly back to consideration of what is equitable or just, which in turn would suggest attention back to the equity doctrine of unconscionability."*[72]

> *"3.32 On balance, the Committee considers that introducing a concept of 'unfairness' to s.51AC carries a serious risk of making the section unworkably ambiguous, by calling on concepts with an unclear legal meaning. It is not clear that 'unfair' would represent a lesser test that 'unconscionable' or that such a provision would enhance protection for small business. …"*[73]

The minority of the *Economics Reference Committee* stated:

> *"20. Government Senators welcome the fact that the Majority Report makes no recommendation for the introduction of vague new statutory language into s.51AC ('harsh', 'unfair' etc.). It is our belief that the consequence of doing so would make the meaning of the section so open to a variety of different interpretations that it would be inimical to the development of a coherent and relatively clear body of law. Furthermore, the transactional uncertainty which the introduction of such language would produce would have undesirable consequences for commerce, the social cost of which is difficult to assess. Paradoxically, it is likely to be the very persons whom the section is designed to protect (ie, person in a position of relative weakness in a transaction) who would suffer most from such transactional uncertainty)."*[74]

In 2008, the *Senate Standing Committee on Economics* stated in its report:

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[70] Commonwealth of Australia, *Finding a balance – towards fair trading in Australia,* May 1997, page 176.
[71] Commonwealth of Australia, *Finding a balance – towards fair trading in Australia,* May 1997, page 181.
[72] Commonwealth of Australia, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, page 35.
[73] Commonwealth of Australia, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, page 36.
[74] Commonwealth of Australia, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, page 85.

5.55 "The Committee does not recommend inserting a statutory definition of 'unconscionable conduct' or 'good faith', or replacing the word 'unconscionable' with 'unfair'. It agrees that in principle, all these proposals have merit insofar as they would give the courts the tools to lower the current threshold for section 51AC cases. However, the committee cautions that these amendments are sweeping in their application, affecting all commercial and consumer activity and would create obligations and uncertainties for legislatures, regulatory bodies and the courts."[75]

Also, in 2008 the Productivity Commission, in its *Review of Australia's Consumer Policy Framework*, noted that:

"existing consumer laws deal adequately with most instances of unfair practices and conduct."[76]

The same report identified a gap in provisions relating to unfair contract terms which has since been addressed with the introduction of the Unfair Contract Term (UCT) regime into the ACL, which has recently been expanded and now includes penalties for breaches of the UCT regime.

The Productivity Commission released a further report in 2008 examining *The Market for Retail Tenancy Leases in Australia*. As part of this Report, the Productivity Commission explored the options for clarifying unconscionable conduct one of which was including notions of fairness in the unconscionable conduct provision. The Report concluded that:

"Attempting to legislate what constitutes a 'fair transaction', and what does not, is inherently difficult and is likely to add further uncertainty to the meaning of unconscionability and potentially constrain the efficient operation of the market as returns to superior bargaining skills are eroded, costs of disputation are increased and the efficiency of investment is diminished by increased uncertainty."[77]

The Commission also concluded that introducing regulations relating to 'fairness' in business-to-business transactions could lead to 'moral hazard'. *"Businesses would be afforded greater protection when undertaking negotiations or in a business transaction, increasing the likelihood of bad decision making through the reduced negative consequences of such decisions*".[78]

"If you spend your life waiting on the train to fairness, you'll miss your flight to greatness."

— Ray A. Davis

"If this was a parable, I guess the lesson would be that life isn't fair but if you complain sometimes you get free things."

— R. Eric Thomas, Here for It; Or, How to Save Your Soul in America: Essays

Whilst this Report is now 15 years old, the rationale remains the same. Assessing conduct through notions of fairness is difficult, increases uncertainty and will lead to negative outcomes for business and productivity.

More recently, New Zealand examined options for expanding protections for businesses and consumers against unfair commercial practices. As part of this process, the Ministry of Business, Innovation, and Employment (MBIE) looked at introducing an unconscionable conduct prohibition, prohibition against unfair contract terms and a probation against unfair commercial practices similar to what exists in the European Union.

In opting against introducing an unfair commercial practices prohibition like that which exists in the EU, MBIE noted the following about the term 'unfair':

"what is considered to be unfair is subjective – something regarded as unfair by one business may be regarded simply as robust commercial negotiation by another. Such negotiations form a key part of healthy competition and can lead to benefits for consumers."[79]

[75] Commonwealth of Australia, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974*, December 2008, page 43.
[76] Commonwealth of Australia, *Review of Australia's Consumer Policy Framework*, April 2008, page 139.
[77] Commonwealth of Australia, *The Market for Retail Tenancy Leases in Australia*, March 2008, page 212.
[78] Commonwealth of Australia, *The Market for Retail Tenancy Leases in Australia*, March 2008, page 212.
[79] Ministry of Business, Innovation and Employment, *Impact Statement: Protecting businesses and consumers from unfair commercial practices*, 20 June 2019, page 6.

As a final example, we note that there have been numerous academic and journal articles and opinions by legal practitioners that explore the topic of unfair trading practices and the introduction of notions of fairness in regulating business conduct.

In comparing whether the introduction of an unfair trading practices prohibition would lead to courts finding differently to how they have been finding in unconscionable conduct cases, lawyer Kate French concludes in her article that:

> *"…an unfair practices prohibition will not result in any additional clarity given the equally subjective nature of any assessment of what constitutes "unfair" conduct."*[80]

The head of Gilbert + Tobin's Competition and Regulation practice, Elizabeth Avery, expressed a similar sentiment in a panel discussion with ACCC Chair, Ms Gina Cass-Gottlieb and Chair of the Consumers' Federation of Australia, Gerard Brody, held on 14 February 2023 noting that introducing a legislative standard of 'fairness':

> *"would introduce uncertainty for clients who otherwise comply with the legislative prohibitions due to an additional ill-defined standard",* and
>
> *"warned against the risk of a vague unfairness regime chilling competition".*

Ms Avery also questioned whether the outcome of cases such *Kobelt* would have been decided differently merely because the adjective was 'unfair' and not 'unconscionable.'[81]

Fairness should not be used to regulate conduct now

The above demonstrates half a century of history where legislators, experts, academics, and legal practitioners have concluded that introducing notions of fairness with respect to regulating business conduct would be highly problematic, based on the fact that the term 'unfair' is subjective, lacks a concrete definition, and is open to attacks that it is opaque.

We respectfully submit that now is not the time to ignore this history and introduce an 'unfair trading practices' prohibition in Australia.

Australia's experience with the UCT regime

In Australia we have of course already dabbled with the introduction of the unfair contract term provisions in the ACL. As discussed above sections 23 to 28, which apply to standard form consumer and small business contracts can be relied upon to render void unfair contract terms and now also include penalties for breach. These provisions, at least as so far as they apply to consumer contracts, came into effect from 1 January 2011. A review of the experience in Australia with these provisions is instructive.

The most obvious thing to note of this experience is that there have only been a very limited number of cases where consumers and small businesses have sought to rely on these provisions over the last 13 years. Our recent Lexis Nexis CaseBase search of cases involving section 23 of the ACL since 1 January 2011 reveals there have only been 50 such cases Australia wide – a number of which were interlocutory decisions or which record settlements. Of these 50 cases, 27 were brought by the ACCC or a like government body.

By way of contrast, our recent Lexis Nexis CaseBase search of cases involving section 18 of the ACL (the misleading and deceptive conduct provision) reveals that there have been 1,397 such cases since 1 January 2011. The vast majority of these cases did not involve the ACCC or a like government body. Section 18 of the ACL, like section 23, came into effect on 1 January 2011.

Now again, as with the statutory unconscionable conduct provision (section 21), the success of section 23 should not be judged on the basis of the number of 'scalps' hanging from the ACCC's belt. It is true success is in changing behaviour. That said, the very limited number of cases over the last nearly 13 years suggests that the introduction of a broader general prohibition on unfair trading practices into the ACL is not likely to present most unfairly treated persons with an attractive means of obtaining relief.

Certainly as discussed above, most of the 'potentially unfair trading practices' identified in the Consultation RIS, would result in standard form contracts being entered into and would involve consumers such that they

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[80] Kate French, *Unconscionable conduct: An unconscionably high standard? An assessment of whether an unfair trading practices prohibition should be introduced to capture conduct engaged in by digital platforms,* Australian Journal of Competition and Consumer Law, 29(4), 241–257, November 2021, page 242.

[81] Gilbert + Tobin, *Unfair Trading Practices: ACCC Chair Gina Cass-Gottlieb at G+T*, 21 February 2023.

would already be the subject of section 23 redress. And yet, despite the claimed prevalence of such unfair trading practices, we have seen very few cases involving section 23 of the ACL.

The reason for this seems obvious. Where the sums involved are low (as they tend to be with e-commerce transactions particularly with free software) and the true damage done to a consumer is largely unknown and difficult to assess (as it is where personal data has been shared for marketing purposes), why would that consumer throw away good money making a claim which is very likely to costs tens of thousands (or hundreds of thousands) to prosecute where they are only likely to recovery nominal damages.

Further, where a consumer (or small business) is minded to make a claim, why would they seek to make a claim under section 23 rather than section 18 where it is pertinent. To prove misleading or deceptive conduct (where it exits) is relatively straight forward, whereas to prove that a contract is unfair (like with unconscionable conduct) you need to consider (and hence a claimant is put to proof as to) all the circumstances. As discussed above, in many (if not most) cases where there is said to be unfair trading practices, misleading and deceptive conduct is involved.

A review of the experience in Australia with the unfair contract term provisions in the ACL (sections 23 to 28) over the last 13 years therefore strongly indicates that the introduction of a general prohibition on unfair trading practices into the ACL is most unlikely to present most unfairly treated persons with a realistic and viable means of obtaining relief (particularly where the unfair trading practices are of the nature discussed in the Consultation RIS).

What such a broader general prohibition would, however, do is present well cashed up "consumers" and, supposed "small business" with the opportunity to challenge contracts (and the conduct that occurs in reliance on that contract) that they have freely and willingly entered into whenever they regard it as advantageous for them to do so. Such entities will have the funds to commence litigation and may see gain in leveraging off the opportunity presented by such a prohibition and the uncertainty it creates.

Given the economic reality that a general prohibition on unfair trading practices in the ACL is unlikely to present most of the relevantly unfairly treated persons with a realistic and viable means of obtaining relief, we can only assume that the real driver behind the ACCC and others pressing for introduction of a such a general prohibition on unfair trading practices is to increase the range of conduct in respect of which penalties might be imposed by the ACCC.

We note that in this regard, in its *Digital Platforms Inquiry Final Report* (when recommending in recommendation 20 the introduction of general prohibition against unfair contract terms), the ACCC said:

> *"…the ACCC believes that the current UCT provisions do not provide sufficient deterrence. This recommendation would allow the ACCC to hold businesses (including digital platforms) to account for including UCTs, not just have UCTs declared void (as is currently the case). The ability to seek pecuniary penalties for the use of UCTs will provide a greater deterrent against their use".*
>
> *"The ACCC Deputy Chair Mick Keogh has stated that 'lacking a legal impediment, and without fear of financial penalties, businesses have an incentive to include potentially unfair terms in their contracts".*

We also note in January 2023, in the forward to the 2023 edition of *Miller's Australian Competition and Consumer Law Annotated*, when commenting on the developments over the past year in consumer protection and fair trading and the successes of the ACCC, Ms Cass-Gottlieb states from the outset that *"in recent years the Courts have imposed significantly higher penalties on corporations for consumer law breaches"*. After making reference to various penalties of $60 million, $44.7 million, $21 million, $14 million and $33.5 million, the ACCC chair states *"these significant enforcement outcomes together with serious penalties send a strong deterrence message raising the disincentives to contravening conduct".*

For the ACCC, the introduction of a general prohibition against unfair trading practices, supported by penalties, seems to be primarily about changing the cost calculus for business when determining whether to engage in certain conduct or not by dramatically increasing the risks and potential costs of adopting the former approach.

If this is the objective of the ACCC and others, then the immediate question becomes whether it is appropriate to impose substantial penalties on the basis of a breach of a general prohibition on unfair trading practices.

In Australia, as yet, we have no experience with the application of penalties to a law where a fairness test is used to establish whether there was breach given penalties have only recently begun to apply to breaches of unfair contract term provisions in the ACL.

As we noted earlier, there are a number of policies that require a guilty mind, the presumption of innocence and that the prosecutor satisfies elevated standards of proof where significant penalties are sought to be

imposed. We consider that each of these policies is relevant to assessing the option of introducing a general prohibition on unfair trading practices that is to be supported by a substantial penalty regime.

First, we would suggest that before a substantial penalty should be able to be imposed for a breach of a general prohibition on unfair trading practices the ACCC should have to prove a "fault requirement" (a "mens rea" or "guilty mind"). If there has been no moral culpability (e.g a business did not appreciate its conduct was "unfair" and reasonable minds might differ that its conduct was "unfair") no substantial penalty should be able imposed.

Currently penalties cannot be imposed under the ACL for misleading and deceptive conduct under section 18 in acknowledgement of the fact that whether conduct is misleading or deceptive is a question of fact and intent is not directly relevant. A business may breach section 18 innocently.

We suggest that a business in Australia should only been punishable by fines in the hundreds of thousands or millions of dollars where its conduct:

- goes "*beyond the mere 'cut and thrust' of everyday business so that it is harsh or oppressive;"* and
- involves *"a substantial departure from that which is generally acceptable commercial behaviour,"*

such that the trader would or should have appreciated in advance that its proposed conduct would or would likely be susceptible to such punishment. Introducing a general prohibition for unfair trading practices with a satisfactory "fault requirement" brings us back to the existing test for unconscionability.

Ultimately it will typically be shareholders, including mum and dad investors and their superannuation funds, who will bear the brunt of any substantial penalties imposed by the ACCC and the courts. Why should their investments and retirement plans suffer where they invested in a trader who otherwise acted within bounds of the law but who is subsequently judged as not acting fairly notwithstanding that they operated within the range of generally acceptable commercial behaviour.

It is not a satisfactory answer to say it does not matter whether, in theory a general prohibition on unfair trading practices might catch conduct not worthy of penalties, because the ACCC in its collective wisdom and good sense will not in practice seek the imposition of such penalties. A broader law will simply ensure that the ACCC has the power to ensure that nothing egregious slips through the cracks.

The reason that this is not satisfactory is in part because there would then be a real risk that businesses in Australia will take an overly conservative position and not engage in normal and worthwhile commercial conduct, thus stifling innovation and investment.

The ACCC also ought not be burdened with the exercise of a discretion to determine retrospectively on a case-by-case basis what conduct does not warrant prosecution and what conduct is more serious and warrants the imposition of civil penalties. Rather the Parliament, and not the ACCC, was popularly elected to determine these questions and to do so prospectively, such is the doctrine of the Rule of Law.

Further it cannot be assumed that the ACCC is, and at all times in the future will be, intuitively and objectively capable of acting as the gate keeper and determining on a case-by-case basis which conduct is offensive and which conduct is not and when to prosecute and when not to prosecute. This is notwithstanding that the SCCA and its members have high regard for the ACCC and its members and notwithstanding that the SCCA and its members recent experiences with the ACCC have been very positive. Personnel at the ACCC might change and excessive power (such as the power of discretion to determine which unfair conduct is sufficiently unfair to warrant the imposition of penalties in the tens of millions and hundreds of millions of dollars) could be misused.

By way of example, in the past, in relation to medical practitioners rostering, in applying the then existing s4D of the *Trade Practices Act* (which does not require proof of a substantial lessening of competition), the ACCC was heavily criticised for *"making a mess of it in health"* by massively overreacting *to "relatively minor behaviour by doctors"* in reaching agreement between themselves as a roster *"to get a night off"*.

Dr Kerryn Phelps, then President of the Australian Medical Association, claimed that, by its heavy-handed approach*, "the ACCC has effectively put an end to after-hours anaesthesia services in the private sector in Australia, hindered the supply of VMO services to public hospitals, hindered the supply of rural GP medical services, and is in the process of significantly reducing the supply of rural obstetric services"*.

In 2003, the Dawson Committee said the ACCC's use of the media *was "one of the issues most frequently raised with the Committee"*. *"The common theme underlying these complaints was that the manner in which the ACCC released information and made comments to the media was neither balanced nor impartial and carried with it the danger that the Corporation or individual involved might be denied procedural fairness in proceedings yet to be determined. In short, the suggestion was the ACCC engaged in trial by media."*

In the future, with a change in personnel or attitude, there is a risk that the ACCC's ability to justly and fairly make decisions as to what conduct is inoffensive and what conduct justifies a civil penalty will be compromised. Parliament should not put the ACCC in this position by abdicating its responsibility to set the hard boundary between what is and what is not legal.

It cannot be assumed that the ACCC's exercise of discretion will be adequately checked by the judiciary. As stated above, the function of the courts is to apply the law. If conduct breaches an overly lax law, then the courts will be obliged to find so even if, as a matter of policy, that conduct ought not have breached the law and even if the ACCC ought not have prosecuted that beach. It is true that the courts exercising their judicial power are likely, at the end of the day, to seek to fit the severity of their sentences to the circumstances of the offence. This, however, provides limited comfort for those who need a higher level of comfort and certainty (for the reasons discussed above).

Whether corporations face very substantial civil penalties should not be left to the whim of the ACCC. Rather than abdicating its legislative responsibilities, parliament should itself determine (and legislatively prescribe in concise terms (and not by the current proposed wide terms)) what conduct warrants the imposition of civil penalties and what does not.

Reflecting the above, the *Law Council of Australia Trade Practices Committee* said that:

> *"The critical issue for competition law [and the imposition of civil penalties] is to draw the line between lawful and unlawful conduct in a way which ultimately enhances competition and which is consistent with sound economic principles. The additional challenge for criminalising anti-competitive conduct is to define the elements precisely, so that the moral reprehensibility of the offence is clear."*

Overseas "Unfairness" Regulation

In addition to Australia's own introduction of the unfair contract term provisions in the ACL, Treasury in its Consultation RIS identifies a number of examples around the globe where laws exist which are said to introduce a general prohibition on unfair trading practices.

As we have respectfully outlined throughout this submission, just because other jurisdictions have an unfair trading practices prohibition, does not mean that Australia should necessarily follow suit as this ignores the already existing laws that we have around regulating business conduct and the historical and political context as to why other jurisdictions have introduced an unfair trading practices prohibition.

A 2008 Productivity Commission Report stated the following about the use of the term 'unfairness' in the US:

> *"the application of the US provisions — the most mature broad law against unfairness — has periodically raised major concerns, due to changing interpretations of unfairness."*[82]

To illustrate this point, in July 2021, the Federal Trade Commission (FTC) withdrew the 2015 bipartisan *Statement of Enforcement Principles Regarding "Unfair Methods of Competition"* under the FTC Act. This occurred following a change in the composition of the FTC. In November 2022, a new statement was issued that abandoned the rule of reason approach previously adopted by the FTC and instead took a different approach to interpreting and applying the FTC including the notion of 'fairness'.

In a dissenting statement issued by Commissioner Christine S. Wilson, Commissioner Wilson expressed that the new statement:

> *"resembles the work of an academic or a think tank fellow who dreams of banning unpopular conduct and remaking the economy"*[83] and

> *"hedges on whether business justifications for conduct will be considered,"*[84]

thus creating a large degree of uncertainty and risk for business.

The continued changing interpretations and ideas of what the term 'fairness' means (including in jurisdictions such as the US where fairness has long been established as a term used to assess conduct in the competition

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[82] Commonwealth of Australia, *Review of Australia's Consumer Policy Framework*, April 2008, page 141.
[83] Christine S. Wilson, *Dissenting Statement of Commissioner Christine S. Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act",* 10 November 2022, page 2.
[84] Christine S. Wilson, *Dissenting Statement of Commissioner Christine S. Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act",* 10 November 2022, page 11.

law context) is particularly concerning for our members as our members require certainty so that they can operate in an efficient and effective manner and are able to make decisions and forward plan with a reasonable degree of assurance.

Businesses need to be able to assess risk and make informed decisions about their conduct, but introducing notions of fairness into competition law to regulate conduct makes this extremely difficult given the subjective and ever-changing nature of the term 'fairness'.

In the Discussion Paper released by the MBIE ahead of the development of the proposal to increase consumer and business protections in New Zealand, MBIE noted that:

> *"Caution also needs to be taken to ensure that measures to protect individual businesses [and consumers] do not over-reach and unduly inhibit competition or economic growth."*[85]

Further, in the policy decision document released by the New Zealand Government, it was stated that:

> *"it is not the role of government to protect consumers or businesses from all practices that they consider to be unfair, or any transaction that they might ultimately regret. We also want to make sure that any measures to protect individual businesses [and consumers] do not over-reach or unduly undermine commercial certainty and ensure that honest businesses can continue to compete effectively, negotiate firmly, and freely enter into contracts that reflect their wishes."*[86]

These were important factors taken into account by the New Zealand Government in deciding not to pursue an unfair commercial practices prohibition based on the European Union example. In reaching this conclusion, the policy decision paper outlined that:

> *"We do not favour a European Union-style unfair practices prohibition on the basis that it would have the most uncertain, and potentially far-reaching, impacts."*[87]

Treasury should consider this very recent decision by New Zealand and reflect on the fact they decided not to pursue a European Union-style unfair practices prohibition (ie a general and specific prohibition that applies to consumers), because of the fact that it would likely have far reaching consequences and it would be a disproportionate response to the policy problem identified.

Reverse onus of proof

The SCCA and its members are particularly concerned to ensure that any general unfair trading practices prohibition that is introduced (in respect of which substantial penalties might be imposed) does not undermine one of the core tenants of Australian law discussed above, which is that a party is innocent until proven guilty and that the party alleging the conduct is the party that needs to prove the alleged conduct.

It is increasingly becoming the case, including in competition law, that the party that is alleged to have performed the conduct is presumed guilty until they prove that they are innocent and did not conduct themselves in the way that is alleged.

For example, section 24(4) of the ACL states that a term in a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise. As a result of this provision, in an unfair contract term dispute, a business who is being accused of including an unfair contract term in a consumer contract or small business contract needs to prove that a term is not unfair and is reasonably necessary to protect a legitimate interest, thus shifting the burden of proof onto them.

This can have particularly perverse results, and not in any way justifiable, where the standard form contract involved was one drafted by or is based on a contract drafted by industry associations or by representatives of both sides of the transactions (such as the ISDA Master Agreement and the Law Society contract discussed above), such that it cannot be said that the relevant issues is 'peculiarly within the knowledge' of the accused.

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[85] Ministry of Business, Innovation and Employment, *Discussion paper: Protecting businesses and consumers from unfair commercial practices*, December 2018, page 17.
[86] Ministry of Business, Innovation and Employment, *Unfair Commercial Practices: Policy Decisions*, August 2019, page 3.
[87] Ministry of Business, Innovation and Employment, *Unfair Commercial Practices: Policy Decisions*, August 2019, page 5.

It makes no sense for the party seeking to rely on a contractual term in those circumstances to bear the burden of proof of showing why that association or those representatives considered the terms reasonably necessary to protect their legitimate interests.

We fear that an unfair trading practices prohibition will mean that anybody can alleged that certain conduct or behaviour by a business is unfair, and irrespective of how frivolous and silly a claim may be, the business will have to defend against such a claim and prove to a court or regulator that their conduct was not indeed unfair/was fair (instead of the person proving that the conduct was unfair).

A business will be required to do this and prove that they did not conduct themselves in an 'unfair' manner even though the term 'unfair' is extremely subjective and vague and has no proper legal meaning or understanding. What may be unfair to one person may not necessarily be unfair to another. This outcome would put businesses in an extremely difficult and challenging position and significantly increase the risks that they face.

We rhetorically ask:

- Why should someone be obliged to pay a significant civil penalty in respect of unfair conduct (which could be quite innocuous) unless the ACCC is able to establish on the balance of probabilities that conduct is unfair?
- Why is the Australian business community not entitled to a presumption of innocence unless and until proven guilty of each of the elements of conduct which are necessary to make that conduct offensive?
- Why should businesses be subject to massive penalties unless the moral reprehensibility of the offence is clearly established?

As such, a general prohibition on unfair trading practices or a combination of general and specific prohibitions should only be introduced as a last resort.

If an unfair trading practices prohibition is to be introduced into the ACL, then it should only be done so with exclusions and safe harbours. It should not include penalties and it should only apply to the business-to-consumer context. We examine this in more detail in the next section.

Considering the width and coverage of any reforms

The SCCA and its members are not aware of any systemic or widespread instances of unfair trading practices such as those described in the Consultation RIS occurring in the shopping centre sector or across the broader economy. This is why our members are very concerned about the suggestion in the Consultation RIS of Option 3 and Option 4 applying to all industries across Australia. As discussed above policy responses need to be proportionate to the policy problem they are seeking to address, and Option 3 and Option 4 are entirely disproportionate.

In contrast to Options 3 and 4, any policy solution that is ultimately pursed should be targeted and refined to areas where an actual issue exists. We have outlined the potential targeted solutions earlier in this submission.

The conduct referenced in the Consultation RIS mostly arises from the *Digital Platforms Inquiry.* It was in the final report of the ACCC to this inquiry which recommends the introduction of a general unfair trading practices prohibition. Respectfully, this recommendation seems to be extreme over-reach and recommends an economy wide solution to a problem that clearly applies primarily to digital platforms.

To the contrary, any Government response must identify the problem with specificity and must develop a policy solution (if one is even needed) that is targeted and tailored and minimises any unintended consequences.

The need for and likely impact of an unfair trading practices prohibition on the retail leasing

Our sector is an example of where targeted and industry specific legislation works.

Every jurisdiction in Australia has its own comprehensive retail lease legislation that governs and regulates the conduct of parties that participate in retail leasing.

Retail lease legislation seeks to provide certainty which Treasury ought to not interfere with through any recommendation it might make to introduce an unfair trading practices prohibition into the ACL.

Any law which has the potential to weaken and erode the confidence that all stakeholders have in the efficient operation of the retail leasing industry, without there being any compelling justification for the introduction of such a law, reflects bad policy.

The further regulation of retail leasing under an unfair trading practices prohibition would not only be unnecessary but also confusing and would undoubtedly lead to legal inconsistencies. It would also add yet another layer of regulation on an already well-regulated industry and undermine the existing legal framework which is mature and working well.

In 2007-2008, the Productivity Commission conducted an inquiry into *The Market for Retail Tenancy Leases in Australia*. A major aspect of this inquiry was the 'fairness' of the market for retail tenancy leases.

The terms of reference addressed matters such as "*competition, regulatory and access constraints"* on the efficient operation of the market; *"any information asymmetry between landlord and tenants"*; "*the appropriateness and transparency of the key factors"* in rent determination and rights when the lease ends; and any measures to "*improve the overall transparency and competitiveness*" of the market.[88]

The Productivity Commission considered:

> *"the market for retail tenancy leases to be operating well overall"*[89] *and that "there is not a strong case for further detailed regulation of the retail tenancy market"*.[90]

We respectfully submit that the same conclusions can and should be reached today by Treasury, and that an unfair trading practices prohibition is further regulation of the retail tenancy market that is unrequired.

We have set out further information in Appendix I.

[88] Commonwealth of Australia, *The Market for Retail Tenancy Leases in Australia*, March 2008, page IV.
[89] Commonwealth of Australia, *The Market for Retail Tenancy Leases in Australia*, March 2008, page 218.
[90] Commonwealth of Australia, *The Market for Retail Tenancy Leases in Australia*, March 2008, page 217.

Industry-specific exclusions or safe harbours

If a general unfair trading practices prohibition is to be inserted into the ACL, one solution might be to introduce specific exclusions or safe harbours which exempt prescribed industries which are mature and already heavily and satisfactorily regulated. Such a carve out would help to prevent overregulation of the industry.

Another option is to exclude conduct the fairness of which other existing commonwealth or state or territory legislation already purports to cover the field.

The SCCA has a successful history of working with Treasury and the ACCC on the introduction of such of exclusions. This included working on the inclusion of a new exemption into the ACL, namely subsection 26(1)(c)-(e) of the ACL. This subsection was recently introduced so that under the unfair contract terms regime, section 23 of the ACL would not apply to a term of a contract to the extent that the term is required, or expressly permitted by a law of the Commonwealth or of a State or Territory.

In effect, this means that if a term is included in a contract that is allowed by law, that term will not be able to be challenged as an unfair contract term under the unfair contract term regime. Subsection 26 expressly includes an example from our sector whereby a provision for termination on the ground of a proposed demolition of the building containing the leased premises is a provision that can be included in a retail lease and will not be considered unfair under the unfair contract terms regime because that is a provision that is allowed under state laws governing retail leasing.

The exemptions in section 26 of ACL are a helpful starting point for the drafting of any general prohibition of unfair trading practice prohibition.

The ACL also contains other examples of potential exemptions or carveouts for particular industries and contracts. Section 28 of the ACL operates to exclude the unfair contract terms regime from applying to certain contracts (e.g. a contract of marine salvage or towage) and section 28A has recently been introduced into the ACL which excludes the unfair contract terms regime from applying to certain contracts connected with financial markets.

If an unfair trading practices prohibition is ultimately pursued, Treasury should give due consideration to exemptions and carveouts in a similar manner to the existing exemptions set out above. For example, conduct that would be allowed under or was purported to be covered by a Commonwealth, State or Territory law should be exempt from the application of any unfair trading practices prohibition.

Exempting conduct that is permitted under another Commonwealth, State or Territory law from falling within an unfair trading practices prohibition would provide some degree of certainty for business and would help to eliminate vexatious and disingenuous litigation claims.

Exclusions for industry standard form contracts and a culture of compliance

In addition to exemptions of the nature discussed above, industry participants should be excluded from penalties where they contract on the basis of (and seek to enforce) standard form contracts that have been prepared by industry associations and the like with the help of representatives of both sides of a transaction which a view to drafting a fair and balanced contract such as the ISDA Master Agreement or the Law Society Sale of Land contract. As a minimum this should be a matter that is required to be taken heavily into account, if not conclusively, when consideration is given to whether a penalty should be imposed for that participant having entered into such a contract.

Similarly, it needs to be obligatory that the relevant parties' genuine attempts to ensure and promote a culture of compliance are taken into account.

In the shopping centre industry, in the lead up to the Federal Government extending the UCT regime to cover small businesses (with effect from 12 November 2016), there was a significant amount of engagement and pre-compliance activity between our members and the ACCC to ensure standard form lease agreements complied with the UCT regime. This included a review of standard lease agreements by the ACCC, seminars and roundtable discussions, and one-on-one discussions between the ACCC and members. The ACCC recognised this and made positive public comments about our sector following this engagement. This included commentary made by then Deputy Chair Dr Michael Schaper, that:

> *"The quick steps that have been taken by the retail leasing industry are a guide for other sectors in adequately preparing for the new unfair contract terms law. All businesses should make an effort to understand how they will be affected by the law and whether it covers any deals they are engaged in."*

More recently, in light of the UCT regime being updated so that penalties apply for a breach of the regime, the SCCA and our members undertook further engagement and pre-compliance activity with the ACCC in order to facilitate and demonstrate a culture of compliance across the retail leasing sector. Members undertook a further review and examination of their standard from and small business contracts and made necessary updates.

Despite this history, the pro-active steps taken to comply and promote a culture of compliance, and the fact that the retail leasing sector is a very settled and heavily regulated industry, our members are still concerned and uncertain as to how the UCT regime will be applied, particularly given the penalties associated with non-compliance are very significant which creates further risk and uncertainty.

Any new unfair trading practices prohibition that regulates conduct (and is not limited to the terms of the contract) will make things even more uncertain.

As such, any legislation introduced needs to provide carrots (and not just a big stick) to encourage compliance and for markets to operate as ideally as they can. Any unfair trading practices prohibition should contain exemptions (or at least explicit recognition) that industries who demonstrate and promote a culture of compliance will not be the subject of an unfair trading practices prohibition.

Capture business-to-consumer interactions only

If Treasury does ultimately recommend that an unfair trading practices prohibition is inserted into the ACL and does not recommend the exclusion of the retail leasing industry from that prohibition, we respectfully implore Treasury to recommend that such a prohibition only captures the business-to-consumer relationship and does not extend to the business-to-business relationship.

As we have sought to explain by the examples detailed in this submission, having an unfair trading practices prohibition that extends to business-to-business relationships and arrangements would be extremely problematic and create an even more significant amount of uncertainty and burden for our members than if a prohibition was introduced that only covered business-to-consumer arrangements.

The SCCA strongly opposes the introduction of an unfair trading practices prohibition that captures business-to-business relationships.

Businesses, small and large are entirely capable of protecting their own interests through:

- appropriate due diligence;
- negotiation and informed risk assessments and decision making;
- the use of external and internal advisers for guidance and advice;
- reliance on existing statutory and common law protections that are in place and available to them.

As a result, businesses are in a position to make well-informed decisions about what arrangements and agreements they should enter into and are more than capable of balancing the potential downside of unfavourable terms and arrangements against the commercial benefit of the agreement. The Government should not intervene in this process through the introduction of an unfair trading practices prohibition that captures business-to-business relationships.

Business entities, unlike consumers, already have sufficient knowledge, have access to specialist and legal advice, and have sufficient bargaining power to resolve matters and deal with their counterparts without intervention by government. In the case of small businesses, which on some occasions might not have equal bargaining power, they are usually already protected by extensive government regulation.

In our sector, the retail lease legislation of each State and Territory is designed to help support and protect small businesses and provide them with equal bargaining power and protection.

Extending protections to small businesses is contrary to the rationale that underpins the differential treatment of consumers and businesses. Businesses are in a much stronger position to identify and protect their own interests compared to consumers, and businesses have far more bargaining power when it comes to capability, advice and knowledge in comparison to consumers.

The particular issues faced by consumers in engaging and contracting with business do not similarly apply to cases of engagement and contracting between businesses. Consumers are more likely to face:

- "all or nothing" clickwrap consents that require them to agree to a voluminous terms and conditions;
- "take it or leave it" offers in the nature of standard form contracts rather than negotiated agreements;
- difficulties in obtaining legal and other expert advice for negotiating;

- an inequality of bargaining power and inability to undertake due diligence; and
- more difficulty in trying to understand and enforce their existing legal protections.

The conduct listed as examples of potentially unfair trading practices in the Consultation RIS clearly relate more to the business-to-consumer relationship and not the businesses-to-business relationship. The way personal data is collected, used and distributed and how people are informed of this is directed at contracts and conduct between business and consumers (not between businesses).

Further, contracts and conduct that tries to dissuade a party from enforcing their rights is clearly directed at supporting consumers, not businesses. As outlined above, businesses are in a far stronger position to protect and enforce their rights and are able to negotiate many of the agreements that they agree to in a way that consumers are not always able to.

Any benefit potentially afforded to more vulnerable businesses by applying consumer style protections to businesses (big and small) would be considerably outweighed by the corresponding decline in certainty and freedom of contract in commercial dealings between businesses, and the wide-ranging negative implications for business operations that will stymie innovation and investment.

How to define 'small business'

Extending an unfair trading practices prohibition to cover small businesses will be an additional regulatory burden that could have the unintended consequence of making businesses respond by preferring to only deal with larger businesses who are not afforded the unfair trading practices protection and other ACL protections.

Furthermore, the proposed definition in the Consultation RIS of what will be considered a small business (employs fewer than 100 persons or has a turnover for the last income year of less than $10 million) is problematic.

Employee count and turnover are not necessarily reflective of a company's bargaining power. Complicated and well thought out corporate structures and arrangements often mean that an entity that is the party to an agreement might meet the technical definition of a small business but in fact has the resources, knowledge, and bargaining power of a much larger business.

For example, in some transactions the contractual counterparty may be a smaller subsidiary or special purpose vehicle of the larger corporate group that it is a part of, and as such, it has access to significant resources and market share giving it much stronger bargaining power than a genuine small business. Because the party to the contract may meet the technical definition of a small business however, it would be able to rely on any potential unfair trading practices prohibition and other consumer protections in the ACL that have been extended to small businesses.

This is an extremely problematic outcome as businesses that are not genuine small business will have the ability to readily challenge contractual arrangements that they have already agreed to, and challenge conduct in circumstances where they are on an equal footing in comparison to the barging power of consumers.

Additionally, the inconsistency in definitions of what is considered a small business under legislation that governs business conduct makes compliance far more difficult and unnecessarily burdensome. For example, ASIC defines a small business as a company that has an annual revenue under $50 million, less than 100 employees, and/or consolidated gross assets of less than $25 million.

However, for taxation purposes, the ATO says that a small business entity is one that has an aggregated turnover of under $10 million whereas Fair Work Australia states that a small business has less than 15 employees, but the Australian Bureau of Statistics says less than 20 employees.

The uncertainty and inconsistency of the definition of small business in legislation would be compounded by references to "fairness" in any unfair trading practices prohibition, making compliance extremely complex.

As outlined earlier, the uncertainty and subjectivity around the definition of unfairness means that any unfair trading prohibition, especially one that is extended to cover business-to-business relationships would be very concerning for our members given unfair business-to-business conduct is difficult to define and what may be unfair to one party may be completely acceptable and reasonable to another. Such subjective views can depend on a variety of experiences and situations and *"not all conduct that businesses perceive as unfair is necessarily problematic from a policy perspective."*[91]

[91] Ministry of Business, Innovation and Employment, *Impact Statement: Protecting businesses and consumers from unfair commercial practices*, 20 June 2019, page 16.

Further, noting that the Consultation RIS refers to the actions of other jurisdictions as one of the main reasons for introducing an unfair trading practices prohibition into Australia, it should be noted that of the four (4) jurisdictions that the Consultation RIS refers to, only one (1) of the jurisdictions (the United States) extends their unfair trading practices prohibition to business-to-business relationships. As such, the application of unfair trading practices prohibitions to business-to-business relationships is not commonplace or widespread in overseas jurisdictions.

There is also a practical issue with applying any unfair trading practices prohibition to business-to-business arrangements, which is that it is difficult for businesses to ascertain whether or not the counterparty that they are dealing with is a genuine small business.

Given that the definition of "small business" is dependent on assessing a party's financials, there is often difficulty and even an inability in obtaining a counterparties financial information to confirm whether or not they are a genuine small business. This leads to further uncertainty and creates more risk for business. An unfair trading practices prohibition that extends to business-to-business arrangements will amplify this risk.

Finally, the same reasoning set out earlier in our submission as to why the status quo should be maintained applies to why any unfair trading practices prohibition should not be extended to small businesses:

- laws need to be clear and certain to facilitate compliance;
- any policy response needs to be proportionate to the problem (which should be real and not perceived), and extending an unfair trading practices prohibition to small business is unnecessary and disproportionate;
- adding unfair trading practices prohibitions into the ACL would compromise freedom of contract;
- the existing provisions of the ACL, CCA and other legislation, and the common law already cover most if not all of the conduct set out as examples of potentially unfair trading practices; and
- the prevalence of harm requiring government intervention has not been established and does not justify new legislative changes.

As a result, we believe there is no policy justification for extending protections under an unfair trading practices regime to small businesses, especially sophisticated and well-resourced businesses that might technically meet the definition of small business but are in fact part of a complex corporate structure that would mean a reasonable person would not consider them to be a genuine small business.

If Treasury is inclined to recommend the introduction of an unfair trading practices regime, such a prohibition should only cover business-to-consumer relationships.

No penalties

If Treasury does ultimately recommend and unfair trading practices prohibition, consideration should be given to initially introducing an unfair trading practices prohibition that does not include penalties.

We have discussed this earlier in our submission but wish to highlight that this would resemble the approach taken with the introduction of the UCT regime, where it was initially the case that there were no penalties for a breach of the UCT regime. If there was non-compliance with the UCT regime, the non-compliant term would be rendered void with the remainder of the contract still in force (but no penalties were applied).

It was only several years later (starting with effect on 9 November 2023) that the UCT regime was amended to introduce penalties for breach of the UCT regime as well as rendering the term void.

This staggered approach provided considerable protection to consumers and small businesses without the imposition of significant penalties on companies that were in breach (often unintentionally).

Alternatively (and /or in addition to an unfair trading practices prohibition that does not have penalties), Treasury could give due consideration to the US model where breach of section 5 of the FTC Act does not automatically result in penalties being applied, rather companies are required to provide an undertaking that they will adapt their behaviour. If they do not change their behaviour, then a penalty will be imposed on the company for the original breach and for breach of the undertaking.

Breach of section 5 does not automatically result in penalties being imposed for the breach. As outlined by *Gilbert + Tobin*, instead the Fair Trade Commission (FTC) "*can issue or threaten a complaint against a company, which will often reach a settlement including undertakings. These then have legal force and a*

breach can give rise to penalties – with a separate violation potentially arising in relation to each affected user on each day of non-compliance."[92]

An example of where this occurred is in 2019, where the FTC reached a $5 billion settlement with Facebook based on Facebook's alleged breaches of a 2012 consent order in which it had agreed to establish better privacy disclosures and protections.

Pre-implementation assurance

If an unfair trading practices prohibition is ultimately pursued against our respectful objections, a significant amount of consultation needs to occur throughout all phases of the implementation process. We acknowledge that this Consultation RIS process is an important part of that and thank Treasury for their engagement with us to date and into the future.

Consultation needs to continue throughout every step of the process so that all consequences can be fully appreciated by Treasury and that experts from each industry are able to contribute and inform the process. An economy wide unfair trading practices prohibition will impact all industries and sectors.

Comprehensive and detailed guidelines must accompany the introduction of any unfair trading practices prohibition. These guidelines need to provide practical examples of the application of any new law and should be used as part of information sessions hosted by the Treasury (noting that these guidelines have no legal force or effect). The guidelines should be detailed and provide a level of assurance to business so that businesses can plan and conduct themselves with a degree of confidence and certainty.

Finally, there should be significant lead-in time between when an unfair trading practices prohibition is passed by the Parliament and when the law ultimately comes into force. 18 months should be the minimum lead in time provided to allow businesses to prepare.

[92] Gilbert + Tobin, *Fair shake: Prohibiting unfair practices in Australia*, 21 November 2019.

Conclusion: identifying the option with the greatest net benefits

In this final section, we summarise our key arguments and recommendations throughout the submission and ultimately conclude that the best option for reform with the greatest net benefits is the status quo (option 1).

Laws should address a real (not perceived) problem and be proportionate

As with all laws, Government should only pursue competition law reform and the further regulation of business activity based on sound policy reasoning and rationale.

It is increasingly becoming the case that governments are seeking to legislate and regulate based on perceived problems or on people's feelings and views about a matter, as opposed to ensuring that an actual policy problem exists before seeking to address the matter through legislation or regulation.

While the Consultation RIS does refer to some conduct in specific areas / industries (i.e. digital platforms) that some may view as problematic and require a regulatory response, it does not identify and evidence an economy wide policy problem that requires an economy wide policy solution that would regulate business conduct across the board.

We of course support efforts that ensure businesses behave appropriately and in line with community expectations, but the Consultation RIS does not identify with substantive evidence any systemic economy wide problem that would warrant the introduction of an unfair trading practices prohibition. As such, Options 3 and 4 (which are the options being pursued by the ACCC) would be clear overreach and should be dismissed as legitimate options for consideration without first having examined the other options that we have set out in our submission.

Any policy response to a problem should be proportionate and address a real issue not mere perception.

Laws need to be clear and certain

Throughout the submission, we have outlined many significant unintended consequences that could result from the introduction of an unfair trading practices prohibition. Respectfully, these consequences need to be carefully considered and assessed by Treasury before any option other than Option 1 (the status quo) is recommended to and pursued by Government.

The increased uncertainty and regulatory risk that would result from the introduction of an unfair trading practices prohibition is very concerning and must be taken into account.

Careful consideration must be given to what is genuinely unfair conduct and what is part and parcel of general business practice. There are nuances associated with much of the conduct set out in the Consultation RIS as potential examples of unfair trading practices.

As we have outlined throughout our submission, the use of "unfair" as the standard to be applied in assessing conduct is extremely problematic given the inherently subjective nature of the term. What is unfair to one person may be completely acceptable to another. This will generate a significant number of unintended consequences for business, and the uncertainty that follows will be detrimental to business investment, innovation, productivity and job creation.

Businesses will be forced to focus on minimising risk and trying to deal with another avenue for potential litigation, much of which could be vexatious and disingenuous.

Any discussions on the potential introduction of an unfair trading practices prohibition should include consideration of how existing laws and regulations can be better enforced, rather than automatically be focused on the need to introduce new legislation and regulation.

We acknowledge that the inclusion of Option 2 in the Consultation RIS is directed at this point and as we have outlined earlier, if Treasury is not inclined to accept our recommendation that Option 1 (the status quo) is the best option or is not inclined to pursue more targeted and more tailored solutions, reasonable amendments to the unconscionable conduct prohibition should be explored.

Aside from the issue of whether or not change is required in the first place, it would be extremely unwise to pursue legislative change that would impose more costs on already compliant and upstanding businesses. This would be a fundamental policy failure. The pursuit of unnecessary regulatory change in one area could also produce a different problem elsewhere.

This is acknowledged in the Consultation RIS with reference to the fact that the introduction of an unfair trading practices prohibition would increase costs for business and, if the new prohibition were poorly framed, it would create uncertainty for both business and consumers and have an adverse effect on innovation, competition and efficiency. Ultimately, consumers will be the party that is negatively impacted the most if unnecessary regulatory change is pursued without proper accounting for and mitigation against the unintended consequences.

Commercial parties require laws that, in any given situation, ensure both parties seeking legal advice as to their rights and obligations can expect clear, confident, and consistent answers from their advisers.

The Attorney General's Department recognises on their website that a key part of encouraging access to justice is reducing the complexity of legislation. As the website states:

> *"complex legislation can create uncertainties about the law. This can impose unnecessary burdens on business and restrict the ability of those affected by the law to understand their legal rights and obligations."*[93]

The businesses and entities that were the subject of the *Digital Platforms Inquiry* and heavily referenced in the inquiry's Final Report include the likes of Google, Facebook, Amazon and Apple. The business models, practices and operations of these companies are very distinct from those in other sectors, including the shopping centre and retail leasing sector.

The status quo should be maintained

For all of the reasons outlined in this submission, the option for reform that the SCCA considers "*generates the greatest net benefit for the community, taking into account all the impacts"* and which we therefore consider should be adopted is option 1 (the status quo).

We are firmly opposed to the ACL being extended to include a new general prohibition or specific prohibitions against unfair trading practices and are of the strong belief that the status quo (i.e. Option 1) should be maintained.

Because each party to a commercial transaction is obliged to protect its own interests, the introduction of the term 'unfair' in regulating conduct is a concept that provides no meaningful guide as to how one business is to act in a particular transaction with another business, and as such, there is no evidence that the introduction of a general or specific prohibition will actually result in a significant change in business behaviour.

As noted earlier, commercial parties require laws that, in any given situation, ensure both parties seeking legal advice as to their rights and obligations can expect clear, confident and consistent answers from their advisers. Those laws should ensure neither party is tempted to embark on lengthy and expensive litigation in the belief that victory depends on winning the sympathy of the court or winning the lottery of which judge may be sitting on the bench.

Furthermore, there is no guarantee that the introduction of a term as subjective and opaque as 'unfair' to try and regulate conduct will lead to judicial outcomes that are different from what is currently occurring with respect to 'unconscionable conduct' or 'misleading or deceptive conduct'. The judicial reasoning is just as likely to apply to an unfair trading practices prohibition.

As such, an 'unfair trading practices' prohibition would be extremely flawed from the outset and would simply create significant risk and uncertainty for businesses without providing the consumer and small business protection that it purportedly is meant to achieve. The status quo should be maintained.

A broad ranging unfair trading practice prohibition would ignore the rule of law and separation of powers doctrines by including vague terms which give considerable discretion to judges to make determinations based on their own perceptions and personal notions of 'fairness', rather than clear and consistent standards.

The need for certainty is a fundamental bulwark of an efficient free market economy in which market participants can operate with confidence knowing that the contractual relationships which underpin their respective businesses and the way that they conduct their business will be binding and enforceable.

It is an extremely worrying development that a broad ranging unfair trading practices prohibition which has the potential to significantly erode confidence and certainty would be pursued, especially when there is no compelling evidence of an economy wide problem that requires an economy wide solution, and when other

[93] Australian Government Attorney General's Department, *Reducing the complexity of legislation*, 2003.

prohibitions already exist under the ACL that would capture most (if not all) of the conduct that is outlined in the Consultation RIS.

Further, freedom and sanctity of contract are cornerstone tenants of commercial activity and competition and should not be undermined without clear reasons for doing so. The overall success of the Australian economy depends on the principle of freedom of contract being upheld with little interference by government.

We respectfully submit that the issues and conduct identified by the Consultation RIS do not warrant the introduction of an unfair trading practices prohibition (i.e. intervention by government) when laws already exist that capture the conduct identified, or when more targeted policy solutions could be pursued.

Introducing an unfair trading practices prohibition would simply re-regulate conduct that is already covered by the ACL and would add another layer of regulation for no substantive benefit. The introduction of laws that overlap with existing provisions is unnecessary and increases the complexity of law. This is especially problematic in the case of the ACL which should be as simple and streamlined as possible so that it is accessible to consumers.

The introduction of an unfair trading practices prohibition would increase uncertainty for business, make the law increasingly complex to understand and open an avenue for parties to pursue unwarranted and vexatious claims.

In creating another avenue for parties to make claims (based on the subjective notion of fairness), the likelihood that there will be unmeritorious claims increases which will give rise to considerable business uncertainty and confusion, and create doubt as to the efficacy, enforceability, and integrity of existing commercial arrangements. Little comfort can be drawn from the proposition that over time the courts will develop a body of case law and precedent which will provide greater certainty as to the operation of any new provision.

By its very nature any new law regarding unfair trading practices will result in court decisions that will necessarily be confined to the individual circumstances of each case and from which little future guidance will be able to be derived or guiding principle distilled. Equally, it is small solace that regulatory authorities such as the ACCC will issue guidelines in relation to the enforcement of a new law. Such guidelines have no legal status and are not binding upon either the courts or upon individual litigants.

It is not in the interests of the public, or the Australian economy, for frivolous claims based on negligible or speculative detriment to be brought before the court, or for such a low threshold to be the basis for regulatory intervention. Not only will this impose undue costs and burden on the business community, but it will also impose heavy administrative burdens on regulators and the court system.

Any competition law reform should uphold fundamental principles for policy making and law reform.

Recommendation 1: Treasury should recommendation Option 1 to Government and maintain the status quo in making no changes to the ACL.

Summary of conclusions on the various options considered

Noting that we consider Option 1 (status quo) is the superior option, if Treasury does believe that some reform is required, then we recommend that a targeted response is pursued, such as through an industry specific code of conduct or through specific legislative prohibitions targeted at digital platforms only.

By pursuing a targeted response covering only digital platforms, there can be more certainty and surety as to the kind of conduct that is regulated, and businesses can better prepare and respond by adjusting their behaviour.

Recommendation 2: If Treasury is inclined to act, Treasury must first consider our proposed new option 5, which would be a more focussed and targeted response to any shortcomings or gaps identified, such as a service/industry specific code or highly specific legislative prohibitions that are well defined and understood and only apply to digital platforms.

The existing prohibitions and compliance tools at the ACCC's disposal are sufficient to address 'potential unfair trading practices', however if Treasury is inclined to make changes to the ACL, Treasury should first consider limited amendments to the unconscionable conduct prohibition (Option 2 of Consultation RIS).

A new overarching unfair trading practices prohibition is not required if the unconscionable conduct prohibition is amended, and further clarity is provided on what constitutes unconscionable conduct (including for the benefit of the judiciary) and able to be contested.

Our submission explains how and why this would address the perceived shortcomings of the interpretation and application of sections 21 and 22 of the ACL and extend the coverage of the unconscionable conduct prohibition.

Recommendation 3: If Treasury is inclined not to accept the status quo or pursue a targeted solution, then Option 2 – amend unconscionable conduct should be considered ahead of other changes to the ACL.

Our submission outlines that it is only if Treasury does not agree that the status quo should be maintained and concludes that targeted solutions and the possible amendments to the unconscionable conduct provisions discussed above are unlikely to be sufficient that Treasury might then consider introducing an unfair trading practices prohibition into the ACL. As discussed in our submission, it is the reform that carries with it the largest costs and largest risks to Australia's market economy and should thus be treated as the reform of last resort.

A general prohibition along with specific prohibitions would be extremely problematic and create significant uncertainty and risk for business. If Treasury does ultimately decide to pursue Option 3 or Option 4, Treasury should consider the following:

- *Account for unintended consequences:* extreme care and due diligence must be taken to ensure that it is well defined and targeted to avoid unintended consequences.
- *Industry-specific exclusions or safe harbours:* should be incorporated for industries that are highly regulated and have overlapping legislative obligations.
- *Capture business-to-consumer interactions only*: it should not be extended to cover the business-to-business context.
- *No penalties*: like with the UCT regime, no penalties should apply from the outset.
- *Pre-implementation assurance:* Prior to implementation, any new prohibition should have an appropriate lead-in time (~18 months) so that:
  - comprehensive guidance material can be developed (in partnership with industry and consumer groups), and
  - businesses can be assured of their compliance by virtue of industry-specific dialogues and compliance exercises (with the ACCC), the opportunity to conduct training and adjust business practices, and gain a clear understanding of enforcement and compliance approaches.

Recommendation 4: If Treasury does recommend a general prohibition on unfair trading practices (Option 3) or combined general and specific prohibitions (Option 4), there must be industry-specific exemptions and safe harbours, no penalties should apply and it should only cover business-to-consumer interactions.

About the SCCA

The SCCA represents Australia's major shopping centre companies.

As Treasury is aware, the SCCA has a longstanding history of engagement with Treasury and ACCC on the ACL and competition policy more generally. Broadly, we have engaged in every key stage of the development of the UCT regime since 2014 and have undertaken two retail leasing-specific pre-compliance exercises with the ACCC, in 2016 and 2023.

The SCCA is keen to engage in the consultation process further. We were grateful for opportunities to present our sectors' perspective during the roundtable discussions and in another meeting with Treasury. We make this submission with a view to formalising our feedback to date and engaging constructively to inform a Decision RIS and the perspective of Treasury.

Contact information

Appendix A – Problems identified in the Consultation Regulatory Impact Statement

Treasury paper quote	Source document
Pg 9: "Targeting of vulnerable people or groups; Dark patterns and digital engagement practices; Predatory or aggressive business conduct; Misleading omissions and hidden information; Difficulty opting out or cancelling goods or services; Limited mechanisms for redress"	No source identified
Pg 10-11: "Seemingly 'free' services or products might be provided to consumers in exchange for consumer and business data that may be sold to third parties. Digital platforms collect and use data and algorithms for multiple purposes, which may lead to personalising offers or pricing for individual consumers without their knowledge or explicit consent. This data also facilitates targeted online advertising, which underpins many of the free services offered by digital platforms… In its 2019 Digital Platforms Inquiry, the ACCC observed that enhanced data collection and increased sophistication in data analysis and consumer targeting creates the potential for significant consumer harm. Stakeholders have also raised concerns about consumer harm resulting from online designs known as dark patterns, which manipulate consumer choice and experience… The ACCC has cautioned that dark patterns present serious concerns for regulators where products are designed in a way that are exploitative, deceptive, or undermine consumer autonomy by encouraging consumers to make decisions that they would not normally make, often through an appeal to certain psychological or behavioural biases. The ACCC defines 'dark patterns' as '[e]lements of user interfaces which have been designed to make it difficult for users to express their actual preferences, or which nudge users to take certain action that may not be in their best interests'. Similarly, the OECD defines dark patterns as 'business practices employing elements of digital choice architecture, in particular in online user interfaces, that subvert or impair consumer autonomy, decision-making or choice… [that] often deceive, coerce or manipulate consumers and are likely to cause direct or indirect consumer detriment in various ways'. … The ACCC also notes that some 'dark patterns' conduct can occur offline as well…	Australian Competition and Consumer Commission, Digital Platforms Inquiry – Final Report, (Report, June 2019). Consumer Policy Research Centre, Not a fair trade: Consumer views on how businesses use their data, (Report, March 2023). Australian Competition and Consumer Commission, Digital Platforms Inquiry – Final Report, (Report, June 2019), p. 26. Consumer Policy Research Centre, Duped by Design – Manipulative online design: Dark patterns in Australia, (Report, June 2022) CHOICE, Wait, what's in my cart? The hidden cost of website 'dark patterns', (19 August 2022) Australian Competition and Consumer Commission, Digital platform services inquiry Interim report No. 3 – Search defaults and choice screens, (Report, September 2021) Consumer Policy Research Centre, Duped by Design – Manipulative online design: Dark patterns in Australia, (Report, June 2022).
Appendix B: 'The ACCC has also observed a range of practices that are significantly detrimental for consumers but which may not neatly fit under existing consumer laws. These practices are driven in part by the significant increase in the amount of consumer data now collected and the increased sophistication in data analysis and	ACCC Digital Platforms Inquiry ACCC Digital Platforms Inquiry – Final report, p. 26

consumer targeting, which also creates the potential for significant consumer harm...'	
Appendix B: 'In the DPI Final Report we recommended that the Australian Consumer Law (ACL) should be amended to introduce a prohibition on certain unfair trading practices. We remain of the view that such a prohibition would enable the ACCC to undertake strategic enforcement action to address the risk of ad tech providers, advertisers, publishers, and digital platforms collecting or using data in ways that have the potential to result in substantial consumer harm, but is conduct not captured by the existing provisions of the ACL.'	ACCC Digital Advertising Services Inquiry ACCC Digital advertising services (DAS) inquiry – Final Report, p. 41
Appendix B: 'The ACCC remains concerned with the tracking of consumers through apps. Many consumers express strong preferences for limitations on tracking, yet the data practices of apps available on the App Store and Play Store often do not align with those preferences … The ACCC continues to support the DPI Final Report recommendations regarding amending the Competition and Consumer Act 2010 to prohibit unfair contract terms (recommendation 20) and certain unfair trading practices (recommendation 21) which will benefit the many consumers who use apps.'	ACCC Digital Platform Services Inquiry – Second interim report (app marketplaces), p. 11
Appendix B: 'Some dark pattern conduct may be covered by existing prohibitions in the ACL, including prohibitions on misleading or deceptive conduct, false or misleading representations, unfair contract terms, and, in the case of extremely harmful or manipulative dark pattern practices, unconscionable conduct. However, many dark pattern and nudge practices, even those that cause considerable consumer harm, would fall outside existing prohibitions.'	ACCC Digital Platform Services Inquiry – Third interim report (search defaults and choice screens), p. 67
Appendix B: 'The ACCC continues to support the introduction of a prohibition on certain unfair trading practices to cover harmful conduct that is currently not captured by existing provisions of the Australian Consumer Law. Such a prohibition may help address issues raised in relation to data collection and use, as well as potential dark patterns or nudges on online marketplaces (which may confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions). The scope of such a prohibition should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance.'	ACCC Digital Platform Services Inquiry – Fourth interim report (general online retail marketplaces), p. 5
Appendix B: 'The ACCC has concerns about unfair trading practices on social media platforms as they often require users to agree to onerous contract terms in order to access their services. This may leave consumers vulnerable to harms arising from extensive data	ACCC Digital Platform Services Inquiry – Sixth interim report (social media services), p. 143

collection and dark patterns, discussed below. We envisage any unfair trading practice prohibition would address problematic conduct arising from power imbalances which is currently unlikely to breach the ACL.'	
Appendix B: 'Recommendation 2: An economy-wide prohibition on unfair trading practices should be introduced into the ACL… The findings of this report provide further evidence that an economy-wide unfair trading practices provision is needed.'	ACCC Perishable Agricultural Goods Inquiry, p. xvii
Appendix C – Defining dark patterns The OECD lists the following practices as dark patterns: • Forced action: forcing the consumer to do something in order to access a specific functionality. For example, forcing consumers to provide more personal information than desired (email/ phone number), requiring access to consumers' contacts in order to use a service. • Interface interference: privileging specific actions from the consumer favourable to the online business through framing of information. For example, visually obscuring important information, preselection of options by default, ambiguity or trick questions (double negatives), and 'confirmshaming' (manipulating consumers towards a particular option using emotive language/framing). • Nagging: repeated requests to consumers to do something thereby exploiting the consumers willpower or time e.g. requests to turn on notifications, or location tracking. • Obstruction: aim to make tasks or interactions more difficult than they need to be, exploiting consumer inertia or willpower e.g. making it easy to sign up to a service, or opt in for privacy intrusive settings, but hard to cancel the service or change privacy settings, or making it hard to delete an account (termed immortal accounts). • Sneaking: seek to hide or disguise the information relevant to the consumer's decision such as costs, and this may exploit sunk cost fallacy in consumers (i.e., the phenomenon whereby a person chooses not to abandon a strategy or course of action because they have invested heavily in it, even when changing the decision/action would clearly be more beneficial to them. • Social proof: triggering a decision based on observations of other consumer's behaviour. For example, notifications about other consumers activities and testimonials about recent purchases. • Urgency: real or fake temporal or qualitative limits on deals in order to pressure consumers to make a purchase, for example, language such as 'low stock', 'high demand', or countdown timers.	Organisation for Economic Co-operation and Development (OECD), 'Dark commercial patterns – OECD Digital Economy Papers – No. 336' (Report, October 2022), p. 8 Consumer Policy Research Centre, 'How Australia can stop unfair business practices – A comparative analysis of unfair trading laws in international jurisdictions' (Report, September 2022).

Appendix B – Quotes and recommendations from Treasury source materials and reports

Below we have inserted our own headings and extracted quotes from various reports and materials with a view to:

1. better understanding and describing (in the report authors' own words but in a much abridged form) the unfair trading practices said to exist in these reports and materials; and
2. identifying, in highlighted boxes, the recommendations made in those reports and materials for addressing these unfair trading practices by specific (rather than market wide) regulatory reform.

Digital Platforms Inquiry - Final Report - June 2019

A mismatch between Consumer Expectation and Industry Practices

The ACCC consumer survey found that most Australians using digital platforms consider that there should be transparency and choice in how digital platforms should collect, use and disclose certain types of user data. The majority of digital platform users surveyed agreed or strongly agreed that digital platforms should:

- tell users who they are providing personal information to (91 per cent)
- allow users to opt out of collection of certain types of information (90 per cent)
- be open about how they use data about users and assess eligibility for products and services (89 per cent)
- only collect information needed to provide their products or services (85 per cent).

Notwithstanding that consumers have different, context-dependent privacy preferences, the ACCC consumer survey has identified three categories of data practices about which consumers are often concerned: location tracking, online tracking for targeted advertising purposes, and the disclosure of user data to third parties.

Location Tracking

"Th[r]ough 'Location Services', Google pretty much knows my whole routine for the week. Time I leave home for work, route I take, where I park my car, time I leave work etc … So, I am really concerned."

Targeting Advertising

…targeted advertising is highly valued by advertisers, which consider that targeting ads to consumers that are more likely to buy a product means advertisers are more likely to get a sale per placement of an ad, which means that targeted advertising is more valuable than non-targeted, traditional advertising.

Digital platforms, which have access to large amounts of consumer data, are able to offer detailed options for targeting audience segments. For example: demographics …; activity …; interests …; location …

The large volumes of user data controlled by digital platforms may also be used in psychological profiling of users for commercial interests. …

Detailed online profiles about consumers can be used to influence their behaviour, which causes consumer harm from risks associated with manipulation and loss of autonomy.

As discussed above, the increased data collection and sophistication of analysis allows digital platforms to offer highly targeted audience segments to advertisers. This increasing ability to segment individuals, however, increases the risk that consumers can experience discriminatory or exclusionary harm as the result of this targeting.

The extensive amount of data collected by digital platforms may include data that identifies (or infers) an individual's vulnerabilities.

Recent research by the CPRC similarly notes that the collection, sharing and use of data may have special harms for children.

[Targeting advertising is possible by reason of] online tracking technologies.

Consumer tracking is a common practice and aided by a variety of online tracking technologies. The most well-known online tracking technology is online cookies, which are small text files that store information about a user's interaction with a web page.

"Online tracking is the bane of the Internet, and there is no visibility to the end user as to WHAT is being tracked, and WHO that is being shared with. Let alone consent to it."

Third Party Data-Sharing

Third party data-sharing occurs when user data is transferred from one entity to another or when one entity allows another entity to access its collection of user data. User data can be shared between digital platforms and a wide variety of third parties, including advertisers, measurement partners, researchers and academics;1433 advertising partners, data analytics providers and payment providers.

Large amounts of user data can also be shared between digital platforms and app developers. … Consumers have expressed concerns about their personal information being shared with third parties. The ACCC consumer survey found that 86 per cent of digital platform users considered it a misuse of their personal information if it was shared with an unknown third party and 83 per cent considered it a misuse of their personal information if it was shared with a third party to enable targeted advertising.

Costs Associated with Data Collection and Sharing

While consumers often do not pay a monetary price to access a digital platform, they may still incur costs when their user data is collected, used, and disclosed by digital platforms.

These costs can include increased risk of data breach and cybercrime from increased online transmission, storage and disclosure, which may result in both financial detriments, such as those associated with identity fraud, as well as non-financial detriments, such as harm to health and safety and reputational injury. Other costs include decreased privacy, potential increases in unsolicited targeted advertising and third parties leveraging information against the consumers' interests, for example by engaging in price discrimination (where it allows businesses to take more of the consumer surplus through higher prices) or targeting of scams.

The OAIC survey results indicate that more than one in 10 Australians have been a victim of identity fraud or theft and more than one in four Australians knew a victim of identity fraud or theft.

Consumer "Consents" to Use of Data

Consumers are invariably provided with a standard set of terms that are offered to all prospective users with no opportunity to negotiate with digital platforms on any specific term, including in relation to how much user data can be collected from them and how that user data may be used and shared with third parties.

Many digital platforms' privacy policies are long, complex, vague, and difficult to navigate. They also use different descriptions for fundamental concepts such as 'personal information', which is likely to cause significant confusion for consumers.

The ACCC review of terms and policies found that each digital platform's privacy policies, excluding the additional links to separate web pages, were between 2 500 and 4 500 words, and would take an average reader between 10 and 20 minutes to read.

In addition to the length of individual policies, the number of separate privacy policies for online services that a consumer encounters is also likely to be impracticably large.

Information overload describes the excess of information available to a person making a decision. …

The ACCC considers that the length, complexity, ambiguity and difficulty of navigation in privacy policies exacerbate information asymmetries between consumers and entities collecting their personal information.
Information asymmetries can occur when users cannot access the information they need because it is not made available to them, or when the relevant information is made available to consumers but they are not aware of it or are unable to understand it (for example, it may be too complex to understand).

As a result of … information asymmetries and bargaining power imbalance, Australian consumers may provide nominal consents to terms and conditions even when they are uncomfortable with them.

It is well established that most consumers do not read the terms of online standard form contracts, particularly if they are acting under time or financial constraints.

Clear and effective privacy policies are a critical first step to ensuring that consumers can engage in the digital economy.

The OECD has found that shortening and simplifying terms and conditions enhanced readability and improved consumers' understanding of and trust in terms and conditions.

The ACCC considers that these information asymmetries may be addressed by stronger economy-wide disclosure requirements regarding the collection, use and disclosure of personal information in Australia to better inform consumers of how their personal information is used across different sectors (see recommendation 16(b)).
The ACCC's view is that the information asymmetries can be addressed by amending the Privacy Act to include stronger consent requirements for entities collecting the personal information of Australians (see recommendation 16(c)).
Giving consumers, who have previously given consent to data practices, the ability withdraw their consent and request erasure of their personal information in certain circumstances would also improve the bargaining power imbalance between digital platforms and consumers (see recommendation 16(d)).
Accordingly, the ACCC considers that the disclosures of digital platforms should be subject to additional, specific regulations that target the specific issues identified in relation to digital platforms, such as requirements to provide informative, multi-layered disclosures which includes a regularly updated online notice regarding key areas of concern and interest for consumers (see recommendation 18(1)).

Effective Opt Out Mechanisms

[Digital platforms tend] …to provide users with privacy controls that do not, in practice, provide a meaningful way to opt-out of data collection.

One way is by offering privacy settings that give a user detailed user-to-user controls to protect their data from being shown or used by other users, without necessarily changing the amount of user data collected by the digital platform or available to third parties such as advertisers.

A second way to avoid providing users with meaningful controls over data collection is by providing opt-outs that does not actually opt-out users to the extent that the user might expect.

While a range of different consumer privacy preferences exist, consumers would benefit from being given a choice to opt-out of the types of data collection that concern them, in a way that best suits their own privacy preferences.

The ACCC considers that the information asymmetries regarding the purpose and effect of digital platforms' privacy controls and settings could be addressed by requiring stronger disclosures and better opt-out controls within an enforceable digital platforms code of practice (see recommendation 18(1) and 18(3)). A requirement for digital platforms to establish a time period for the retention of personal information collected outside the purpose of providing the core consumer-facing service would also assist in overcoming the status quo bias …

A Do Not Track Option

Another measure being considered in the US to strengthen privacy protections is legislation which would mandate a 'Do Not Track' option for internet users, which would allow consumers to block online companies from collecting data beyond what is necessary for their services. The proposed legislation would seek for consumers to activate this option via a one-time click in the settings on their web browser or by downloading a mobile app. In addition, companies would be banned from discriminating against users who activate Do Not Track and violations of this law will be accompanied by strict penalties.

Breach of Privacy Act Class-Actions

Under the existing regulatory framework, individuals have limited recourse against digital platforms or other firms to seek compensation for mishandling their user data or personal information.
It has also been a consistent finding of a number of legislative reviews that Australia's privacy regulatory framework does not provide consumers with adequate remedies for invasions of privacy.

Finally, consumers rights under the Privacy Act should be further strengthened by giving consumers a direct right to bring actions or class actions for interferences with their privacy under the Privacy Act (see recommendation 16(e)) and increased penalties for any breaches of the Privacy Act (see recommendation 16(f)).
The ACCC considers that deterrence against problematic data practices that interfere with an individual's privacy could be improved if individuals could directly bring actions or class actions in court for breaches of privacy and data protection laws. This could be achieved by giving individuals a right to bring an action for an interference with privacy under the Privacy Act (see recommendation 16(f)) and by introducing a statutory tort of privacy to address any serious incursions of privacy that are outside the scope of the Privacy Act.

Privacy Act and Privacy Code Recommendations

The ACCC considers that the problematic data practices of digital platforms are partly enabled by an overly-broad interpretation of the Privacy Act's principles-based model that has not been adequately designed to address the exponential increase in use, collection and disclosure of personal information in digital markets dominated by digital platforms. As such, the ACCC recommends a suite of targeted amendments to the Privacy Act to close some existing gaps in the definition of 'personal information' and to strengthen the current notification and consent requirements (see section 7.10, recommendation 16(a), 16(b) and 16(c)).
However, the ACCC notes that more generally, closer alignment of Australian privacy regulations with the GDPR's higher standards of protection could significantly increase the effectiveness of Australian privacy law and increase the accountability of entities processing the personal information of Australian consumers.

- Recommendation 16(a) Update 'personal information' definition …
- Recommendation 16(b) Strengthen notification requirements …
- Recommendation 16(c) Strengthened consent requirements and pro-consumer defaults …
- Recommendation 16(d) Enable the erasure of personal information …
- Recommendation 16(e) Introduce direct rights of action for individuals …
- Recommendation 16(f) Higher penalties for breach of the Privacy Act …

…recommendation 18 seeks to establish a Privacy Code applying specifically to digital platforms that process a large volume of Australian consumers' personal information, to proactively target concerning data practices of digital platforms identified in this Inquiry.

Recommendation 18 – OAIC Privacy Code for Digital Platforms
An enforceable code of practice be developed by the OAIC, in consultation with industry stakeholders, to enable proactive and targeted regulation of digital platforms' data practices (DP Privacy Code). The code should apply to all digital platforms supplying online search, social media, and content aggregation services to Australian consumers and which meet an objective threshold regarding the collection of Australian consumers' personal information.
The DP Privacy Code should be enforced by the OAIC and accompanied by the same penalties as are applicable to an interference with privacy under the Privacy Act. The ACCC should also be involved in developing the DP Privacy Code in its role as the competition and consumer regulator.
The DP Privacy Code should contain provisions targeting particular issues arising from data practices of digital platforms, such as:
1. **Information requirements**: requirements to provide and maintain multi-layered notices regarding key areas of concern and interest for consumers. …
2. **Consent requirements**: requirements to provide consumers with specific, opt-in controls …
3. **Opt-out controls**: …
4. **Children's data**: additional restrictions on the collection, use or disclosure of children's personal information for targeted advertising or online profiling purposes and requirements to minimise the collection, use and disclosure of children's personal information.
5. **Information security**: requirements to maintain adequate information security management systems in accordance with accepted international standards.
6. **Retention period**: requirements to establish a time period for the retention of any personal information collected or obtained that is not required for providing the core consumer-facing service.

…the ACCC recommends that an enforceable privacy code of practice should be developed and implemented for digital platforms operating in Australia (DP Privacy Code).
…it's noted that this recommendation could align with the Government's recently-announced intention to enact legislative amendments that will result in 'a code for social media and online platforms which trade in personal information'. The ACCC welcomes this proposal and any other method which could ensure that the matters proposed by this Code could be addressed by an instrument which provides appropriate enforcement mechanisms and penalties on parties to ensure effective compliance.
This recommendation for a DP Privacy Code targeting digital platforms' data practices as proposed in the Preliminary Report was supported by stakeholders including Oracle, SBS, Optus, MEAA, UN Special Rapporteur, Nine, the OAIC and key consumer and privacy advocates.
The Law Council of Australia and APF suggested that the DP Privacy Code could deal with issues relating to data analytics and artificial intelligence.
The ACCC believes the final form of the DP Privacy Code should be developed following comprehensive consultation with the digital platforms industry and other relevant stakeholders.
The ACCC considers that a DP Privacy Code dealing with the above issues would alleviate information asymmetries about personal information collection, use and shared by digital platforms, increase consumer control over their personal information, and improve protections for all consumers (including vulnerable consumers) from data-related harms.

(ii) Multi-layered notification

In addition, the ACCC also notes that this requirement should not prescribe how each of the layers must be presented to the consumer or prevent initiatives to make notifications more engaging for consumers, but instead is intended to set out a baseline of requirements for what each layer contains.
A part of this requirement, the first layer should contain concise, high-level statements regarding key areas of consumer concern and interest in relation to data collection practices (for example, data sharing practices) with more detailed information set out in subsequent layers provided to consumers.
Standardised categories or language would also help inform consumers why their data is being collected and with whom it is being shared, while avoiding information overload.
Standardised definitions could be particularly useful for consumers to describe types of third parties to whom information may be provided. For example: media companies, data analytics firms, or market research companies.

Examples of standardised categories that could be useful to develop for consumers in order to more clearly identify the types of purposes for which a digital platform could use a consumer's data could include: 'market research and product development'; 'diagnostics and troubleshooting'; 'personalised advertising', or 'personalised services'.
The ACCC considers that the scope and breadth of consumer data collected and used by digital platforms means it is appropriate to include a requirement within the DP Privacy Code that digital platforms seek consent whenever they use or disclose data for purposes other than the core consumer-facing service. This requirement means digital platforms would have to inform consumers of all the purposes they collect data that do not contribute to the consumer's use of the platform, and provide consumer control over what data they provide as part of their use of a digital platform.
By requiring consent for standardised categories, rather than every piece of 'new' information collected, the ACCC considers that this recommendation minimises the risk of 'consent fatigue', enabling consumers to engage with the data collection process and choose the level of data collection that aligns with their individual preferences. Standardised categories will also reduce the burden on digital platforms.
The draft currently before EU parliament states that, 'The methods used for providing information and obtaining end-user's consent should be as user-friendly as possible'.
The regulation states, for example:
End-users should be offered a set of privacy setting options, ranging from higher (for example, 'never accept cookies') to lower (for example, 'always accept cookies') and intermediate (for example, 'reject third party cookies' or 'only accept first party cookies').
Stakeholders have generally recommended a broad consultation process in developing a DP Privacy Code for digital platforms. … Several stakeholders support the ACCC's involvement in developing the DP Privacy Code, which is likely to need consideration of how digital platforms interact with consumers and involve broader competition and consumer protection issues.
If a DP Privacy Code were created by the OAIC, a breach of the DP Privacy Code would constitute an interference with the privacy of an individual. That means the Australian Information Commissioner may investigate and make a determination regarding the breach.

Other Recommendations

The APPs currently only require APP entities to collect personal information by fair and lawful means, but does not contain any requirement that the use and disclosure of personal information must also be fair and lawful. In contrast, comparable international jurisdictions such as the UK, EU and Canada each contain broader requirements that the collection, use and disclosure of personal information must be fair or reasonable.[94]
A new requirement for the fair use and disclosure of personal information would ensure that all handling of personal information by APP entities is underpinned by a broader obligation to act fairly and lawfully. This could mitigate some of the information asymmetries, bargaining power imbalances and behavioural biases identified in this chapter that lead to consumer harm from unfair uses of personal information such as discriminatory targeting (see further section 7.9 on consumer harms).

Sixth, the ACCC recommends that the Government should consider introducing an independent certification mechanism to monitor and demonstrate the compliance of particular APP entities collecting, using or disclosing a large volume of Australians' personal information.

In summary - Key Findings of the Report

- Digital platforms provide a wide range of valuable services to consumers, often for zero monetary cost, in exchange for consumers' attention and their user data.
- Many digital platforms can collect a large amount and variety of data on a user's activities beyond what the user actively provides while they are using the digital platform's services. Digital platforms often have broad discretions in how they use and disclose this data. …

[94] See EU GDPR article 5(1)(a), Data Protection Act 2018 (UK) section 2(1), and Personal Information Protection and Electronic Documents Act (Canada) section 5(3). See also OAIC, Submission to the ACCC Digital Platforms Inquiry, May 2019, p. 13.

- Several features of consumers' current relationship with digital platforms prevent consumers from making informed choices. They include bargaining power imbalances, information asymmetries between digital platforms and consumers and inherent difficulties for consumers to accurately assess the current and future costs of providing their user data.
- Many digital platforms seek consumer consents to their data practices using clickwrap agreements with take-it-or-leave-it terms that bundle a wide range of consents.
- These features of digital platforms' consent processes leverage digital platforms' bargaining power and deepen information asymmetries, preventing consumers from providing meaningful consents to digital platforms' collection, use and disclosure of their user data.
- Many digital platforms' privacy policies are long, complex, vague, and difficult to navigate. They also use different descriptions for fundamental concepts such as 'personal information', which is likely to cause significant confusion for consumers. …
- Many consumers would like to be able to opt-out of certain types of data practices and some digital platforms give consumers the impression that they provide extensive privacy controls. However, … in some cases, digital platforms do not provide consumers with meaningful control over the collection, use and disclosure of user data. …
- In Australia, the collection, use and disclosure of personal information is primarily regulated under privacy laws.
- The existing Australian regulatory framework for the collection, use and disclosure of user data and personal information does not effectively deter certain data practices that exploit the information asymmetries and bargaining power imbalances between digital platforms and consumers.

ACCC Digital Advertising Services Inquiry, Final Report, August 2021

Data about consumers, and their online activity, and in some cases offline activity, is important to the supply of ad tech. It enables one of the key features of the open display channel, its ability to target ads to specific consumers. This section outlines why ad targeting is valuable, how ad tech providers gather or access data about consumers, and how they are able to build consumer profiles using this data to target ads to consumers. It also discusses some of the potential consumer harms that can arise from targeting.

Ad tech providers are able to build profiles on consumers' demographics and interests from data that they collect or access from a wide range of sources. These generally fall into two broad categories: first-party data and third-party data that ad tech providers use to collect data.

Many ad tech providers rely on data provided by third-parties to provide targeting services as they do not operate the consumer facing services that allow them to gather data directly from consumers.

To combine data from various datasets on individual users to create these profiles, ad tech providers need to be able to identify the same user in different datasets. Ad tech providers are able to do this by matching and connecting unique identifiers associated with consumers.

For example, ad tech providers and other digital platforms, which have broad discretions to collect and use consumers' data without consent (or potentially without consumers understanding fully what they consented to when they used a service or made a transaction) can give rise to consumer harms from increased profiling, the potential for price discrimination and exclusion, and risks to vulnerable consumers.

The use of data collected to deliver highly personalised and targeted ads to vulnerable consumers, including children, for alcohol, gambling, or unhealthy food and beverages.

The ability of consumers to understand the use of their data through ad tech and make informed decisions that reflect their true preferences, which one stakeholder submits cannot be fully addressed through improved consent practices or an unfair trading prohibition.

5.7 Recommendations

In the Interim Report, the ACCC made three proposals which could be used to address concerns about the transparency of the pricing and performance of ad tech services:

Implementation of a voluntary standard to enable full, independent verification of DSP services. This involved industry developing a voluntary standard which would enable advertisers to fully and independently assess DSP services and encourage competition.

Implementation of a common transaction ID to allow a single transaction to be traced through the entire ad tech supply chain. This proposal involved industry implementing a common system in which each transaction in the ad tech supply chain would be identified with a single identifier.

Implementation of a common user ID to allow tracking of attribution activity in a way that protects consumers' privacy. This recommendation involved industry developing and introducing a secure common user ID. Here, ad tech providers would be required to assign to any data used for attribution purposes.

Following the Interim Report and consideration of further information and submissions from stakeholders, the ACCC makes the following recommendations:

Recommendation 4: industry should establish standards to require ad tech providers to publish average fees and take rates for ad tech services, and to enable full independent verification of demand side platform services. This addresses transparency issues across the supply chain.

Recommendation 5: Google should provide publishers with additional information about the operation and outcomes of its publisher ad server auctions. This proposal is to address Google-specific transparency concerns around the information available about its publisher ad server auctions.

Recommendation 6: The ACCC should be given powers to develop and enforce rules to improve transparency of the price and performance of ad tech services. The rules would apply across the Australian ad tech supply chain. Because the ad tech supply chain is complicated, this recommendation recognises and addresses that other measures may be necessary to address transparency concerns."

ACCC Digital Platform Services Inquiry, Interim Report No. 3 – search defaults and choice screens, September 2021

The ability to search for information and access content online quickly and easily is a must-have for consumers. Most Australian consumers use a search engine on a daily basis, with search engines acting as a gateway to other websites and content on the Internet.

Google Search, the dominant search engine in Australia with a market share of 94%.

Given the critical role search engines perform in the online economy, the ACCC is particularly concerned with the low levels of contestability and competition in the supply of search engine services and the subsequent harms to businesses and consumers.

Accordingly, the ACCC considers that measures are required to address these harms and to facilitate increased competition in search. As a first step, the ACCC recommends that it is given the power to mandate, develop and implement a mandatory choice screen to improve competition and consumer choice in the supply of search engine services in Australia.

Given the absence of any significant competition in the supply of search services, it is recommended that the ACCC is also given powers to consider other measures beyond mandatory choice screens to improve competition and consumer choice in search. The primary purpose of these measures would be to facilitate competition in search by lowering barriers to entry and expansion, and creating conditions in which rival search engines can emerge and effectively compete.

The pre-installation of browsers, and the availability of search engines as a default on browsers and devices, can be beneficial to consumers by providing them with a seamless way of accessing the Internet. However, pre-installation and default arrangements, particularly when combined with the way that platforms provide these services and present choices to users, can exacerbate default biases that may not always be in consumers' best interests.

The strong tendency of consumers to remain with the default or pre-installed service, and the information asymmetry between consumers and providers, is heightened by the choice architecture of search engines and browsers.

Some of the processes required for consumers to change their default browser and pre-set search service are not intuitive, and require a reasonable amount of knowledge on the part of the user. In addition, the ACCC considers that choice architecture can be employed in a way that discourages consumers from making a meaningful choice about the service they use and switching providers.

Platforms should design user interfaces in a way that facilitates consumer choice and respects individual autonomy. For example, platforms should have an obligation to refrain from using dark patterns or designing user interfaces in a way that exploits consumers' behavioural biases and vulnerabilities.

However, the design and implementation of the choice screen should be subject to detailed consultation with industry participants and user testing. It should also be proportionate to the competition and consumer choice issues identified in this Report, while minimising any adverse impacts on efficiency and the business models of industry participants.

These measures could potentially limit the ability of a search engine provider, which meets the pre-defined criteria, from:

- tying or bundling their supply of search engine services with their supply of other goods or services,

The measures could also involve mandating such a provider to:

- provide access to its click-and-query data, and potentially other datasets, subject to extensive consideration of privacy impacts, and careful design and ongoing monitoring to ensure there are no adverse impacts on consumers, and
- when providing syndicated search results to downstream search engines, do so on fair, reasonable and non-discriminatory terms.

ACCC Digital Platform Services Inquiry, Interim Report No. 4 – General online retail marketplaces, March 2022

This fourth interim report in the Digital Platform Services Inquiry examines competition and consumer issues associated with general online retail marketplaces (online marketplaces) in Australia.

General online retail marketplaces in Australia include, but are not limited to, Amazon, Catch, eBay and Kogan. They offer a wide variety of retail products and perform an increasingly important role in the economy, connecting consumers and sellers.

The ACCC has previously examined how consumers make choices and how user interfaces can direct consumers towards making certain decisions. The tools online marketplaces use to display products to consumers can clearly have a significant effect on what consumers view and purchase. This includes marketplace search algorithms which determine the products relevant to a consumer's search query, the order in which those products are displayed and what products are highlighted to consumers. For example, the majority of purchases on the Amazon platform were offers that Amazon featured on the Buy Box.5

Highlighting a small number of relevant products on an online marketplace can have clear benefits for consumers seeking to purchase online. However, the ACCC has found examples where it was not clear to consumers on online marketplaces why particular products are being shown to them in prominent positions in search results or highlighted in other ways. This is a particular concern in the case of hybrid marketplaces, where the online marketplace sells both third-party products and its own products.

Given the reliance consumers have on the tools that help them to reduce their search costs, such as the online marketplaces' search algorithms and the featuring of offers, the ACCC considers that online marketplaces should be more transparent about the factors that influence how prominently products are displayed, particularly for products that might be shown for reasons that appear less relevant to a consumer.

As with previous digital platforms examined, the ACCC is concerned that certain data practices of online marketplaces may not align with consumer preferences, including the purposes for which consumer data is used.

The ACCC considers, as always, that consumers should be given both sufficient information and adequate control to allow them to make informed choices about what data is collected and used by the digital platform.

There are also concerns that pricing restrictions imposed by an online marketplace on third-party sellers (particularly price parity clauses, which would prevent a seller from discounting on rival platforms) could potentially impede competition between rival online marketplaces.

Given the reliance of sellers on large marketplaces, the ACCC considers it particularly important that the level of fees charged is transparent and that advance notice is given of any changes to these fees. The ACCC will continue to monitor these fees in the Australian context.

As decisions made by online marketplaces about how to display and rank products have an important effect on what consumers ultimately purchase, they also have a significant effect on a seller's business.

Opacity of algorithms or processes that determine when and how a product is seen, makes it harder for sellers to improve their product offerings. Further, if a hybrid marketplace advantages its own products above those of rival products sold by third-party sellers, many sellers will find it harder to compete on their merits to reach consumers.

While the ACCC recognises the importance of ensuring sellers are unable to 'game' the marketplaces' search algorithms, the ACCC considers it important that online marketplaces are transparent about which factors influence how prominently products are displayed.

Online marketplaces which sell their own products as well as the products of third parties (known as hybrid marketplaces) are growing.

A key concern with hybrid marketplaces is whether preferential treatment is provided by the marketplace to its own products at the expense of third-party sellers (through algorithms, policies or other decision making).

Online marketplaces also have access to large amounts of rich data on consumers, which can allow them to better tailor their products and services to make them attractive to consumers. Third-party sellers do not have access to the same depth and breadth of data collected by an online marketplace, which can

hinder sellers in their ability to test and improve their product range and strategies to the same extent an online marketplace is able to.

ACCC Digital Platforms Services Inquiry, Interim Report 6: Report on social media services, March 2023

Social media platforms provide an important service for Australian consumers to connect and communicate with friends and family, public figures, influencers, and businesses online. They are also important intermediaries for businesses and advertisers seeking to reach customers, as well as for community organisations seeking to share relevant information with their members. …

The main social media services examined in this report are Facebook and Instagram (owned by Meta), Twitter, Snapchat and TikTok (owned by ByteDance). We have also considered other social media services, including YouTube, Reddit, Pinterest, BeReal and Linkedln.

Most social media platforms provide their services at zero monetary price. In exchange, platforms have access to an individual's personal data and attention, which is then sold to advertisers in the form of targeted advertising.

Algorithms are used to target advertisements to specific groups of users based on demographics, interests, and online behaviour, making display advertising opportunities highly effective at reaching their desired audience.

Many social media platforms derive the vast majority of their revenue by monetising user data and attention for targeted advertising. Some platforms also sell virtual goods, premium features, and subscriptions to consumers. The sale of virtual goods is a small but increasing source of revenue for platforms, where platforms take a commission on digital 'gifts' that are given to creators and influencers that produce digital content.

Social media platforms provide advertisers with the ability to target individual users at a very detailed level, which is not a feature of traditional advertising such as on radio or television. This type of targeted advertising is employed by businesses of all sizes and is not exclusive to any particular industry groups, however, businesses of different scales may employ these services differently.

A lack of effective competition in the supply of social media services can reduce innovation and consumer choice. Where there are few (or no) comparable alternatives available, or consumers feel compelled to use the service because their social or work networks are on them, consumers may need to accept undesirable terms of use. These undesirable 'take-it-or-leave-it' terms can involve the unwanted collection and use of consumers' data, particularly where there is no privacy law safety net, or greater exposure to targeted advertising. Effective competition, in combination with effective regulation of privacy and data collection, may improve the level and range of privacy and data protection offered by social media platforms.

Many of the harms to consumers and small businesses on social media that have been identified in this report are common across a range of digital platform services, and have been previously considered in our Digital Platform Services Inquiry reports into App Marketplaces, Defaults and Choice Screens, General Online Retail Marketplaces and the Ad-tech Inquiry. These harms occur across a range of platforms and are not limited to those that hold market power.

Scams on social media platforms continue to be of significant concern.

Fake ratings and reviews, and the manipulation of ratings and revie s have the potential to harm both consumers and businesses.

There are a range of unfair trading practices that currently fall outside of the Australian Consumer Law, including the extent of collection, use and disclosure of data by platforms does not align with consumer preferences.

The ACCC considers that disclosure of sponsored posts by influencers needs to be improved. Lack of disclosure may mislead consumers who may be unaware that endorsements by influencers are paid for, preventing them from making informed choices when purchasing products online.

Recommendation 2: Digital platform specific consumer measures

The ACCC recommends additional targeted measures to protect users of digital platforms, which should apply to all relevant digital platform services, including:

- Mandatory processes to prevent and remove scams, harmful apps and fake reviews …

Recommendation 3: Additional competition measures for digital platforms

The ACCC recommends the introduction of additional competition measures to protect and promote competition in markets for digital platform services. These should be implemented through a new power to make mandatory codes of conduct for 'designated' digital platforms based on principles set out in legislation.

Each code would be for a single type of digital platform service (i.e., service-specific codes) and contain targeted obligations based on the legislated principles. This would allow flexibility to tailor the obligations to the specific competition issues relevant to that service as these change over time.

These codes would only apply to 'designated' digital platforms that meet clear criteria relevant to their incentive and ability to harm competition.

Recommendation 4: Targeted competition obligations

The framework for mandatory service-specific codes for Designated Digital Platforms (proposed under Recommendation 3) should support targeted obligations based on legislated principles to address, as required:

- anti-competitive self-preferencing
- anti-competitive tying
- exclusive pre-installation and default agreements that hinder competition
- impediments to consumer switching
- impediments to interoperability
- data-related barriers to entry and expansion, where privacy impacts can be managed
- a lack of transparency
- unfair dealings with business users
- exclusivity and price parity clauses in contracts with business users.

The codes should be drafted so that compliance with their obligations can be assessed clearly and objectively. Obligations should be developed in consultation with industry and other stakeholders and targeted at the specific competition issues relevant to the type of service to which the code will apply. The drafting of obligations should consider any justifiable reasons for the conduct (such as necessary and proportionate privacy or security justifications).

Duped by Design, Manipulative Online Design: Dark Patterns in Australia, Consumer Policy Research Centre

Dark patterns are design features and functionalities built into the user interface of websites and apps that purely exist to influence consumer behaviour — often not in the consumer's best interest.

This report looks closely at ten dark patterns common in Australia today, ranging from those that are ubiquitous and frustrating for consumers to those that are possibly misleading and deceptive and can lead to significant consumer harm.

Many of the dark patterns we observed in our sweep of Australian websites involved credence claims: statements made by a company that cannot be easily verified by the customer. Claims like 'five people are looking at this right now' may be accurate but, depending on how they are determined, they could also be misleading,

Hidden costs

This occurs when consumers are unaware of additional costs or are forced to pay more for a product or service than they initially perceived. Often this occurs via pre-selected add-ons that are embedded close to or at the final stage payment. This can including shipping and other costs that are not made clear upfront It can also include pre-selected add-ons such as insurance or service plans that are either automatically added to a shopping cart by default or presented in a way that heavily implies the need to purchase. Consumers have to actively "untick", "opt-out" or navigate through a variety of options to avoid the extra cost.

This design choice by Appliances Online strongly implies that a consumer requires a 3-year care plan in order to have a product repaired if something goes wrong. This hidden cost is particularly harmful because it likely adds an unnecessary product for the consumer. The "3-year care plan for home", like many extended warranties, adds very little extra value for a consumer when compared to the rights all consumers have for free under the consumer guarantees in the ACL.

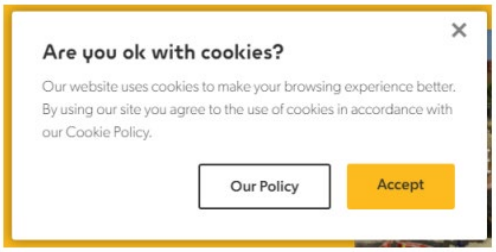
Disguised advertisements

Research indicates a sizable proportion of consumers cannot differentiate between adverts and organics search results, despite the presence of these identifiers ("Sponsored" or "Advertisement").

Our survey revealed … one in three (33%) found it deceptive.

Trick question

The introduction of GDPR in Europe led to a plethora of trick questions when it came to consent.



While not illegal, it is deeply unfair that websites push consumers to navigate unnecessary choices not in a consumer's best interests – adding significant cognitive burden.

Scarcity cues

Instilling a fear of missing out (FOMO) in the minds of consumers, scarcity cues demand attention by creating the notion of limited supply or limited time to act.

More than one in three Australians (35%) found this practice manipulative, while more than one in four (28%) found it deceptive.

There is no way for a consumer to confirm whether the urgency created is genuine.

Confirmshaming

Confirmshaming is when specific language is used to suggest that a particular choice is shameful or inappropriate. It aims to make a consumer feel guilty or foolish for selecting the option that the business clearly does not want the consumer to make. Often this is used to encourage consumers to:

• remain subscribed to a service

Hotel California (Forced continuity)

[This] is a dark pattern which uses design features and website navigation in a way that impedes consumers' ability to cancel or move out of a particular service.

It can often involve complex website or app navigation paths that require several clicks, vague terminology and continuous attempts to encourage the consumer to reconsider a request. This design treatment is very likely to cause consumer frustration …

…one way to achieve this is for government to impose obligations that a service should be as easy to opt-out of as it is to opt-in. Laws requiring that businesses offer simple online cancellation services have already been enacted in specific cases in Australia. For example, in 2018, the National Consumer Credit Code was amended to allow easier online credit card cancellation options …

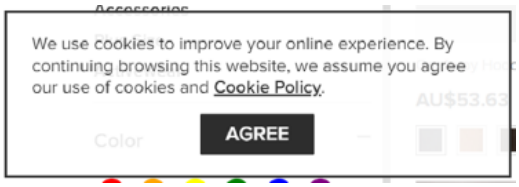
Data-grab

…certain design features and functionality have been built specifically into websites or apps for the sole purpose of collecting more consumer data.

Data-grab can happen in various forms including:

• forcing a consumer to create a customer profile and/or requesting more information than necessary to browse or purchase a product or service

• showing a message on the website or app notifying consumers that by using the website they accept their data terms and conditions



Australia needs a well- resourced regulator with the capacity and capability to audit and enforce breaches in the complex digital environment.

Consumers can't continue to be responsible for identifying and reporting breaches, … Regulators should be pushing businesses to be radically more transparent about their business models and practices – this is a first step to then removing unfair practices.

Consumer Policy Research Centre, 13 April 2022, Letter to Australian Competition and Consumer Commission

…data can be used to build an "online profile" of a consumer and effectively "score" their value – with a view to identifying and retaining profitable customers through advertisements (and avoiding those who are not profitable). A lack of transparency and accountability within such processes means it is difficult for consumers to see how their profile is produced; understand the impact it will have on them; or influence, appeal or correct assumptions based on wrong information. Profiles can also be used to set prices, leading to some groups of consumers paying more for the same service.

Companies can use the information they hold about customers to shape what products are shown and what information is presented, effectively exacerbating the information asymmetries between companies and consumers. Manipulation can also lead to unfair outcomes, misuse of data, compromise the dignity of consumers and hinder or distort competition.

…Digital platform services present, or more so, can misrepresent choice to consumers. They ask people to accept terms and conditions or adjust their privacy settings. In reality, consumers are given little control over what data is collected and how it is used. …

… CPRC recommends an inquiry to explore how to construct and implement positive obligations on businesses to use data in consumers' interests.

…The research further reveals consumer discontent with tactics such as ad targeting, personalised price discrimination and exclusion from products and services:

- 92% agree that companies should only collect information they need for providing their product / service
- 60% of Australians consider it very or somewhat unacceptable for their online behaviour to be monitored for targeted ads and offers
- 90% believed it is unacceptable to charge people different prices based on past purchase, online browsing, and payment behaviours.

Given the increasing role of data collection, use and disclosure across the Australian economy – and the government's efforts to accelerate this trend – we remain firm that it is essential to strengthen the Privacy Act so it is fit for purpose.

CPRC strongly recommends the introduction of reforms that prohibit unfair trading practices that have the effect of:

- concealing data practices via privacy policies and terms and conditions
- undermining consumer autonomy via opaque targeting practices and interface design strategies
- increasing risks of consumer vulnerabilities being exploited through poor data-handling practices

Appendix C – Examples of successful digital prosecutions by the ACCC

In October 2019, the ACCC began proceedings against Google for making misleading representations to consumers by representing to some Android users that the setting titled "Location History" was the only Google account setting that affected whether Google collected, kept and used personally identifiable data about their location.

However, another Google account setting titled "Web & App Activity" also enabled Google to collect, store and use personally identifiable location data when it was turned on, and that setting was turned on by default.

The Federal Court found that Google had breached the ACL when it made misleading representations about the collection and use of location data in the manner outlined above,[95] and recently ordered Google to pay $60 million in penalties for making the misleading representations to consumers.

By way of further example, earlier this year, the ACCC successfully pursued action against Meta subsidiaries for engaging in conduct liable to mislead in breach of the ACL. The two subsidiaries were each ordered to pay $10 million by the Federal Court.[96]

The Court found that the two entities had engaged in conduct liable to mislead the public in promotions for the Onavo Protect app (a free app providing a virtual private network (VPN), as they failed to adequately disclose that users' data would be used for purposes other than providing Onavo Protect.

The app was promoted as a product that would keep users' data protected and safe, however, the personal activity data from users collected by the app was shared with the parent company, Meta for commercial benefit. The app listing conveyed that users' data would only be used to provide the Onavo Protect VPN, but did not disclose that the data collected would be used for other purposes.

These two examples highlight that the ACCC has been able to successfully pursue conduct related to the use, collection, and disclosure of personal data under the existing provisions of the ACL.

The ACCC was recently successful in its action against Booktopia, with the Federal Court ordering that Booktopia pay a $6 million penalty for making false and misleading representations about consumers' rights to refunds.[97]

Booktopia admitted that it had told customers that they were only entitled to a refund if they notified Booktopia within 2 business days of delivery that the product was faulty, damaged, or incorrect. Booktopia admitted having made these representations on its website and in customer service calls. Booktopia also admitted that it represented to consumers that they were not entitled to a refund for any reason for digital products such as eBooks, even if the product was faulty.

Under the ACL, a business cannot exclude, restrict, or modify the availability of the consumer guarantees or a consumer's entitlement to exercise the rights to a remedy for goods that do not comply with the consumer guarantees.

In addition to paying a penalty, the Federal Court ordered that Booktopia publish a corrective notice on its website, enter into agreed compliance measures, and pay the ACCC's costs of the proceedings.

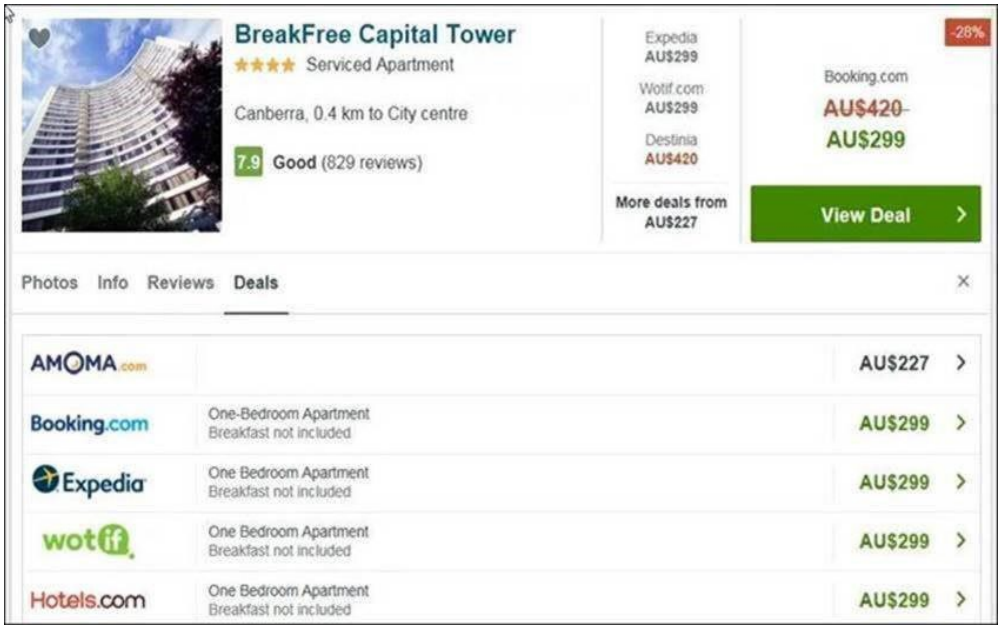
As such, the ACCC was successfully able to bring an action against a company who was partaking in conduct that tried to dissuade consumers from exercising their rights.

In addition, the ACCC was recently successful in establishing that Trivago had, through the design of its website engaged in misleading conduct and found that it had made misleading representations about hotel room rates on its website and television advertising.[98]

The decision by the judge in the first instance was upheld by the Federal Court which found that Trivago did not sufficiently disclose to consumers that its website used an algorithm that meant accommodation providers paying Trivago a higher payment fee were given prominence on the Trivago website, meaning that the most prominent offers were not always the cheapest for consumers.

[95] *Australian Competition and Consumer Commission v Google LLC (No 2)* [2021] FCA 367.
[96] *Australian Competition and Consumer Commission v Meta Platforms Inc* [2023] FCA 842.
[97] *Australian Competition and Consumer Commission v Booktopia Pty Ltd* [2023] FCA 194.
[98] *Australian Competition and Consumer Commission v Trivago NV* [2020] FCA 16.

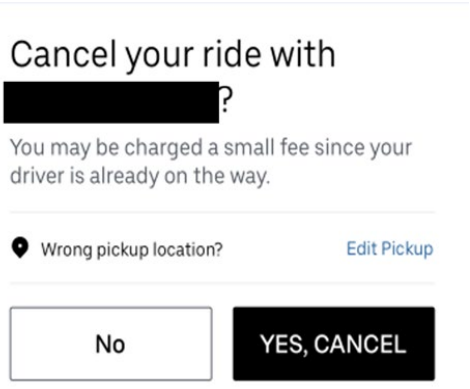
The court also found that Trivago misled consumers through the use of strike through prices and text in different colours because Trivago often compared the rate for a standard room with the rate for a luxury room at the same hotel.



This above is an example from the ACCC of Trivago's website in April 2018 that shows the AU$299 deal being highlighted in green when a cheaper deal is available if a consumer were to click "more deals from AU$277.

As a further example, late last year the ACCC was successfully able to institute proceedings against Uber in the Federal Court for engaging in misleading or deceptive conduct and making false or misleading representations to consumers.[99] Uber admitted that it had breached the ACL by engaging in misleading conduct and making false or misleading representations in relation to cancellation messages and the price of Uber Taxi rides.

Between December 2017 and September 2021, users would receive a cancellation message which stated, '*You may be charged a small fee since your driver is already on their way*,' even if those users were seeking to cancel during Uber's 'free cancellation period'.



This is an example from the ACCC of Uber's misleading cancellation message to users.

More than two million consumers saw the misleading cancellation message.

[99] *Australian Competition and Consumer Commission v Uber B.V.* [2022] FCA 1466.

Uber also admitted the price range estimate for an Uber Taxi ride displayed to consumers on Uber's app and website from July 2018 until August 2020, was false and misleading as the price range estimate displayed was higher than the actual Uber Taxi fare most of the time. Uber was ordered to pay a penalty of $21 million for its breaches of the ACL.

Consequently, under existing provisions of the ACL, the ACCC and consumers already have the ability to challenge conduct that seeks to dissuade consumers from exercising their rights, rendering a separate unfair trading practices prohibition entirely unnecessary.

Appendix D – Contrasting the ACL with overseas unfair trading prohibitions

Cases referred to in the Consultation RIS – comparison with Australian law

#	Case name	Relevant conduct	Relevant Australian law
United states			
1.	In the matter of Epic Games Inc. 192-3203	In a complaint announced in December 2022, the FTC alleged that Epic Games used dark patterns to trick users into making purchases, charged account holders without authorisation and blocked access to purchased content by locking the accounts of customers who disputed unauthorized charges with their credit card companies. The FTC also alleged Epic Games ignored more than one million user complaints and repeated employee concerns that many consumers were being wrongfully charged. The specific conduct was as follows: • Though Fortnite itself is free to download and play, Epic charges consumers for certain in-game items, such as costumes, dance moves, and item-filled piñatas shaped like llamas. • Epic charged consumers for such items without first obtaining their express informed consent, and then banned consumers from accessing previously paid-for content when they disputed unauthorized charges with their credit card providers. • When consumers first made a purchase through Epic, the payment information was saved by default and used to bill consumers for future charges, including charges incurred by children. Many consumers did not realize that Epic had saved their cards. • When downloading Fortnite, customers clicked on a yellow "GET" button. Above the box, Epic reminds consumers that Fortnite is "Free." • However, to obtain Cosmetics, Battle Passes, and Llamas, kids use "V-Bucks." For more than a year after Epic began offering in-app purchases, kids could acquire V-Bucks simply by pressing buttons within the game with no parental or card holder action or consent. • At that point, Epic automatically billed the parents' stored payment information for the V-Bucks. Epic	The following provisions of Australian law apply to Epic's conduct: • **Section 18** of the Australian Consumer law (**ACL**) would apply to the following conduct: ○ The prominent use of the yellow "GET" button below a statement that says that Fortnite is "Free" may give rise to a reasonable expectation that customers would not be charged any money without their explicit consent (*Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357). ○ In charging customers to purchase V-Bucks without disclosing that they were required to pay for this, it is arguable that Fortnite's conduct would have been misleading or deceptive. • **Section 21** of the ACL would apply to the following conduct: ○ Section 21 of the ACL prescribes a normative standard of conscience which is permeated with accepted and acceptable community standards against which the relevant conduct is assessed, having regard to all of the circumstances (*ASIC v Kobelt* (2018) 267 CLR 1 at [234]). ○ Epic charged users for payment for V-Bucks while they were playing Fortnite in circumstances where it was aware that many users of Fortnite were children, did not tell customers at the time they would be charged for purchasing V-Bucks and had previously collected credit card details from users when downloading Fortnite when representing that Fortnite was "Free". ○ That is conduct that arguably falls short of the normative standard of conscience prescribed by s 21 of the ACL. • **Section 29(1)(i)** of the ACL would apply to the following conduct: ○ Section 29(1)(i) of the ACL prohibits the making of false or misleading representations with respect to the price of goods or services. ○ There is no material difference between the meaning of false or misleading and

#	Case name	Relevant conduct	Relevant Australian law
		did not require parents to enter a PIN or password to authorize V-bucks purchases, or even allow them to enable such a control.	misleading or deceptive (*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634 at [40]). ○ The central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (*Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177). ○ In the present case, the words above the "GET" button stating the Fortnite is "Free" arguably contravenes s 29(1)(i) of the ACL.
2.	FTC v Vonage Holdings Corp & Ors Case No. 3:22-cv-6435	Vonage advertises and sells communication services, including Voice over Internet Protocol ("VoIP") phone services, to residential and small business consumers. Vonage's services renew automatically, and it charges most customers' credit cards or debits their bank accounts directly and on a recurring basis. Since at least 2015, Vonage has failed to provide a simple method for customers to cancel their telephone services, employing a panoply of hurdles, sometimes referred to as "dark patterns," which compound to deter and prevent customers from stopping recurring charges. Specifically: • Consumers were able to enrol for services on their own and at any time through Vonage's website. • However, Vonage required cancelling customers to speak to a live "retention" agent over the phone during limited working hours before processing their request. Retention agents cannot be contacted via the main customer service telephone number, customers have to call a special number that is obscured within the website. • Vonage has made the requirement to cancel via a live agent difficult for customers to satisfy through obscured contact information, circuitous and redundant procedural requirements, long wait times, dropped or unanswered calls, lengthy and repeated sales pitches, and unexpected high-dollar Early Termination Fees ("ETFs"). • Even when customers have managed to navigate Vonage's process and have reached a live agent and cancelled their accounts, in many instances, Vonage has	The following provisions of Australian law apply to Vonage's conduct: • **Section 21** of the ACL would apply to the following conduct: ○ As set out in respect of case no. 1 above, s 21 of the ACL prescribes a normative standard of conscience against which the relevant conduct is assessed, having regard to all of the circumstances (*ASIC v Kobelt* (2018) 267 CLR 1 at [234]). ○ In circumstances where Vonage charged customers a cancellation fee that was not brought to their attention, and was aware that it was difficult for customers to cancel or downgrade their product but yet maintained a system that perpetuated these difficulties, it is arguable that its conduct falls short of the normative standard of conscience prescribed by s 21 of the ACL. • **Section 24** of the ACL, under which unfair contract terms are not enforceable, would apply to the clause under which the ETFs were payable, to the extent the relevant agreement was with consumers or small businesses. That is in circumstances where the clause causes an imbalance in the parties' rights and obligations by restricting cancellation, is not reasonably necessary, causes detriment to consumers and is not transparent.

#	Case name	Relevant conduct	Relevant Australian law
		continued to charge them without consent. • Vonage was aware that customers were "sent in a circle when they want to downgrade or remove the service". • Vonage's small business and residential customers were required to complain via the chat function and to then wait for a call from a retention agent. • Vonage provided monetary incentives to retention agents to convince customers not to cancel, who were required to ask probing questions of customers. • Vonage also charged a cancellation fee that was not clearly and conspicuously disclosed to customers.	
3.	In the matter of Google LLC and Heartmedia Inc. 202 3092	In February 2023, the FTC finalised consent orders against Google and iHeartMedia settling allegations that they produced and aired nearly 29,000 deceptive first-person endorsements by radio personalities promoting the personalities' use of and experience with Google's Pixel 4 phone in 2019 and 2020. Separate state judgements also required them to pay a total of $9.4 million in penalties. Specifically, the radio personalities read from statements saying that they had used the Pixel 4 and personally thought it was excellent in circumstances where they had never used the phone. Google and Heartmedia were aware of this before the relevant conduct occurred and had sought to avoid this by having each of the radio personalities use the Pixel 4. Ultimately this was not possible, though the ads proceeded regardless.	The following provisions of Australian law apply to Google and Heartmedia's conduct: • **Section 18** of the ACL would apply to the following conduct: ○ The statements would have led listeners of the show into error in believing that the radio personality had actually used the product when they had not. • **Section 21** of the ACL would apply to the following conduct: ○ In circumstances where Google and Heartmedia were aware that the relevant radio personalities had not used the Pixel 4, it is arguable that its conduct in providing them scripts which represented that they had personally used the phone and that it took good photos falls short of the normative standard of conscience prescribed by s 21 of the ACL. ○ That is particularly the case given the personalised nature of the scripts, which encouraged radio personalities to say things like "*with the continuous zoom feature, I didn't miss a second of my daughter's school play even though I was in the last row*". • **Section 29(1)(f)** of the ACL would apply to the following conduct: ○ Section 29(1)(f) of the ACL prohibits the making of false or misleading representations concerning a testimonial by a person, or a representation that purports to be a testimonial.

#	Case name	Relevant conduct	Relevant Australian law
			○ In circumstances where the relevant radio personalities had not used the Pixel 4, their testimonials were false or misleading. ○ Google and Heartmedia were aware those testimonials were not true. • Section 130V of the *Broadcasting Standards Act 1992* (Cth) would apply to the following conduct: ○ The *Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2022* (the ***Standard***) is an industry code under s 125 of the *Broadcasting Standards Act 1992* (Cth). ○ Breach of an industry code is a civil penalty provision: s 130V *Broadcasting Standards Act 1992* (Cth). ○ Section 10 of the Standard requires a disclosure announcement if a presenter of a current affairs program promotes the products of a sponsor they have a commercial arrangement with.
4.	FTC v Age of Learning Inc. Case No. 2:20-cv-7996	The FTC alleged that children's education company Age of Learning, Inc., which operates ABCmouse, made misrepresentations about cancellations and failed to disclose important information to consumers, leading tens of thousands of people to be renewed and charged for memberships without proper consent. The FTC also alleged that ABCmouse also unfairly billed users without their authorization and made it difficult for consumers to cancel their memberships, preventing consumers from avoiding additional charges. Specifically: • ABCmouse failed to adequately disclose key terms of memberships to access online educational content for children. • Customers who accessed a "special offer" of $59.95 for 12 months which was marketed as payable in instalments and advertised as offering "*Easy Cancellation – if your family does not absolutely love ABCmouse, you can cancel at any time*", were enrolled in a negative option plan under which ABCmouse charged them $59.95 immediately and each year thereafter until they affirmatively cancelled their program. • The page on which customers signed up did not say that subscriptions would automatically renew after 12 months.	The following provisions of Australian law apply to Age of Learning Inc's conduct: • **Section 18** of the ACL would apply to the following conduct: ○ Representations made by ABCmouse that it was easy to cancel a subscription, but it was in fact quite difficult. ○ Further, the statement that the subscription was for 12 months arguably created a reasonable expectation that ABCmouse would tell customers if that was not the case. • **Section 21** of the ACL would apply to the following conduct: ○ Offering subscriptions for 12 months but automatically renewing subscriptions if the customer did not cancel their subscription. That is particularly the case where ABCmouse received a large volume of complaints in respect of this issue.

#	Case name	Relevant conduct	Relevant Australian law
		• Even though consumers who signed up were prominently promised "Easy Cancellation," ABCmouse for years made cancellation difficult. Many consumers tried without success to cancel by calling, emailing, or contacting ABCmouse through a customer support form. • Rather than accepting these cancellation methods, ABCmouse instead required consumers to find and navigate a lengthy and confusing cancellation path that repeatedly discouraged consumers from cancelling and, in many instances, resulted in consumers being billed again without their consent. • ABCmouse was well aware of the fact that many of its customers were not aware that they needed to cancel their subscription.	
5.	FTC v Match Group Inc. Case No. 3:19-cv-02281	The FTC commenced proceedings against Match Group Inc. in respect of a number of issues, as set out below. Fraudulent accounts: • Match users could browse the app without paying a fee but could not respond to messages unless they became a paid member. • Match sent messages to users advising them that another user was trying to contact them when it was aware the user attempting to make contact was suspected of being a fraudulent account. Those messages contained the following "*you caught his eye and now he's expressed interest in you…could he be the one?*" • In contrast, messages from accounts suspected of being fraudulent were not able to contact paid users. • Many consumers purchased subscriptions because of these deceptive ads. In many cases, they would have found a scammer on the other end. Alternatively, if Match completed its review process and deleted the account as fraudulent before the consumer subscribed, the consumer received a notification that the profile was "unavailable." In either event, the consumer was left with a paid	The following provisions of Australian law apply to Match's conduct: • **Section 18** of the ACL would apply to the following conduct: ○ Representing to users that they had been contacted by someone who "could…be the one" when Match was aware they were probably a fraudulent profile. ○ Failing to disclose that the profile was suspected of being fraudulent when Match represented that the profile was genuine by saying "*could he be the one?*", which gave rise to a reasonable expectation that the user in fact could not possibly be "the one". ○ Representing that customers would get a six-month free subscription when they had a number of hurdles to overcome, which arguably gave rise to a reasonable expectation that those hurdles would be disclosed. • **Section 21** of the ACL would apply to the following conduct: ○ Allowing suspected fraudulent accounts to contact users and encouraging users to pay for a subscription to respond, in circumstances where paid users were not able to be contacted by suspected fraudulent accounts. ○ Advertising that users could have six months free if they did not meet someone without not disclosing the requirements of receiving a refund.

#	Case name	Relevant conduct	Relevant Australian law
		subscription to Match.com, as a result of a false advertisement. Six months free: • The FTC also alleges Match deceptively induced consumers to subscribe to Match.com by promising them a free six-month subscription if they did not "meet someone special," without adequately disclosing that consumers must meet numerous requirements before the company would honour the guarantee. • Specifically, the FTC alleges Match failed to disclose adequately that consumers must: ○ Secure and maintain a public profile with a primary photo approved by Match within the first seven days of purchase; ○ Message five unique Match.com subscribers per month; and ○ Use a progress page to redeem the free six months during the final week of the initial six-month subscription period Match also banned users who disputed charges through their financial institutions from accessing the services they paid for. Cancellations: • Finally, Match failed to provide a simple method for a consumer to stop recurring charges from being placed on their credit card, debit card, bank account, or other financial account. • The complaint states that Match's own employees described the cancellation process as "hard to find, tedious, and confusing" and noted that "members often think they've cancelled when they have not and end up with unwanted renewals."	○ Banning customers who disputed charges. ○ Maintaining a cancellation process that was extremely difficult after becoming aware of the issues with the process.
6.	In the matter of Retina X Studios LLC & Anor 1723118	The FTC alleged that Retina-X: • Developed apps that allowed purchasers to monitor mobile devices (including physical location and online activities) on which they were installed, without the knowledge or permission of the device's user. • To install the apps, the purchasers were often required to jailbreak or root (i.e., actions to bypass various	The following provisions of Australian law apply to Retina-X's conduct: • **Section 21** of the ACL would apply to the following conduct: ○ Enabling its customers to use its products to stalk people, obtain victims' sensitive personal information without authorization, surreptitiously monitoring victims' physical movements and online activities, using that information to perpetuate stalking and abusive

#	Case name	Relevant conduct	Relevant Australian law
		restrictions implemented by the operating system and/or the manufacturer of mobile devices), which the FTC alleged exposed the devices to security vulnerabilities and likely invalidated manufacturer warranties. • Each of the apps provided purchasers with instructions on how to remove the app's icon from the mobile device's screen so that the device's user would not know the app was installed on the device. • The FTC also alleges that Retina-X failed to adequately secure the information collected from the mobile devices. • This substantially injured device users by enabling purchasers to surreptitiously stalk them. Stalkers and abusers use mobile device monitoring software to obtain victims' sensitive personal information without authorization and surreptitiously monitor victims' physical movements and online activities. Stalkers and abusers then use the information obtained via monitoring to perpetuate stalking and abusive behaviours, which cause mental and emotional abuse, financial and social harm, and physical harm, including death.	behaviours, causing victims mental and emotional abuse, financial and social harm, and physical harm, including death. • **Section 55A** of the *Privacy Act 1988* (Cth). The following conduct of Retina-X may contravene s 55A of the Privacy Act 1988 (Cth): ○ Under ss 6A, 13, 52 and 55A of the Privacy Act, the OAIC may commence proceedings to enforce a determination that a person has breached an Australian Privacy Principle ○ APPs 3, 5 and 6 relate to how personal information is collected, dealt with and used . ○ It is arguable that Retina-X breached these principles in failing to take steps to secure the personal information collected from purchasers and device users being monitored, placing information collected from purchasers and device users at risk of unauthorised disclosure and use.
7.	Wildec LLC – no proceedings commenced. Apps were removed from App Store and Google Play store following criticism by the FTC	Three dating apps operated by Ukraine-based Wildec LLC (Meet24, FastMeet and Meet4U) were removed from the Apple Store and the Google Play Store after the FTC warned they allowed children who indicated they were as young as 12 to access them and allowed adult users to communicate with the children. The apps also collected users' real-time location data.	The following provisions of Australian law apply to Wildec's conduct: • **Section 21** of the ACL would apply to the following conduct: ○ Enabling children as young as 12 to sign up to dating sites, allowing other users to search dating sites by age and to have access to the users' location.
European Union			
8.	Samsung Electronics Italia S.p.A	Samsung promoted the sale of electronic products (audio-video, telephone sets, home appliances, IT products) by promising prizes (e.g., a tablet PC) and bonuses (e.g. discounts, bonus on the electricity bill, free subscription to a TV content provider) to consumers. However, contrary to what the advertising promised: • to get the prize, consumers were required to register to a website or go to an authorized retailer or only if the product was sold online directly by Amazon (and not just	The following provisions of Australian law apply to Samsung's conduct: • **Section 18** of the ACL would apply to the following conduct: ○ In promising prizes to customers, Samsung arguably created a reasonable expectation that it would disclose the conditions under which those prizes would be offered, and, in enforcing conditions that were not disclosed, thereby contravened s 18. • **Section 21** of the ACL would apply to the following conduct: ○ Promising prizes to customers and then placing a number of undisclosed hurdles

#	Case name	Relevant conduct	Relevant Australian law
		sold through Amazon's marketplace) • None of those conditions were specified in the advertisements but could be read only after registering on the website and having read the Terms and Conditions in full. • getting the prizes was very difficult, as consumers were repeatedly requested to provide documents over and over again. • Further, consumers could fulfill those requests only online, making it impossible for buyers not having an internet connection to take all the steps required for getting the promised prize.	in their way to reduce the prospect of customers successfully claiming their prize. • **Section 32(1)** of the ACL would apply to the following conduct: ○ Section 32(1) prohibits a person from offering a prize with the intention of not providing it, or of not providing it as offered. ○ Samsung intended that the prizes it was offering would not be offered other than in accordance with conditions that were not disclosed. • **Section 32(2)** of the ACL would apply to the following conduct: ○ Section 32(2) requires a person offering a prize to provide it within the time specified and in accordance with the offer. ○ The prizes were not provided to customers in accordance with Samsung's offer.
9.	Wind Tre & Vodafone Italia	By two decisions of 6 March 2012, the AGCM penalised Wind and Vodafone for similar practices whereby: • those companies sold SIM cards on which internet browsing services and voicemail services had been pre-loaded and pre-activated, the fees for using those services being charged to the user if the services were not deactivated at the user's express request, without the user having been sufficiently informed, in advance, of the fact that those services had been pre-loaded and pre-activated, nor of their cost. • from the moment those SIM cards were first inserted into a mobile telephone or any other device allowing browsing on the internet, the internet browsing service could result in connections without the user's knowledge, inter alia by means of 'always on' applications.	The following provisions of Australian law apply to Wind Tre & Vodafone Italia's conduct: • **Section 40** of the ACL would apply to the following conduct: ○ Section 40 of the ACL prohibits the assertion of a right to payment for unsolicited goods or services. ○ Goods or services are unsolicited if they are supplied without a request made by the purchaser. ○ Wind Tre & Vodafone charged for data used by users who did not request internet browsing and voicemail services.
10	Facebook Ireland Ltd. and Facebook Inc.	Facebook did not disclose to customers that it would sell their personal information to third-parties. Specifically: • Facebook pre-selected the broadest consent to data sharing when users set up an account with it, enabling the transmission of their data to the single websites / apps, without any express consent. • When users decide to limit their consent, they are faced with significant restrictions on the use of	The following provisions of Australian law apply to Facebook's conduct: • **Section 21** of the ACL would apply to the following conduct: ○ Not informing customers of the purpose for which it was collecting their data and in selling customer data to third-parties without their consent. • **Section 55A** of the *Privacy Act 1988* (Cth) would apply to the following conduct:

#	Case name	Relevant conduct	Relevant Australian law
		the social network and third-party websites / apps, which induce users to maintain the pre-selected choice. • Facebook did not adequately explain to customers the distinction between the use of data to personalize the service (in order to connect "consumer" users with each other) and the use of data to carry out advertising campaigns aimed at specific targets. • Facebook did not inform customers that it would transmit their data from Facebook to third-party websites/apps for commercial purposes, and vice versa.	○ Under ss 6A, 13, 52 and 55A of the Privacy Act, the OAIC may commence proceedings to enforce a determination that a person has breached an Australian Privacy Principle ○ APPs 3, 5 and 6 relate to how personal information is collected, dealt with and used. ○ It is arguable that Facebook breached these principles in collecting data that was not reasonably necessary for its functions (see APP 3.1), in not informing customers of the purpose for which it was collecting their data (see APP 5.2(d) and in selling customer data to third-parties without their consent (see APP 6).
11	Sixthcontinent Europe S.r.l.	Sixthcontinent is primarily an e-commerce platform: the registered user buys on this platform shopping cards via which they can then make purchases online or directly at physical stores. For each new purchase made with a shopping card, the user receives bonuses that can be used in lieu of money to buy additional shopping cards, which allows for considerable savings. Users obtain points – which may also be used for purchases – if they introduce the platform to new members, or when people connected to them make purchases on the same platform. The Italian Competition Authority fined Sixthcontinent €4 million in respect of the following conduct, which affected more than 500 thousand consumers: • Hindering the issue of shopping cards by the various merchants and delaying their activation. • Forcibly converting its own shopping cards of a promised value, which could be spent on the platform, into credits to use on the platform. • Reducing the percentage of credits that could be used to purchase the shopping cards of the various merchants from 50% to 1-3%. • Considerably reducing the number and importance of shopping cards that could be purchased and other payment services that could previously be used with the balance and accumulated credits. • Blocking the accounts of many customers in an unjustified manner. • Finally, in some cases it failed to reimburse customers the sums paid	The following provisions of Australian law apply to Sixthcontinent's conduct: • **Section 18** of the ACL would apply to the following conduct: ○ Representations regarding the merchants at which the shopping cards could be used would have been false and misleading once Sixthcontinent decided to reduce the payment services that the cards could be used for as from that time it would not have had a reasonable basis for the representations. ○ Similar observations apply in respect of the percentage of credits that could be used to purchase shopping cards. • **Section 21** of the ACL would apply to the following conduct: ○ In unilaterally altering the ability of members to use their accumulated points in accordance with the rules of the scheme, Sixthcontinent's conduct was similar to that of a bank who decides to prevent account holders from withdrawing their money or making payments from their account. ○ That is arguably conduct that contravenes s 21 of the ACL. • **Section 24** of the ACL, under which unfair contract terms are not enforceable, may also apply to the extent Sixthcontinent's contractual agreements purported to allow it to unilaterally change what members could use their points for. That is in circumstances where such a clause would cause an imbalance in the parties' rights and obligations, would not be reasonably necessary and would cause detriment to consumers.

#	Case name	Relevant conduct	Relevant Australian law
		for the purchase of the shopping cards and only offered credits that could be spent on the platform, which now lacks many payment services that could be used before.	
United Kingdom			
12	Expedia, Booking.com, Agoda, Hotels.com, ebookers and trivago (the **Hotel Booking Sites**)	As part of its ongoing investigation, the Competition and Markets Authority (CMA) identified widespread concerns, including with how hotel booking sites presented their results: • Search results: for example, not disclosing to what extent the amount of commission a hotel pays the site influenced whether it appeared in the customer's search results and how prominently it was displayed. • Pressure selling: whether claims about how many people are looking at the same room, how many rooms may be left, or how long a price is available, create a false impression of room availability or rush customers into making a booking decision. • Discount claims: whether the discount claims made on sites offer a fair comparison for customers. For example, the claim could be based on a higher price that was only available for a brief period or not relevant to the customer's search criteria, such as comparing a higher weekend room rate with the weekday rate for which the customer has searched. • Hidden charges: the extent to which sites include all costs in the price they first show customers or whether people are later faced with unexpected fees, such as taxes or booking fees.	The following provisions of Australian law apply to the Hotel Booking Sites' conduct: • **Section 18** of the ACL would apply to the following conduct: ○ To the extent that claims regarding how many people were looking at a room, how many rooms were available or how much a room was discounted by were not accurate, they may be misleading or deceptive in contravention of s 18 of the ACL. • **Section 21** of the ACL would apply to the following conduct: ○ The combination of not disclosing commissions, using pressure selling tacts, misrepresenting the amount by which rooms had been discounted and hiding the true cost of rooms. • **Section 29(1)(i)** of the ACL would apply to the following conduct: ○ Section 29(1)(i) prohibits the making of false or misleading statements in respect of the price of goods or services. ○ To the extent that claims regarding how much a room was discounted by were not accurate, or the price displayed for the room was not accurate, they may be false or misleading in contravention of s 29(1)(i) of the ACL. • **Section 35** of the ACL would apply to the following conduct: ○ Section 35 prohibits the advertisement of goods or services at a specified price unless there are reasonable grounds to believe the person will be able to offer the goods or services at that price. ○ Advertising rooms for a price that the Hotel Booking Site was not able to supply the goods for arguably contravenes s 35 of the ACL. • **Section 48** of the ACL would apply to the following conduct: ○ Section 48 requires that a person offering goods or services for personal, domestic or household use must specify in a prominent way and as a single figure the single price for the goods or service.

#	Case name	Relevant conduct	Relevant Australian law
			○ That has been found to apply to advertisements of goods without including GST (*ACCC v Signature Security Group Pty Ltd* (2003) 52 ATR 1). ○ To the extent rooms contained hidden costs not included in the price initially shown for the room, then charging a higher price without prominently displaying the single price for the room may contravene s 48 of the ACL.
13	Apple Inc.	The Competition and Markets Authority (CMA) raised consumer law concerns with Apple Inc regarding the following: • The failure to clearly warn consumers that their phone's performance could slow down following a 2017 software update designed to manage demands on the battery. • The CMA became concerned that people might have tried to repair their phone or replace it because they weren't aware the software update had caused the handset to slow down. • Apple did not provide clear and easily accessible information regarding battery health, with the result that people were not able to easily find information about the health of their phone's battery, which can degrade over time.	The following provisions of Australian law apply to Apple's conduct: • **Section 18** of the ACL would apply to the following conduct: ○ The failure to clearly warn customers of the impact of the software updates may constitute misleading or deceptive conduct by silence. ○ That is, making the software update available to customers gave rise to a reasonable expectation that Apple would explain the effect of the update on the performance of iPhones. In those circumstances, the failure to clearly warn customers was arguably misleading or deceptive. • **Section 21** of the ACL would apply to the following conduct: ○ It appears that Apple provided an undertaking to the CMA in circumstances where it had already voluntarily moved to address the issue, suggesting that Apple may not initially have been aware of the problem. ○ However, to the extent that Apple was, or should have been, aware that its software updates had reduced the performance of iPhones, and that consumers were repairing or replacing their phones as a result, it is arguable that its conduct contravenes s 21 of the ACL.
14	Secondary ticketing websites	The CMA investigated a number of secondary ticketing websites in respect of the following conduct: • Pressure selling – whether claims made about the availability and popularity of tickets create a misleading impression or rush customers into making a buying decision. • Difficulties for customers in getting their money back under a website's guarantee. • Speculative selling – where businesses advertise tickets for	The following provisions of Australian law apply to the conduct of the secondary ticketing websites: • **Section 18** of the ACL would apply to the following conduct: ○ Making false claims about the availability of tickets. • **Section 21** of the ACL would apply to the following conduct: ○ Imposing unreasonable barriers to obtaining a refund.

#	Case name	Relevant conduct	Relevant Australian law
		sale that they do not yet own and therefore may not be able to supply. • Not informing consumers of which seat they would get in a venue. • Concerns about whether the organisers of some sporting events have sold tickets as a primary seller directly through a secondary ticket website, without making this clear to consumers. Not informing consumers when ticket sellers are businesses, including professional resellers.	• **Section 29(1)(m)** of the ACL would apply to the following conduct: ○ Not disclosing that businesses were selling tickets through secondary ticket websites arguably contains a representation that the ACL does not apply to the sale of the tickets as tickets sold by consumers would not be in trade or commerce. • **Section 35** of the ACL would apply to the following conduct: ○ Offering tickets for sale they do not own, in which case there may be reasonable grounds for believing they will not be able to offer the tickets at the advertised price.
Singapore			
15	Lenovo Singapore and Want Join	An investigation by the Competition and Consumer Commission of Singapore ("CCCS") ascertained that Lenovo Singapore had, between April 2019 and June 2020, stated on its website (www.lenovo.com/sg) that the screen refresh rate of its Legion Laptops could achieve a screen refresh rate of "up to 144 Hz". However, in a model comparison table for the full range of models of the Legion Laptop, only two specific models were stated to have a screen refresh rate of 60 Hz.2 In fact, four other models of the Legion Laptop3 could only achieve a screen refresh rate of up to 60 Hz. This information was omitted from the model comparison table on Lenovo Singapore's website, giving rise to the impression that the "up to 144 Hz" screen refresh rate also applied to these four models. CCCS also ascertained that Want Join, in its capacity as a former authorised reseller/partner of Lenovo Singapore, had, between August 2019 and March 2020, posted product listings for two models of the Legion Laptop4 on the LazMall Website stating that the screen refresh rate could achieve "up to 144 Hz", when these models could in fact only achieve a screen refresh rate of up to 60 Hz.	The following provisions of Australian law apply to Lenovo and Want Join's conduct: • **Section 18** of the ACL would apply to the following conduct: ○ Representing that the refresh ration of Legion Laptops was up to 144 Hz when most models in fact had a refresh rate of 60 Hz.
16	Mobile Air	Jover Chew Chiew Loon, owner of the Mobile Air electronics shop, sold relatively low-priced mobile devices to consumers. He would then alter invoices to require consumers to pay more money than they had agreed to pay. That was done by collecting payments in separate tranches and using seemingly innocuous documents couched as warranty agreements and invoices.	The following provisions of Australian law apply to Mobile Air's conduct: • **Section 18** of the ACL would apply to the following conduct: ○ Representing that more money was payable for invoices than was in fact owing. • **Section 21** of the ACL would apply to the following conduct: ○ Fraudulently altering invoices.

#	Case name	Relevant conduct	Relevant Australian law
			• **Section 29(1)(i)** of the ACL would apply to the following conduct: ○ Representing that more money was payable for invoices than was in fact owing.
17	Fashion Interactive	The Competition and Consumer Commission of Singapore ("CCCS") applied to the State Courts on 28 November 2019 to obtain an injunction against Fashion Interactive and its director, Mr. Magaud in respect of the following conduct: • Consumers were enticed to click on the "SHOP NOW" action button on Fashion Interactive's advertisements placed on Facebook/GoogleAd by the greatly discounted prices shown. • Customers were unable to purchase shoes at the advertised price without first subscribing to Fashion Interactive's "VIP Club" membership with recurring monthly fees. • Throughout the purchase process, there was no notice of this provided to consumers. • Consumers were led to believe that they were consenting to a one-off purchase of shoes when they clicked on the "PLACE YOUR ORDER" button at the payment page. Under the prominent and boldly coloured "PLACE YOUR ORDER" button was a check box with an "opt-in" sentence. CCCS found the "opt-in" sentence failed to adequately inform consumers that by clicking on the check box they would be consenting to Fashion Interactive's membership terms and recurring monthly fees. • The check box could also be bypassed. For consumers who did not click on the check box and attempted to complete the transaction by clicking on the "PLACE YOUR ORDER" button, a pop-up box would appear asking for the consumers' consent to agree to the Terms and Conditions. This pop-up box did not contain any information stating that the consumer agreed to subscribe to the membership and be charged a recurring monthly fee. Consumers who proceeded to click the "I agree" button, were not informed they had consented to be charged a recurring monthly fee.	• **Section 18** of the ACL would apply to the following conduct: ○ Representations regarding the price of the relevant goods that did not include the cost of subscriptions. • **Section 21** of the ACL would apply to the following conduct: ○ Failing to notify customers that they were required to subscribe to the VIP Club before they could buy goods at the advertised price. ○ Representing that recurring monthly subscriptions were one-off payments but automatically renewing subscriptions if the customer did not cancel their subscription. • **Section 29(1)(i)** of the ACL would apply to the following conduct: ○ Representations regarding the price of the relevant goods that did not include the cost of subscriptions. • **Section 35** of the ACL would apply to the following conduct: ○ Representations that the goods will cost a particular price when Fashion Interactive knew they cost more money as consumers were required to subscribe to the VIP Club. • **Section 48** of the ACL would apply to the following conduct: ○ Section 48 requires that a person offering goods or services for personal, domestic or household use must specify in a prominent way and as a single figure the single price for the goods or service if they are to make a representation with respect to an amount that if paid would constitute part of the consideration for the supply of the goods or services. ○ This would apply to representations that the goods will cost a particular price when Fashion Interactive knew they cost more money as consumers were required to subscribe to the VIP Club.

Appendix E – Policy Design Considerations explained

Below we seek to set out and explain in more detail a number of the general policies and doctrines (policy design considerations) which we suggest are relevant to assessing the various options for addressing any problems identified by Treasury in its analysis.

Promotion of competition, fair trading and consumer protection

First, as with any review of the CCA and ACL, we suggest regard should be had to the objects of the CCA set out in section 2 which provides:

> *"The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."*

Since at least the days of Adam Smith, economists have spruiked the virtues of competition. This is because industries with plenty of competitors tend to deliver lower prices and more choice than sectors dominated by a single monopoly or only a few industry players.

Competition in commerce may occur across all the dimensions of the produce-service package offering including price, quality, range, service, accessories, warranties and other terms and conditions. Regulation that limits the terms and conditions upon which suppliers may supply their goods and services limits one of these dimensions of competition.

> *"Effective competition requires both that prices should be flexible reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers."*[100]

In addition to the promotion of competition, section 2 of the CCA talks about "fair trading" and "consumer protection". Certainly, these are policies which should also guide any new regulation. That said, they are policies which are already imbedded within and underpin each and everyone of the provisions in the ACL, irrespective of the fact that the word "fair" itself rarely appears in those provisions. The concept of "fairness" is discussed in more detail later in this submission.

Freedom and sanctity of contract

Next regard should be had to the freedom of contract and sanctity of contract doctrines. The freedom of contract doctrine is a doctrine which states that individuals should be free to bargain among themselves without government interference. It is a doctrine that advances the concept of free competition across all dimensions of the price-product-service package offering.

The sanctity of contract doctrine is a doctrine that states parties of free will ought to be bound by the terms of the contract as framed by them, in the circumstances that existed at the time the contract was entered into, subject to any variations that were subsequently agreed by both.

Contract law is one of the fundamental institutions that underpin a market economy such as Australia. According to economic theory, when two rational parties voluntarily enter into a contract, they must be (at least weakly) better off than in the absence of the contract. The parties will agree on a contract that maximizes the total surplus that they can generate. Such a contract enhances economic efficiency as it results in the transfer of goods or services to a person who values them more highly. It also enhances social welfare by enhancing individual welfare.

> *"Individuals are assumed to be the persons best placed to assess their own welfare. Voluntary exchanges move resources to their most valued uses because an individual will only exchange a thing (such as money, goods or services) for another thing that he or she values more highly"*

The above economic analysis of contract law favours the doctrine of freedom of contract and discourages state intervention. It also favours the doctrine of sanctity of contract which enables contracts to be a legal mechanism for establishing and regulating potentially long-term commercial relationships as well as a

[100] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co. Ltd* (1989) 167 CLR 177 at 190.

mechanism for allocating the risks between the parties. Sanctity of contract promotes the beneficial social practice of "making and keeping promises and agreements".

In the late 19th century, the English judiciary espoused "freedom of contract" and "sanctity of contract" as generally applicable features of good public policy. This was perhaps best expressed in *Printing and Numerical Registering Co v Sampson* (1875) 19 Eq 462 by Sir George Jessel MR in a case which concerned a contract by which an inventor agreed to sell what he may invent, or acquire a patent for before he has invented it (which no doubt turned out to be far more valuable than the price paid for the same).

> *"…if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract …*
>
> *Nothing is more common in intellectual pursuits than for men to sell beforehand the future intellectual product before it is made, or even conceived. Does any one imagine that it is against public policy for an artist to sell the picture which he has never painted or designed, or for the sculptor to sell the statue, the subject of which is to be hereafter given to him, or for the author to sell the copyright of the book, the title of which is even as yet unknown, or, more than that, that a contributor to a periodical may agree that he will devote himself to the exclusive service of a certain periodical for a given period, for a given reward? These examples are, to my mind, entirely repugnant to the argument that there is any public policy in prohibiting such contracts. On the contrary, public policy is the other way. It encourages the poor, needy, and struggling author or artist. It enables him to pursue his avocations, because people rely upon his honour and good faith, and the ordinary practice of mankind; and it will provide for him the means beforehand which, if the law prohibited such a contract, he could not otherwise obtain. This appears to me to apply as much to a patent invention as to any other subject which the intellect can produce. A man who is a needy and struggling inventor may well agree either for a present payment in money down, or for an annual payment, to put his intellectual gifts at the service of a purchaser. I see, therefore, not only no rule of public policy against it, but a rule of public policy for it, because it may enable such a man in comparative ease and affluence to devote his attention to scientific research, whereas, if such a contract were prohibited he would be compelled to apply himself to some menial or mechanical or lower calling, in order to gain a livelihood."*

Given that "freedom of contract" and "sanctity of contract" are generally applicable features of good public policy, as a matter of good practice and policy governments should not restrict commercial enterprise, freedom of contract nor interfere with the sanctity of contract unless a case for action has been clearly established and there is a clear net benefit to the community, and should be the minimum necessary to achieve its objectives.

In stating this the SCCA acknowledges that these doctrines only serve the public interest where the parties were in a position to act rationally in their interests at the applicable time (including by reason of them having access to relevant information and knowledge that might have enabled them to make a rational decision). Reflecting this, the existing law of contract recognises a range of factors as vitiating a contract and justifying non-performance, such as where a party has been misled, has entered into the contact on the basis of a mistake or has been subject to illegitimate pressure to enter into the contract. Contract law also recognises that some people do not have the capacity to decide what is in their own best interests, such as children or persons who are mentally incapacitated.

Rule of Law

Another policy that should be had regard to when assessing the options for reform is the Rule of Law. As stated on the Rule of Law Education Centre website -

> *"…most of the content of the rule of law can be summed up in two points:*
>
> *(1) that the people (including, one should add, the government) should be ruled by the law and obey it and*
>
> *(2) that the law should be such that people will be able (and, one should add, willing) to be guided by it."*
>
> *– Geoffrey de Q. Walker, The rule of law: foundation of constitutional democracy, (1st Ed., 1988)*

According to the Rule of Law Education Centre the relevance of the Rule of Law is demonstrated, inter alia, by application of the following principles.

- The law is applied equally and fairly, so that no one is above the law.
- The law is capable of being known to everyone, so that everyone can comply.
- No one is subject to any action by any government agency other than in accordance with the law
- The judicial system is independent, impartial, open and transparent and provides a fair and prompt trial.
- No one can be prosecuted, civilly or criminally, for any offence not known to the law when committed.
- No one is subject adversely to a retrospective change of the law.

The Rule of Law Education Centre uses the Rule of Law Wheel to aid members of the public to understand "What is the Rule of Law?". A copy of this wheel appears at Appendix E to this submission.

In terms of the principle that the law should be known and accessible it is variously stated on the Rule of Law Education website that:

> *"The law must be known and predictable so that all people are able to be guided by it and know clearly the consequence of their actions.*
>
> *The laws must also be comprehensible and clear with limited government discretion so that the laws are applied predictably and in a non-arbitrary manner.*
>
> *…. All laws must be reasonably clear in their meaning, public, and ascertainable or knowable to all citizens, stable and prospective. When two people try to figure out what a law is, that law should be clear enough so that they come to broadly similar conclusions…."*

In terms of the principle that people can only be punished in accordance with the law it is variously stated on the Rule of Law Education website that:

> *"The law must be sufficiently defined and government discretion sufficiently limited to ensure the law is not applied in an arbitrary manner.*
>
> *In Australia, people can only be punished for breach of the law and in accordance with the law. Citizens, corporations, groups, or any arm of the government cannot impose any punishment otherwise than in accordance with the law."*

In terms of the principle that there should be no retrospective laws it is variously stated on the Rule of Law Education Website that:

> *"Retrospective laws are laws that change what people's rights and responsibilities were in the past. In other words, they are laws that are passed today that change what was legal or illegal yesterday.*
>
> *….. People cannot plan their lives and make sure they act within the boundaries of the law if the law can be changed so that their actions – legal at the time – later become illegal."*

As one legal commentator has stated:

> *"…the Rule of Law is intended to maximize freedom of choice by enabling the citizen to act in the confidence that her conduct is legal unless it contravenes clear and specific legal rules."*[101]

Separation of Powers

A further doctrine to which regard should be had is the Separation of Powers doctrine. The Separation of Powers doctrine is a doctrine which states that the legislative, executive and judicial powers of government should be vested in three different institutions of government:

a. *The Legislature (Parliament) alone should have the power to make and change laws.*

b. *The Executive (which includes Australian government ministers and the Governor-General) alone should have the power to enact law and administer the business of government through government departments, statutory authorities and the defence forces.*

c. *The Judiciary alone should have the power to interpret law and conclusively determine legal disputes.*

[101] Lisbeth Campbell, '*Drafting Syles: Fuzzy or Fussy?'* Murdoch University Electronic Journal of Law 3(2) July 1996 citing FAR Bennion, Statute Law, 2nd Ed 1983, Oyez Longman at [28].

The Separation of Powers doctrine is imbedded in the Commonwealth Constitution and is concerned with ensuring that there are appropriate checks and balances on the exercise of power by these three different institutions.

The Separation of Powers doctrine is presently relevant in so far as to it provides for a separate judiciary, independent of parliament and government, whose role is not to make or change laws (or to otherwise exercise executive or legislative power) but rather to interpret the law and conclusively determine legal disputes.

In *Rv Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 138 it was held that a Chapter III court cannot be vested with anything other than judicial power and that the parliament has no power to entrust the exercise of the judicial power of the Commonwealth to any other hands than a Chapter III court.[102]

In *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 Griffiths CJ said at 357:

> *"I am of the opinion that the words "judicial power" as used in s 71 of the Constitution mean the power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property."*

In deciding whether a matter is "justiciable" (properly determinable by a Court exercising its judicial powers) the Courts have drawn a distinction between the creation or rights and duties for the future and the declaration and enforcement of existing rights and duties – with the latter, and not the former, being matters permissible for a Court to do exercising judicial powers. The distinction being that courts are properly concerned to apply existing legal standards derived from legislation and the common law, while parliament and administrators are primarily governed by broad policy considerations.

> *"To apply generalised policy considerations directly, in each case, instead of formulating principles from policy and applying those principles, derived from policy, to the case in hands, is, in my view, to invite uncertainty and judicial diversity."*[103]

The distinction between the creation of rights and duties for the future and the declaration and enforcement of existing rights and duties has typically been drawn by the Courts where parliament has impermissibly purported to give to tribunals or courts the task of applying standards that are so broad that they look like those appropriate to legislative or administrative discretion or policy; these include such standards as "reasonable", "just" or "oppressive" (much like any proposed standard of "fairness").

In *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, for instance, the matter concerned the Trade Practices Tribunal (ie not a court) created by the Trade Practices Act 1965. Section 49 provided that if, in the proceedings instituted by the Commissioner of Trade Practices, the tribunal was "satisfied" that, *inter alia*, an examinable agreement existed, it was to "determine, in accordance with its opinion, whether the restriction or practice to which the proceedings relate is contrary to the public interest". Section 50 then set out what Owen J described as "a series of general economic and political matters" to which regard was to be had by the tribunal in determining whether the restriction or practice was contrary to the public interest. It was required to take as a basis its consideration the principle that competition was desirable and weigh that against a number of other social interests, such as the economic distribution of resources, the needs of the export market, the interests of small businesses, and so on. The effect of a determination that a restriction in an agreement was contrary to the public interest was that it became unenforceable: s 51. Under s 52 the tribunal was empowered to make orders restraining parties from giving effect to an agreement the subject of a determination. Disobedience to an order was made punishable by the Commonwealth Industrial Court as if it were a contempt of court.

In that case it was held by Kitto, Windeyer, Owen and Walsh JJ, with Menzies J dissenting, that the Act was valid because it did not confer upon the tribunal any part of the judicial power of the Commonwealth. All the majority judges (and perhaps Menzies J) were agreed that the function of determining under ss 49 and 50 whether a restriction was contrary to the public interest was properly exercisable by a non-judicial body. The criteria in s 50 was not objectively determinable and did not conform to judicial standards. That criteria of being "contrary to the public interest", in the words of Kitto J a 376, was "a description the content of which has no fixity – a description which refers the tribunal ultimately to its own idiosyncratic conceptions and modes of thought". Windeyer J similarly declared at 400 that "[t]he public interest is a concept which attracts indefinite considerations of policy that are more appropriate to law-making than to adjudication according to

[102] See also *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73.
[103] Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 567.

existing law". Another feature emphasised by Kitto J was that there was no suit between the parties. In that case the Commissioner of Trade, although a party of the proceedings, did not assert and was not seeking the vindication of an existing right to relief in either a personal or representation capacity.

Applying similar logic:

- In *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 the High Court unanimously held that the Establishment and Employment Act purported to confer non-judicial power on State courts and was therefore invalid. That Act had purported to give the State court power to determine whether an ex-serviceman was entitled to a preference in employment – having regard to their comparative qualifications for the job and other matters, including length and nature of service and to make "such order as it thinks just and reasonable in the circumstances".
- In *R v Spicer; ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277, the matter concerned s 140 of the Conciliation and Arbitration Act which provided that "the court may, upon its own motion or upon application made under this section, disallow any rule of an organisation which, in the opinion of the court, … "satisfied various criteria including being "tyrannical or oppressive" or one which imposed "unreasonable conditions upon the membership of any member or upon any application for membership". The court (Dixon CJ, McTiernan, Kitto and Taylor JJ; Williams and Webb JJ dissenting) held that the power intended to be conferred was not part of the judicial power of the Commonwealth and therefore could not be conferred on the Commonwealth Industrial Court. Dixon CJ said at 290 that the criteria were "vague and general and give much more the impression of an attempt to afford some guidance in the exercise of what one may call an industrial discretion than to provide a legal standard governing a judicial decision". Kitto J at 306 said that the terms used were "so broad as to be more appropriate for conveying general conceptions to a person engaged administratively in performing a function conceived of as part of a system of industrial regulation than for stating, to a body acting judicially, grounds of jurisdiction which it is to interpret and apply with precision"..
- In *United Engineering Workers' Union v Devanayagam* [1968] AC 356 the Privy Council was concerned with an Act which purported to empower a labour tribunal to adjudicate on the basis of what was "just and equitable" as to whether a workman, upon the termination of his services by his employer, was entitled to any gratuity or other benefit in respect of the termination (notwithstanding anything in his contract of service). The majority of the Privy Council held that the tribunal's function was not to determine legal rights and that the tribunal was not exercising judicial power.

Despite these cases and pronouncements it is fair to say that the breadth of the standards that parliament can constitutionally prescribe for application by a court has not proved to be a great restriction on its power to confer functions on courts. This has particularly been the case where the field of discretion in which the judiciary has been charged with exercising is itself relatively limited or suited to judicial determination – such as:

- To cancel or vary contracts, leases or mortgages if satisfied that their performance was impossible, inequitable or onerous by reason of circumstances attributable to the war;[104]
- To determine whether obligations or restrictions on membership of an organisation were "oppressive, unreasonable or unjust";[105] or
- In matrimonial causes cases, "to make such maintenance order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other circumstances", to make settlement of property arrangements which it considered just and equitable for the benefit of any of the parties to and children of the marriage and to vary ante-nuptial and post-nuptial settlements.[106]

As one legal commentator has said:

> *"In the long run … in cases of both broad standards and the creation of rights and duties, the issue* [really] *is the desirability or appropriateness of judges performing the particular function… A particular function will only be appropriate if its exercise is consistent with the "professional habits" and techniques practised by the judiciary. Judicial reasoning, of course, requires a high degree of consistency; it involves the formulation of principles and decisions based on those principles".*

Consistent with the above, where parliament has given courts the task of applying broad standards and this has been held to be constitutional or has not been challenged, the technique of judicial interpretation

[104] *Peacock v Newtown Marrickville and General Co-Operative Building Society No 4 Ltd* (1943) 67 CLR 25.
[105] *R v Commonwealth Industrial Court, ex parte Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368.
[106] *Cominos v Cominos* (1972) 127 CLR 588.

(involving having regard to the object of the law and precedents) is then inevitably used by the courts to give the broad standard content and a more detailed meaning on a case to case basis. Consistent with the Separation of Powers doctrine, rules and principles of the courts then inevitably emerge which guide and direct (and confine) later courts in the application of the standard and the exercise of the discretion – such that uniformity is created in the administration of justice.

When developing the common law Courts have themselves been careful to limit themselves to functions and roles that are *"consistent with the "professional habits" and techniques practised by the judiciary"* and which require "judicial reasoning" rather than a judge to exercise his or her "own idiosyncratic conceptions and modes of thought".

In *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483; 42 ALJR 123, for instance, Barwick CJ, McTiernan and Kitto J described the common law business judgment rule at 493 as follows:

> *"Directors in whom are vested the right and duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts."*

Similarly, in *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* (2008) 39 WAR 1; 70 ACSR 1; [2008] WASC 239 at [4619], Owen J stated that it is the directors who determine what are the best interests of the company and courts should not substitute their own views about the commercial merits of a decision for the views of the directors. However, a court may find a breach of duty if the decision of the directors is one that, according to the court, no reasonable board of directors would judge to be in the interests of the company.

The courts have also found that the bona fide exercise of a discretion by a trustee will be protection to him or her whether the result be good or bad. Absent proof of mala fides, unreasonableness in the exercise of the discretion is of itself not a ground for interference by the court; *Cock v Smith* (1909) 9 CLR 773 at [844].

Further in administrative law, the judiciary looks at legalities of the decision made (including whether the decision-maker had regard to irrelevant considerations or failed to have regard to a relevant consideration or otherwise acted ultra vires) and not strictly to the merits of the decision. The judiciary only adjudicates on the merits where the decision is so unreasonable that no reasonable decision maker could have made that decision ("Wednesbury unreasonableness").[107] This is much like the approach adopted by the courts when determining whether conduct is unconscionable as discussed below.

In summary and in the context of any new regulation, the SCCA suggests that it is consistent with the Separation of Powers doctrine for that regulation to set down clear standards which are capable of being interpreted and applied correctly and consistently by judges. We further suggest that it is inconsistent with this doctrine and with the roles and functions appropriately served by the judiciary (having regard to their traditional expertise, experience (or lack thereof) and professional habits), for that regulation to impart on the judiciary matters of subjective merit and broad discretions which require arbitrary or prerogative judgment. That is particularly the case where the judgment requires regard to be had to matters of policy or judgment today as to the commercial merits of decision voluntarily entered into past by participants in the relevant market (having regard to and looking after their own interests).

As one legal commentator has stated:

> *"…A prime advantage attributed to a precise and detailed drafting is certainty and foreseeability of outcome in the great majority of cases … A second advantage is democratic control. To vest decision making in a non-elected judge or official by bestowing wide discretionary powers on them is undemocratic as power is transferred from the elected legislature to an unelected executive or judiciary."*[108]

Policies requiring the presumption of innocence, a guilty mind and an elevated standard of proof where significant penalties are sought to be imposed

In Australia, there are a number of policies that require the presumption of innocence, a guilty mind and that the prosecutor satisfies elevated standards of proof where significant penalties are sought to be imposed.

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[107] *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[108] Lisbeth Campbell, *'Drafting Syles: Fuzzy or Fussy?'* Murdoch University Electronic Journal of Law 3(2) July 1996 citing FAR Bennion, Statute Law, 2nd Ed 1983, Oyez Longman at [28].

Each of these policies are considered relevant to assessing any of the options being considered which would be supported by and may potentially involve penalties being imposed on offenders.

In criminal trials in Australia, for instance, the prosecution almost invariably bears the burden of proof. As the Australian Law Reform Commission said in chapter 9 of its report entitled "*Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*" tabled on 2 March 2016 (ALRC Report 129):

> *"9.1 This has been called 'the golden thread of English criminal law' and, in Australia, 'a cardinal principle of our system of justice'. The High Court of Australia observed in 2014 that:*
>
> *"[o]ur system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person."*
>
> *9.2 This principle and the related principle that guilt must be proved beyond reasonable doubt are fundamental to the presumption of innocence…'[109]*
>
> *9.9 Professor Andrew Ashworth has expanded on the rationale for the presumption of innocence:*
>
> *"…the presumption is inherent in a proper relationship between State and citizen, because there is a considerable imbalance of resources between the State and the defendant, because the trial system is known to be fallible, and, above all, because conviction and punishment constitute official censure of a citizen for certain conduct and respect for individual dignity and autonomy requires that proper measures are taken to ensure that such censure does not fall on the innocent."*
>
> *9.10 In the High Court of Australia, French CJ called the presumption of innocence 'an important incident of the liberty of the subject'...[110]*
>
> *9.19 Generally, the prosecution bears the legal burden of proving the defining elements of an offence, as well as the absence of any defence. However, the accused will generally bear an evidential burden of proof in relation to defences. This is reflected in s 13.3(3) of the Criminal Code, …"*

In relation to legislation that has sought to reverse the onus of proof it was said in ALRC Report 129 that:

> *9.15 The Guide to Framing Commonwealth Offences states that 'placing a legal burden of proof on a defendant should be kept to a minimum'.[111] …*
>
> *9.59 … as the Guide to Framing Commonwealth Offences notes,*
>
> *[t]he fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant. If an element of the offence is difficult for the prosecution to prove, imposing a burden of proof on the defendant in respect of that element may place the defendant in a position in which he or she would also find it difficult to produce the information needed to avoid conviction. This would generally be unjust.*
>
> *9.60 The Institute of Public Affairs submitted that difficulties associated with proof are not a sufficient justification for a reversal of the burden of proof, stating that '[t]he common law legal system is ideal not for the ease with which it allows for prosecutions, but for the protections it offers against an overbearing state'.*

In Australia proof of the commission of a criminal offence also typically requires the prosecutor to prove particular prohibited act (the *actus reus*) together with a guilty mind (*mens rea*). *He Kaw Teh v The Queen* (1985) 157 CLR 523, for instance, is authority for the proposition that there is a rebuttable presumption that a serious criminal offence requires proof of knowledge or some other blameworthy state of mind.

Since the introduction of the *Criminal Code Act 1995* (Cth) (the Code) for Commonwealth criminal offences, proof of the commission of a Commonwealth offence now requires proof of the `physical element/s' of an offence together with the applicable 'fault element/s' for each physical element.[112] That is to say, under the Code, the concepts of actus reus and mens rea are in effect dealt with as 'physical elements' and 'fault

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[109] *Lee v The Queen* [2014] HCA 20 (21 May 2014) [32].
[110] *Momcilovic v The Queen* (2011) 245 CLR 1, [44].
[111] Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 51.
[112] Section 3.2 *Criminal Code Act*.

elements'. The fault elements under the Code may be either intention, knowledge, recklessness and negligence.[113] .

The policy behind the requirement for a citizen to have "a guilty mind" to the commit a criminal offence and to thus be subject to substantial penalties, including potentially imprisonment, seem to be pretty self evidence. One you should not be liable to a penalty for unintentional and innocent mistakes.

Further in Australia the standard of proof required to prove the commission of a criminal offence is the standard of "beyond reasonable doubt" rather than the civil standard of "balance of probabilities, unless the law creating the offence provides for some other standard of proof.[114] Even where parliament has required only the civil standard, the *Briginshaw v Briginshaw* (1938) 60 CLR 336 decision is authority for the proposition that Courts applying the civil standard of proof must be actually persuaded of the facts at hand, and all the more so when a serious allegation is involved. *Briginshaw* stands for the proposition that the more serious the allegation to be adjudicated, the more cogent the proof ought to be: '[A] court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct' (at 362).

In making reference to the above policies we are well aware that these policies are generally understood to apply to criminal offences and that it has not been suggested by Treasury or anyone else of whom we are aware that any general unfair trade practices prohibition introduced ought to be a prohibition that attracts criminal sanctions. As was said, however, by the Australian Reform Commission in ALRC Report 129

> *"9.7 There can be a blurring of distinctions between criminal and civil penalties, such that some civil laws may effectively be criminal in nature. Reversals of the burden of proof in such laws merit careful scrutiny…*
>
> *9.109 The distinction between civil and criminal proceedings may not always be clear. The ALRC's 2003 report on civil and administrative penalties noted that the*
>
> > *Traditional dichotomy between criminal and non-criminal procedures no longer accurately describes the modern position, if it ever did. The functions and purposes of civil, administrative and criminal penalties overlap in several respects. Even some procedural aspects, such as the different standards of proof for civil and criminal sanctions, are not always clearly distinguishable."*
>
> *9.110 The Institute of Public Affairs observed that governments 'increasingly regulate behaviour through the civil law, rather than the criminal law'. Professor Anthony Gray has noted the existence of 'a broader debate regarding the ongoing utility of such a distinction, whether there should be recognised a "third category" of proceedings that are properly neither civil nor criminal, and the essence of what is and should be considered to be a crime'.*
>
> *9.111 Where there is such a blurring of distinctions between criminal and civil penalties, careful scrutiny of any reversals of the burden of proof is merited. The Human Rights Committee has noted that civil penalty provisions*
>
> > *may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.*
>
> *9.112 For the Human Rights Committee, matters to consider in assessing whether a civil penalty is 'criminal in nature' include: the classification of the penalty; the nature of the penalty, including whether it is intended to be punitive or deterrent in nature, and whether the proceedings are instituted by a public authority with statutory powers of enforcement; and the severity of the penalty."*

Australian Government Drafting Considerations

In addition to the doctrines and polices referred to above, we would suggest that the guidelines that the Australian Government Attorney-General's Department has published concerning draft legislation are also relevant policy design considerations against any of the options for reform ought to be assessed. According

[113] Section 5.1 *Criminal Code Act.*
[114] Part 2.6 of the Code Section 13.2

to its website the Australian Government Attorney-General's Department is committed to working with agencies including the Office of Parliamentary Counsel (OPC) to develop laws that are clear, fair, simple, effective, principles-based and consistent with our Constitution and human rights obligations.

In particular the Commonwealth Attorney-Generals Department on its website on a web-page entitled "Reducing the complexity of legislation" sets out the following "Principles for clearer laws":

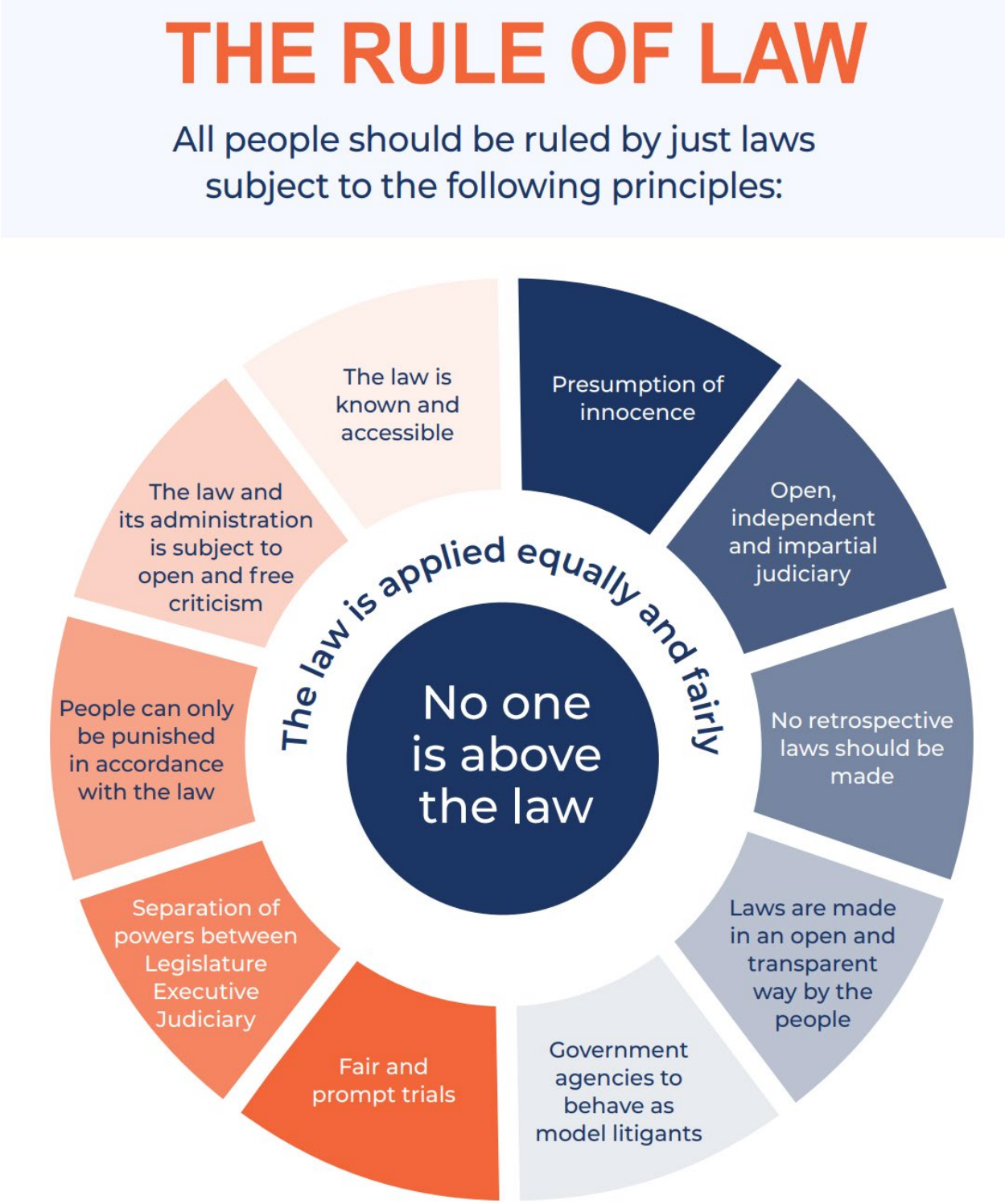
> *"Laws that are clear and easy to understand are an essential part of an accessible justice system. Clearly written laws can be better understood, complied with and administered.*
>
> *Policymakers, instructing agencies and drafters should apply the following general principles when developing Commonwealth legislation:*
>
> - *Consider all implementation options—don't legislate if you don't have to.*
> - *When developing policy, reducing complexity should be a core consideration.*
> - *Laws should be no more complex than is necessary to give effect to policy.*
> - *Legislation should enable those affected to understand how the law applies to them.*
> - *The clarity of a proposed law should be continually assessed, from policy development through to consideration by Parliament (for Acts) and consideration by the rule-maker (for legislative instruments)."*[115]

Also, on the web-page entitled "Reducing the complexity of legislation" the Commonwealth Attorney-Generals Department discusses the "regular review of legislation".

> *"Legislation should be regularly reviewed for readability, usability, ease of administration and policy desirability. This should include testing the legislation for continuing relevance, consistent with the Government's focus on reducing red tape.*
>
> *A review should be done both as a stand-alone process and when existing legislation is being amended. The overall clarity of the legislation should be reconsidered and the underlying policy could also be reassessed.*
>
> *In implementing new policy into legislation, instructors often look to make amendments to existing Acts without reviewing the existing provisions or the Act as a whole. This can result in longer legislation and make it harder to find and understand the relevant provisions and how they fit in with the Act as a whole."*[116]

[115] Australian Government Attorney General's Department, *Reducing the complexity of legislation*, 2003.
[116] Australian Government Attorney General's Department, *Reducing the complexity of legislation*, 2003.

Appendix F – Rule of Law Wheel



Appendix G – Markets with good regulation

In this appendix we seek to draw a picture, having regard to the above policy design considerations, of what markets should look like and how they should operate with good regulation.

What a given market should look like and how it should operate varies depending on the products and services involved and the value and price of those products and services. There is no perfect one size fits all model.

Scenario 1: Where, for instance, the value of the good or service is low you are likely to see very little time and cost wasted on negotiation, on the parties trying to grapple with and understand the terms and conditions of the transaction or on the buyer investigating the qualities of the good or service being offered. You consequently want the terms and conditions for such transactions (including the terms of any consents) to be largely standardised across the relevant industry on everything except price and time of delivery and you want those standardised terms and conditions to be balanced, concise and reasonable having regard to both sides of the transaction's legitimate interests. Ideally these standardised terms and conditions will have been drafted and settled upon by qualified and experienced persons representing those two sides (ideally mediated by an independent third party who also an eye to the wider welfare of society) such that all the parties then have to do, when entering into a transaction, is to agree on price and say colour. Where the consumer needs to make additional choices, such as whether and how data pertaining to them might be collated, used and shared, the options presented to them ideally should be simple and standardised across the industry so that there is the realistic possibility of the user, with little effort and in a limited time period, making an informed choice.

Far from being demonised (as standard form contracts seem to have been since the introduction of sections 23 - 27 of the ACL), the balanced standardised standard contract should be seen as the object of good regulation where the value of the good or service is low. It being a document which the parties should be able to largely and safely ignore during negotiations and it being a document that those parties should only need to consult when things go awry. This standard form contract (to the extent it is written) should then ideally contain, in a single document, terms and conditions that are balanced and clear - such that in most cases they present a clear and certain path forward that is readily enforceable and not fairly contestable.

Traditionally with retail sales from a shop-front, for instance, it is only the price that may or may not be the subject of negotiation. The other terms of the contract are typically implied into that contract by the common law and by legislation such as by the consumer guarantee provisions of the ACL (sections 51 to 63). Section 54 of ACL, for instance, provides for the insertion into such a sales contract a "guarantee as to acceptable quality" by providing:

"(1) If:

(a) a person supplies, in trade or commerce, goods to a consumer; and

(b) the supply does not occur by way of sale by auction;

there is a guarantee that the goods are of acceptable quality.

(2) Goods are of acceptable quality if they are as:

(a) fit for all the purposes for which goods of that kind are commonly supplied; and

(b) acceptable in appearance and finish; and

(c) free from defects; and

(d) safe; and

(e) durable;

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in subsection (3).

(3) The matters for the purposes of subsection (2) are:

(a) the nature of the goods; and

(b) the price of the goods (if relevant); and

(c) any statements made about the goods on any packaging or label on the goods; and

(d) any representation made about the goods by the supplier or manufacturer of the goods; and

(e) any other relevant circumstances relating to the supply of the goods.

(4) If:

(a) goods supplied to a consumer are not of acceptable quality; and

(b) the only reason or reasons why they are not of acceptable quality were specifically drawn to the consumer's attention before the consumer agreed to the supply;

the goods are taken to be of acceptable quality.

(5) If:

(a) goods are displayed for sale or hire; and

(b) the goods would not be of acceptable quality if they were supplied to a consumer;

the reason or reasons why they are not of acceptable quality are taken, for the purposes of subsection (4), to have been specifically drawn to a consumer's attention if those reasons were disclosed on a written notice that was displayed with the goods and that was transparent.

(6) Goods do not fail to be of acceptable quality if:

(a) the consumer to whom they are supplied causes them to become of unacceptable quality, or fails to take reasonable steps to prevent them from becoming of unacceptable quality; and

(b) they are damaged by abnormal use.

(7) Goods do not fail to be of acceptable quality if:

(a) the consumer acquiring the goods examines them before the consumer agrees to the supply of the goods; and

(b) the examination ought reasonably to have revealed that the goods were not of acceptable quality."

Where the value of the good or service is low, it is clearly preferrable for the "guarantee as to quality" to be on the above terms (which was clearly drafted by qualified draftsmen who were seeking to introduce a balanced term) than might be negotiated or consented on the fly and in the instant. Both the consumer and the purchaser are better off with such a clear, comprehensive and balanced statement of their rights and obligations to rely upon than some vague rule of fairness.

Scenario 2: Where the value of the good or service being traded may be high but where say the time allowed for entering into the contract is tight – such as is the case with say trades in shares and in derivatives (where the price payable is dynamic and market driven) - you similarly want the terms and conditions largely standardised across the industry except as to price (and for those standardised terms and conditions to be balanced and reasonable).

The ISDA master agreement is an example of such a desirable standard form contract. An ISDA Master Agreement is the standard document regularly used to govern over-the-counter derivatives transactions. The agreement, which is published by the International Swaps and Derivatives Association (ISDA), outlines the terms to be applied to a derivatives transaction between two parties, typically a derivatives dealer and a counterparty. The ISDA Master Agreement itself is standard, but it is accompanied by a customized schedule and sometimes a credit support annex, both of which are signed by the two parties in a given transaction.

As it says on the Investopedia website:

"The most significant advantages of an ISDA Master Agreement are improved transparency and higher liquidity. Since the agreement is standardized, all parties can study the ISDA Master Agreement to learn how it works. That improves transparency because it reduces the possibilities for obscure provisions and escape clauses. The standardization provided by an ISDA Master Agreement also increases

liquidity since the agreement makes it easier for the parties to engage in repeated transactions. The clarification of terms offered by such an agreement saves time and legal fees for everyone involved."[117]

Scenario 3: Where the value of the good or service being traded is high but the nature of the transaction is pretty common but not necessarily to parties involved (who may themselves have very limited experience) - you similarly want the terms and conditions largely standardised across the industry but readily subject to variation and amendment. Take for instance contracts for the sale of domestic land used by mums, dads and first home buyers. Ideally what you want, and what is in fact typically used, are standard form contracts that have been painstakingly been prepared over many years by say the Law Society of New South Wales (with a view to being fair and balanced document having regard to the legitimate interests of both the purchaser and the vendor).

Treasury may be familiar with this contract. It is a standard contract which contains a number of cover pages which detail the inclusions and exclusions of the property, the price, the deposit, the pattern of land tax, the payment of capital gains tax, the address of the solicitor for the vendor and the vendor's agent, the title reference of the property and its address and other necessary details which are used to summarise the transaction. On these cover pages the parties have a number of option (ie whether the sale is with "vacation possession" or "subject to tenancies", adjustable for land tax etc and whether the purchase is as "joint tenants" or "tenants in common") which enable the parties to tailor the contract to their circumstances. The contract on the second page lists all of the documents which are included in the contract. There are then a list of standard terms and conditions which are included in the contract which include approximately 30 terms which the parties agree to. Special conditions may then be included in the contract (which vary and/or add to these standard terms and conditions).

The use of such contracts has drastically reduced the legal costs and level of disputation involved in domestic conveyancing; much to the benefit of society including in particular mums, dads and first home buyers. They have also particularly reduced the level of stress involved for these market participants because if the term is one of the standard terms (and unless it is one of the special conditions) they do not really need to worry about it, knowing that the term is a term that persons far more knowledgeable and experienced than them have judged fair and reasonable – unless their particular circumstances are a little out of the ordinary.

In the shopping centre industry, we similarly have the Casual Mall Licensing Code of Practice (CML Code) which has been agreed between the Australian Retailers Association, National Retail Association, National Online Retail Association and the SCCA. It is a code that has been drafted to provide balanced guidelines that ensure that the practice of casual mall licensing (the short term licensing of common area space in shopping centres to retailers) adds variety to the retail offering of shopping centres, helps attract customers to shopping centres and enables existing retailers to augment their normal sales whilst being sensitive to existing retailers at a shopping centre. It is a code of practice that each of the above associations encourages be implemented by their members as circumstances permit. It is a code of practice which requires the introduction of a casual mall licence policy with a casual mall licence plan in respect of any given shopping centre and deals with matter such as the maintenance of sightlines to existing shopfronts, the position of casual mall licences relative to competing existing retailers and adjustments for outgoings. It is a code that is subject to regular review by a Code Administration Committee which is comprised of representatives of both retailers and landlords.

In authorising the CML Code, the ACCC has acknowledged that the CML Code likely results in public benefits in the form of:

- Greater certainty and transparency for lessees and licensees about the terms by which casual mall licences might be granted;
- The provision of a dispute resolution pathway;
- Efficiency for those lessees that enter into leases in multiple shopping centres or in multiple jurisdictions by standardising the terms on which casual mall licences may be granted.

The ACCC has further said that it considers these public benefits are likely to outweigh the minimal public detriment resulting from the CML Code, as constituted by a possible lessening of competition.

Scenario 4: Where the value of the good or service being traded is high, the arrangement between the parties is expected to continue over the medium to the longer terms (where things can and do often change both foreseeably and unforeseeably) and where the market participants on both side typically have a reasonable amount of experience and expertise - you want there to be greater scope for the terms and

[117] James Chen, *ISDA Master Agreement: Definition, What It Does, and Requirements,* 27 November 2020.

conditions to be negotiated and sculptured to the particular demands of the parties looking after their own interest (unrestrained by preconceived undirected view of fairness). You probably want those participants starting their negotiations with fairly standardised contracts with fairly standardised terms and conditions (so as to minimise transaction costs and the amount of time required for the participants to become familiar with those terms and conditions) but with them have plenty of scope to adapt the same, should they choose to do so, to their particular circumstances and the particular circumstances of the transaction at hand.

Retail leases generally fall within this category – with the lease typically lasting 5-7 years (often with options for renewal) and the participants (or at least their professional advisors) being well familiar with nature and standard terms and conditions of the transactions involved. Over the term of the lease there is the possibility of the retailer getting into financial difficulty and wanting to terminate or assign the lease, the price of electricity and other outgoings rising substantially, the landlord wanting to upgrade and/or develop the shopping centre and it common areas, and changes in the make-up of the surrounding tenancies. There needs to be scope for all of these matters to be subject of negotiation upfront and to then form the basis for the terms and conditions of the lease ultimately entered into. The Western Australian Government began an exercise in 2005 to reach agreement on certain standard retail lease clauses but abandoned it after one year when it proved impossible to find a consensus on the form of these clauses.

Any regulation of this category of transactions, including of retail leases, should be focused on requiring minimum industry practices and in setting clear minimum terms and conditions rather than standards which might otherwise confine what the particular might legitimately agree to fully cognisant of their own best interests). Above those minimum terms suppliers should be able to compete on the terms they offer and negotiate.

Every jurisdiction in Australia, for instance, already has its own comprehensive retail lease legislation that governs and regulates the conduct of parties that participate in retail leasing. This retail lease legislation contains provisions that regulate conduct that is harsh, unjust or unconscionable but by regulation that is tailored to the retail leasing industry. The *Retail Leases Act 1994* (NSW) for instance contains detailed provisions which are intended to achieve fairness and which, inter alia, regulate:

- The provision of a copy of the lease, a retail tenancy guide and a tenancy fit-out statement or guide at the negotiation stage
- The right to compensation for pre-lease misrepresentations
- The provision of a Lessor's and a Lessee's disclosure statement
- Costs before fit-out
- Guarantees and other forms of security (including security bonds)
- Payment of rent when lessor's fitout not completed
- Turnover rent
- Recovery of outgoings from lessee
- Sinking fund repayments
- Determination of current market rent
- Relocation clauses
- Demolition clause
- Grounds on which consent to assignment can be withheld
- The prohibition of key-money on assignment prohibited
- Negotiations for renewal or extension of lease
- Trading hours
- Confidentiality of turnover information
- Advertising and promotion requirements
- Geographical restrictions
- Unconscionable conduct in retail shop lease transactions
- Misleading or deceptive conduct in connection with retail leases

In general terms, Australia has a very successful retail leasing environment which is arguably the most efficient retail tenancy market in the world. In many ways it presents a good picture of what a market with good regulation looks like. Key factors that have contributed to this are a mature and competitive retail industry, a generally stable economic environment, planning laws which encourage long term investment in public and private infrastructure and the existing retail lease legislation, which is specific, settled and well

understood. Shopping centre landlords are well versed and incredibly diligent in ensuring that retail leasing is conducted in a fair and transparent manner, which meets the expectations of government and regulators.

Scenario 5: Where the value of the good or service being traded is high and the transaction is relatively bespoke, say with the sale of a business or with a joint venture agreement, you typically want the parties to have nearly unlimited scope for negotiation and to assign and share risk. Keeping those parties bound to the terms of the contract they might ultimately have voluntarily entered into is paramount. In this context there should be and typically is less need for the use of standardised terms and conditions.

Appendix H – Examples of the impact of uncertainty on shopping centres

Example 1: Impact on development and investment

A shopping centre landlord has an agreement for lease with an anchor tenant (which is the entity listed on the retail lease) that technically meets the definition of "small business" proposed in the Consultation RIS. The anchor tenant is, however, a company within a corporate group and thus has the knowledge, resources, ability to access expert advice, and experience of a large business. This anchor tenant opened into the agreement for lease willingly and with its eyes wide open.

Based on this agreement for lease the shopping centre landlord has made plans to develop and expand the centre on the basis that having this anchor tenant in the centre will generate increased foot traffic and drive new tenants to lease premises in the shopping centre. The landlord has already made agreements with additional tenants to join the centre on the basis that the anchor tenant is in the shopping centre.

The landlord also has planned to develop the car park and associated transport hub to cater for the expected increase in foot traffic and retail spend at the shopping centre. It has committed hundreds of millions to invest in and develop the centre. It has engaged architects, town planners, developers, builders and signed up hundreds of trades.

The anchor tenant, however, sees it as in its commercial best interests to get out of the lease but under the existing regulations would have no basis for doing so. The agreement for lease and lease to be entered under that lease meet all the requirements of the existing extensive state regulation. With the introduction of a general unfair trading practices prohibition, however, the anchor tenant is able to threaten or take legal action against the landlord on the basis that agreement for lease is "unfair".

In this scenario, the following consequences flow for the shopping centre landlord from the uncertainty created by the introduction of an general unfair trading practices prohibition:

- The landlord is forced to defend the action brought by the anchor tenant, which requires extensive time, resources and money spent on external advisors;
- The risk and uncertainty of the anchor tenant no longer remaining in the shopping centre means that the significant development and expansion of the shopping centre cannot proceed, which means the additional jobs, retail spend, foot traffic, tenants and economic activity that was to result from the development does not happen.
- Without having the luxury of being able to await the hearing of a protracted trial, the landlord now must spend time and resources to find another tenant to replace the anchor tenant.
- The Landlord potential finds itself in breach of lease agreements with other tenants who were to join the centre on the basis that the anchor tenant would be there and there would be increased foot traffic. This forces the landlord to defend claims brought by these tenants for the breach.
- These other tenants and their plans are put in jeopardy;

Going forward, there is a heightened sense of risk and uncertainty for the landlord that means the landlord is more cautious about making other investment and development decisions, putting more jobs and economic activity at risk.

Whilst we note that not all of those consequences might flow, they have been listed to highlight and demonstrate that there is a significant level of additional risk and uncertainty imposed on shopping centre owners and operators because of an unfair trading practices prohibition.
The subjective nature of "unfairness", the fact vexatious claims can be made and that businesses that are not genuine small businesses can rely on an unfair trading practices prohibition are extremely problematic and are key reasons why an unfair trading practices prohibition should not be pursued, especially when more targeted and tailored solutions are available.

Example 2: Impact on cleaning and security services and supplier agreements

A shopping centre landlord has a two year cleaning contract with a cleaning service provider who meets the small business definition set out in the Consultation RIS. This service provider has considerable experience and expertise in the market and is well familiar with the terms of the contract it has entered into. It in fact proffered the relevant contract to be signed by the landlord.

Mid-way through the two year term, the cleaning service provider takes offence at something the landlord or its tenants does at its centre. Perhaps a butcher becomes a tenant at the centre and the operating costs of the service provider substantially increase (say because the butcher's rubbish includes large amounts of pork off-cuts which the cleaner's existing staff for religious reasons are not keen to handle and/or for some other reasons specific to the service provider). Assume the service provider would have no means of recourse against the landlord available to it under existing laws to charge the landlord higher service fees in the circumstances.

With the introduction of a general unfair trading practices prohibition, however, the service provider decides to seek to have its cleaning service contract set aside on the basis that it is unfair because it does not contain any provision that makes an adjustment to the rates payable to the service provider where that service providers costs increase in this way. Further, the service provider claims that the landlord is not acting fairly by seeking to rely on its contract and only pay the rates payable under that contract. The landlord then decides to defend the claim because it honestly believes that the service provider had agreed to assume the risks of any costs increases when it had nominated the rates it was prepared to provide the service for.

Because of the uncertainty in the term "fairness" neither party is advised with certainty that they will win or lose the case and both persist with their case in the belief in the reasonableness and fairness of their divergent positions.

In this scenario, the following consequences flow for the shopping centre owner:

- Notwithstanding the shopping centre owner having acted in its honest view fairly and reasonably, because of the subjective nature of the term 'unfair', the shopping centre owner defends the action brought by the cleaning or security service provider, which requires extensive time, resources and money spent on external advisors.
- The relationship between the shopping centre owner and the cleaning or security service provider is severely damaged.
- The damaged relationship between the shopping centre owner results in the contract for services being poorly performed or then an early termination of the agreement.
- The lack of proper cleaning services being provide both in the lead up to and post the termination of the agreement results spillages not being cleaned up swiftly, bathrooms not being kept sanitised and clean and the general cleanliness and hygiene of the centre deteriorating.
- A deterioration of a shopping centre's cleanliness and safety impacts upon foot traffic and retail spending as the customer experience is worsened making the centre a less desirable place to visit.
- Retail and tenants suffer alike.
- The shopping centre owner may be in breach of lease agreements with tenants as the shopping centre owner is required to keep the centre clean and safe.

These direct and indirect costs that are incurred for both the landlord and the cleaning and security service provider may far exceed the difference in rates initially in dispute, but because neither party was advised they would lose (due to the uncertainty of the "fairness" term) both persisted with litigation and as above. Such an unfairness term served no-ones best interest.

Appendix I – Impact of an unfair trading practices prohibition on existing retail leasing legislation

Retail leasing legislation includes the:

- Leases (Commercial and Retail) Act 2001 (ACT);
- Retail Leases Act 1994 (NSW);
- Business Tenancies (Fair Dealings) Act 2003 (Northern Territory);
- Retail Shop Leases Act 1994 (Queensland);
- Retail and Commercial Leases Act 1995 (South Australia);
- Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998 (Tasmania);
- Retail Leases Act 2003 (Victoria); and
- Commercial Tenancy (Retail Shops) Agreements Act 1985 (Western Australia)

The overseas examples cited in the Consultation RIS do not have equivalent retail leasing legislation.

The above legislation was introduced for the very purpose of ensuring that retail leases do not contain provisions that are 'unfair' and it is comprehensive. It sets out in great detail what is required to enter into and what constitutes a 'fair' lease. For example, this retail tenancy legislation requires the extensive disclosure of information to prospective tenants prior to signing a lease; prohibits the use of certain lease terms such as rent 'ratchet clauses'[118]; limits the expenses allowed to be charged as outgoings under the lease; and imposes penalties for misleading, deceptive and unconscionable conduct. This legislation, among other things, discourages the use of 'take it or leave it' retail leases. By reason of this legislation, retail leasing is considerably more heavily regulated in Australia than other sectors.

By reason of this legislation shopping centre landlords in Australia are well versed and incredibly diligent in ensuring that retail leasing is conducted in a fair and transparent manner, which meets the expectations of government and regulators.

We are consequently unaware of any systemic issues in the shopping centre or retail leasing sector that would require a new unfair trading practices prohibition to be introduced, particularly when any conduct asserted to be "unfair" could be dealt with under existing provisions.

Within this context, our sector would not reasonably expect to fall foul of any 'unfair trading practices'. Even so, the prospective reforms outlined in the Consultation RIS would have a significant impact on our sector and we have fundamental concerns about the options put forward other than the status quo.

The introduction of a further generic regulatory regime targeted at unfair trading practices would simply add further regulation to an already heavily regulated sector and runs the risk of resulting in the industry being subject to multiple competing, inconsistent regulatory regimes. While these regimes may have some desired outcomes in common, there is a risk of unintended consequences arising from their application. It is difficult to see a generic regime which is designed to be applied across all industries providing a more efficient or effective regulatory outcome than already exists.

In 2007-2008, the Productivity Commission conducted an inquiry into *The Market for Retail Tenancy Leases in Australia*. A major aspect of this inquiry was the 'fairness' of the market for retail tenancy leases.

The Productivity Commission found that:

> *"it is unlikely that market tensions will be resolved or eliminated by government intervention into contracts through retail tenancy or other regulation." …*
>
> *"clauses to prevent unfairness can be fraught with problems. Not least of these is the distinction between what constitutes unfair or unconscionable behaviour as opposed to a hard bargain."*[119]

[118] A ratchet clause is any provision in a lease that precludes or prevents a reduction of rent or limits the extent to which rent may be reduced.
[119] Commonwealth of Australia, *The Market for Retail Tenancy Leases in Australia*, March 2008, page 90.

As such, the introduction of an economy wide unfair trading practices prohibition that applies to the retail leasing sector would be contrary to the Productivity Commission's assessment which we submit still applies today.

Furthermore, the Productivity Commission rejected arguments for the extension of existing, or the creation of additional "fairness" provisions in relation to the retail leasing industry. The Productivity Commission did so on the basis that such measures would create market uncertainty, give rise to market inefficiency and create additional cost for an already heavily regulated sector.

The Productivity Commission was also concerned that *"regulations relating to fairness may lead to a 'moral hazard'"*[120] that would arise on the part of those who would seek to avoid the binding nature and consequences of agreements that they sign or agree to by relying on such legislative measures. The Productivity Commission found that:

> *Regulation is not a good substitute for due diligence, the appropriate use of commercial lease advisory services and lease information – and sound business judgment".*[121]

In light of the above, the introduction of an unfair trading practices prohibition has the potential to weaken and erode the confidence of participants and stakeholders in the efficient operation of the retail leasing industry, without there being any compelling justification for the introduction of such a law.

The introduction of an unfair trading practices prohibition on top of the existing regulation is further likely undermine the effectiveness of that existing regulation.

There are a number of terms of contracts (and conduct that flows from these terms) commonly used within the retail lease industry (as indeed industry generally) having characteristics that render them potentially vulnerable to a general prohibition on unfair trading practices and which are recognised and regulated under existing State and Territory Retail Lease legislation.

Section 34A of the *Retail Leases Act 1994* (NSW) concerns relocation and provides:

> *"If a retail shop lease contains provision that enables the business of the lessee to be relocated, the lease is taken to include provision to the following effect—*
>
> *(a) The lessee's business cannot be required to be relocated unless and until the lessor has provided the lessee with details of a proposed refurbishment, redevelopment or extension sufficient to indicate a genuine proposal that is to be carried out within a reasonably practicable time after relocation of the lessee's business and that cannot be carried out practicably without vacant possession of the lessee's shop.*
>
> *(b) The lessee's business cannot be required to be relocated unless the lessor has given the lessee at least 3 months written notice of relocation and that notice gives details of an alternative shop to be made available to the lessee within the retail shopping centre. Such a notice is referred to as a "relocation notice".*
>
> *(c) The lessee is entitled to be offered a new lease of the alternative shop on the same terms and conditions as the existing lease except that the term of the new lease is to be for the remainder of the term of the existing lease. The rent for the alternative shop is to be the same as the rent for the existing retail shop, adjusted to take into account the difference in the commercial values of the existing retail shop and the alternative shop at the time of relocation. [Note: Paragraph (c) only specifies the minimum entitlements that the lessee can insist on. It does not prevent the lessee from accepting other arrangements offered by the lessor when the details of a relocation are being negotiated.]*
>
> *(d) If a relocation notice is given to the lessee, the lessee may terminate the lease within 1 month after the relocation notice is given by giving written notice of termination to the lessor, in which case the lease is terminated 3 months after the relocation notice was given unless the parties agree that it is to terminate at some other time.*
>
> *(e) If the lessee does not give a notice of termination as referred to in paragraph (d), the lessee is taken to have accepted the offer of a lease as referred to in paragraph (c), unless the parties have agreed to a lease on some other terms.*

[120] Commonwealth of Australia, *The Market for Retail Tenancy Leases in Australia*, March 2008, page 212.
[121] Commonwealth of Australia, *The Market for Retail Tenancy Leases in Australia*, March 2008, page XXVI.

(f) The lessee is entitled to payment by the lessor of the lessee's reasonable costs of the relocation, including but not limited to—

(i) costs incurred by the lessee in dismantling fittings, equipment or services, and

(ii) costs incurred by the lessee in replacing, re-installing or modifying finishes, fittings, equipment or services to the standard existing immediately before the relocation but only to the extent that they are reasonably required in the premises to which the lessee's business is relocated, and

(iii) legal costs incurred by the lessee.

(g) If the lessor and the lessee do not agree as to what the actual amount of reasonable costs of the relocation are to be, the amount of the costs is to be determined by a quantity surveyor—

(i) appointed by agreement between the parties to the lease, or

(ii) failing agreement, appointed by the person for the time being holding or acting in the office of President of the Australian Institute of Quantity Surveyors.

[Note: This section does not prevent the parties negotiating a new 5 year lease for the purpose of relocating the lessee. Paragraph (f) only specifies the minimum entitlements that the lessee can insist on and the parties can come to some other arrangement for the payment or sharing of the lessee's relocation costs when the details of a relocation are being negotiated.]"