

Unfair trading practices – Consultation Regulation Impact Statement

Tech Council of Australia Submission

November 2023



1. Introduction

Thank you for the opportunity to make a submission regarding the options to address unfair trading practices. We recognise and have a deep appreciation for the need for strong consumer protections as a foundation for the Australian economy across all industries. Maintaining consumer trust in the goods and services that they purchase, and the entities that they purchase from, underpins business viability and promotes competition and economic growth.

The TCA is Australia's peak industry body for the tech sector. The tech sector is a key pillar of the Australian economy, with the tech sector Australia's third largest industry behind mining and banking, and Australia's seventh largest employing sector. The TCA represents a diverse cross-section of Australia's tech sector, including startups, scale-ups, venture capital funds and global tech companies, many of whom provide services directly to consumers and small businesses.

Australia has an established and comprehensive consumer protection regime that deals with a range of unfair practices by containing prohibitions on unconscionable conduct, unfair contract terms, misleading and deceptive conduct, robust statutory warranties for goods and services, and a national product safety law. There are also a range of other laws and regulations that operate to protect consumers and small businesses from unfair practices, including the Privacy Act, Telecommunications Act, Online Safety Act and instruments such as industry-specific codes.

Given Australia's existing framework of laws, it is not clear that any additional prohibition on unfair trading practices is required, or would offer consumers and small businesses any additional protections. Introducing an unfair trading practices prohibition where it is not required risks:

- Increasing uncertainty, ultimately reducing dynamism and deterring innovation for new products and services, and
- Increasing costs of compliance, especially given Australia's consumer law will remain distinct from other global jurisdictions, which are ultimately borne by consumers.

There have also been recent changes to Australia's consumer laws, for which insufficient time has passed to properly consider the effect of these changes. Last year, the penalties for breaches of Australia's consumer law were increased significantly, which have a significant deterrent effect. From 9 November 2023, businesses were also prohibited from proposing, using or relying on unfair contract terms in standard form contracts with consumers and small businesses. Together, these reforms have a significant impact on businesses considering their compliance with consumer laws in Australia.

We support option 1 in the Consultation Regulation Impact Statement (CRIS), and have concerns with options 2-4, which are outlined further below.

2. Australia's current consumer protection laws are highly effective

Australia's unfair practices regime is enforced by one of the world's most active consumer protection regulators. It protects consumers and small businesses and is supported by strong law enforcement and the threat of significant penalties.

The basis for the introduction of a prohibition on unfair trading practices is that existing laws are insufficient to capture behaviour which is harmful to consumers. However, the ACCC has had a high degree of success in bringing claims under the Australian Consumer Law, including with respect to misleading and deceptive conduct, false representations, unfair practices and unconscionable conduct claims. These laws are also sufficiently flexible to capture conduct comprising unfair trading practices.

The CRIS outlines an option for dealing with unfair trading practices through expanding statutory unconscionable conduct (option 2). With respect to statutory unconscionable conduct claims:

- Of the 33 unconscionable conduct cases that the ACCC has brought, the ACCC has been successful in relation to the unconscionable conduct claim in 28.
- Of the 5 cases where the ACCC was unsuccessful on an unconscionable conduct claim, 3 cases succeeded on alternative consumer law grounds.

As noted above, the penalties for breach of Australia's consumer law were increased in November 2022 so that maximum penalties increased by five-fold – to the greater of \$50 million or three times the value derived from the breach, or if the value cannot be determined, 30% of the company's turnover during the time the conduct was engaged in.

The quantum of the penalties imposed for breaches of Australia's consumer laws also have a significant deterrent effect for other businesses considering engaging in conduct that could breach consumer laws. On 28 July 2023, the Federal Court of Australia imposed penalties totaling \$438 million against the Phoenix Institute of Australia Pty Ltd and Community Training Initiatives Pty Ltd for engaging in unconscionable conduct and making misleading representations.¹ The ACCC Chair, Gina Cass-Gottlieb, has indicated that the ACCC will be seeking penalties of over \$600 million against Qantas for engaging in misleading and deceptive conduct, by allegedly selling consumers tickets for flights that had already been cancelled.²

¹ [Record penalties of \\$438m ordered against Phoenix Institute and CTI for acting unconscionably and misleading students | ACCC](#)

² [Qantas should be fined 'hundreds of millions' if guilty to send message to companies, ACCC says | Qantas | The Guardian](#)

3. There is significant overlap between the harms in the CRIS and other laws

Overlap with the Privacy Act Review

We have strong concerns about the overlap between the harms outlined in the CRIS as being potentially addressed by the introduction of a prohibition on unfair trading practices, and the consideration of these same harms in the Privacy Act Review.

The CRIS includes ‘using opaque data-driven targeting... to undermine consumer autonomy’ and the use of ‘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’ as examples of unfair trading practices that could be captured in a new prohibition.

The Privacy Act Review reforms under consideration by the Government are aimed at strengthening the protection of personal information and the control individuals have over their information, and have considered a range of proposals that would regulate targeting of individuals based on information that relates to them, and that would provide individuals with greater power to make informed and genuine choices about how their information is collected and used.

On 28 September 2023, the Government responded to the Privacy Act Review Report, which supported providing individuals with greater transparency and control over their information through improved notice and consent mechanisms, and the introduction of a range of individual consumer rights.

We are very concerned that including privacy-related issues under the remit of an unfair trading practices prohibition would duplicate the extensive consultation and consideration in the context of the Privacy Act Review and complicate the administration of Australia’s privacy laws by having dual regulators.

Overlap with other laws and industry codes

Australia’s consumer law regime sits alongside many other laws and instruments that also govern the interactions between businesses, consumers and small businesses. These prevent unfair practices in relation to particular issues across the economy and in relation to particular sectors for which specific harms have been identified.

This includes the Privacy Act, Telecommunications Act, Online Safety Act, and Spam Act. Other instruments that may protect consumers and small businesses from unfair trading practices include the:

- Telecommunications Consumer Protections Code
- Food and Grocery Code of Conduct
- Franchising Code
- Dairy Code
- Unit Pricing Code, and
- Consumer Data Right Rules.

For example, the Telecommunications Consumer Protections Code contains rules for telecommunications providers to protect consumers. Providers must follow rules including how they communicate with or deal with customers, and what they can say in advertising and sales information.

4. The CRIS lacks detail about what harms would be addressed by an unfair trading practices prohibition

The CRIS does not clearly articulate whether an unfair trading practices prohibition would be directed to particular types of conduct, or particular harm, or both. The TCA considers that Australia's consumer laws should focus on addressing harms suffered by consumers and small businesses (and, in particular, significant or substantial harms), rather than focusing on particular practices.

The CRIS identifies practices, beyond those that are privacy related, that an unfair trading practices prohibition could address, including practices such as dark patterns and subscription traps. The TCA is concerned that:

- These practices are extremely difficult to define;
- These practices exist on a spectrum where many instances of these practices cause no or minimal consumer harm.

For example, "dark patterns" can be simple behavioural nudges. Behavioural nudges are commonly used in a wide variety of contexts, including in retail stores (for example, the design of aisles in a supermarket, or the placing of items at front counters) and are used by government in the design of government websites and communications, to encourage or persuade consumers to make particular choices. For example, behavioural nudges can also be used to help improve consumers' cyber security, by nudging users to install security updates on their computer, or using a pop-up to make users consider whether a link or attachment is from a trusted source before clicking on it.

The TCA considers that consumer and small business harms arising out of subscription traps and dark patterns are already captured by existing consumer laws. For example, hipages recently entered into a court-enforceable undertaking with the ACCC regarding misleading or deceptive conduct by failing to adequately disclose contract terms that allowed it to automatically renew subscriptions and charge an early termination fee.³

It is also likely that some of the more clear-cut examples of harms from dark patterns overlaps with the harms targeted by the reforms proposed by the ACCC's Digital Platform Services Inquiry Regulatory Reforms Report that recommend digital platform-specific consumer measures to address scams and harmful apps. These proposed reforms were consulted on by Treasury in its Consultation on Regulatory Reform⁴ and are awaiting a response from government. This risks creating another area of duplication and inconsistency.

³ [Tradie platform hipages rectifies subscription trap issues | ACCC](#)

⁴ [Digital Platforms – Consultation on Regulatory Reform | Treasury.gov.au](#)

5. Other jurisdictions cannot be easily compared to Australia

As set out in the CRIS, there are a range of overseas jurisdictions that do have some form of unfair trading practices prohibitions, such as the US, UK, EU and Singapore. However, an important differentiator between these jurisdictions and Australia is that these jurisdictions do not already have the existing consumer protection laws that Australia does. Many of the international examples of unfair trading practices cover what would in Australia be misleading and deceptive conduct, for example:

- The United Kingdom's prohibition has been used to address behaviour by booking sites that gave consumers a false impression of a room's popularity, did not display the full cost of a room upfront and limited consumer options.⁵ This case is similar to the misleading and deceptive conduct case the ACCC successfully took against Trivago, which found that it had made misleading representations about hotel room rates to consumers and resulted in a fine to Trivago of \$44.7 million.⁶
- The US Federal Trade Commission Act's prohibition on unfair or deceptive acts or practices has been used in cases that involved 'tricking' customers using dark patterns,⁷ which would likely be considered misleading or deceptive in Australia. It has also been used in the US to address subscription traps,⁸ similar to the hipages example noted above.⁹
- The European Union Directive on unfair business-to-consumer commercial practices in the internal market has been used to address behaviour where consumers were not properly informed of the terms and conditions of a special offer.¹⁰ The ACCC has similarly taken action in respect of potentially misleading special offers.¹¹

Any comparison to international jurisdictions should acknowledge that Australia's existing consumer laws tend to cover most, if not all, of the consumer harms prohibited in other jurisdictions.

6. Uncertainty and cost considerations

Given that the introduction of an unfair trading prohibition would be a whole of economy reform, there would inevitably be significant costs and uncertainty created for Australian businesses and consumers should any economy-wide change be introduced.

The reasons for this include that the concept of unfair trading is inherently highly subjective. As it would be a new concept, the existing case law would provide no or limited direction and

⁵ [Hotel booking sites to make major changes after CMA probe - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/hotel-booking-sites-to-make-major-changes-after-cma-probe)

⁶ [Trivago to pay \\$44.7 million in penalties for misleading consumers over hotel room rates | ACCC](https://www.accc.gov.au/news-room/press-releases/2019/06/trivago-to-pay-447-million-in-penalties-for-misleading-consumers-over-hotel-room-rates)

⁷ The FTC alleged that Fortnite maker Epic Games tricked users into making unwanted and unintended in-game purchases, [FTC Finalizes Order Requiring Fortnite maker Epic Games to Pay \\$245 Million for Tricking Users into Making Unwanted Charges | Federal Trade Commission](https://www.ftc.gov/news-events/press-releases/2018/07/ftc-finalizes-order-requiring-fortnite-maker-epic-games-to-pay-245-million-for-tricking-users-into-making-unwanted-charges).

⁸ [FTC Action Against Vonage Results in \\$100 Million to Customers Trapped by Illegal Dark Patterns and Junk Fees When Trying to Cancel Service | Federal Trade Commission](https://www.ftc.gov/news-events/press-releases/2018/07/ftc-action-against-vonage-results-in-100-million-to-customers-trapped-by-illegal-dark-patterns-and-junk-fees-when-trying-to-cancel-service)

⁹ [Tradie platform hipages rectifies subscription trap issues | ACCC](https://www.accc.gov.au/news-room/press-releases/2019/06/tradie-platform-hipages-rectifies-subscription-trap-issues)

¹⁰ See, for example, the Italian Competition Authority's case against Samsung Electronics Italia: [Italian Competition Authority & Samsung Electronics Italia](https://www.concure.gov.it/en/competition-authority/samsung-electronics-italia)

¹¹ [ACCC concerns about Mitsubishi discount offer resolved following consumer refunds | ACCC](https://www.accc.gov.au/news-room/press-releases/2019/06/accc-concerns-about-mitsubishi-discount-offer-resolved-following-consumer-refunds)

there would be a significant period of time before jurisprudence is developed (and this is acknowledged in the CRIS). This will require increased legal spend from businesses to seek advice on uncertain and wide-reaching new legislative provisions.

The uncertain and subjective nature of such a prohibition would chill innovation, as organisations contend with having to navigate an unclear prohibition (and this is also acknowledged in the CRIS). Organisations are likely to delay or decide against practices that may not be unfair, but out of an abundance of caution are avoided. This may include activities that benefit consumers and competition, but for the uncertainty that an unfair prohibition introduces, makes them unattractive risks for businesses (e.g. digital marketplaces may feel compelled to re-balance the risk-based model they use to suspend sellers on their platforms to ensure that it remains a safe place for consumers to purchase).

Maintaining the status quo would not mean failing to deal with the types of conduct outlined in the CRIS. As outlined above, Australia's existing consumer protection regime provides many avenues for pursuing these types of conduct, as do reforms that are being pursued in other parts of government.

7. Specific commentary on options 2-4

Of the options that would introduce a prohibition on unfair trading practices, we have concerns with all three. Our greatest concerns relate to the introduction of a general and a specific prohibition set out in option 4.

In respect of option 2, if significant or substantial harms are identified that are not already covered by existing consumer laws, there is some merit in expanding the meaning of unconscionable conduct to include unfair trading practices. However, the concept of what is 'unconscionable' is generally well understood by courts, the public, and the business community and has a settled meaning. Amending statutory unconscionable conduct risks introducing considerable uncertainty about the meaning of what is unconscionable or unfair.

With respect to option 3, we hold the same concerns that are outlined above, that is, the introduction of a general prohibition on unfair trading practices is not necessary and risks introducing considerable cost and uncertainty to businesses. A general prohibition is also likely to have significant overlap with existing laws and instruments.

We are most concerned about option 4, which involves the introduction of specific prohibitions on unfair trading practices. A list of specific prohibitions is likely to quickly date, be out of line with community expectations, and is unlikely to be responsive to emerging consumer harms. The TCA considers that should an unfair trading practices prohibition be introduced (in the form contemplated by either options 2 or 3), that the ACCC should issue guidance that can clearly outline to businesses the sort of practices and harms that are likely to be investigated by the ACCC as a potential breach of an unfair trading prohibition. ACCC guidance documents serve as a useful guide for businesses operating in Australia to mitigate the risk of the ACCC opening an investigation into particular behaviours and can be easily amended in response to emerging issues.

8. Recommendations

The TCA makes two recommendations in response to the CRIS:

- **Recommendation 1:** the Government proceed with Option 1 in the CRIS by continuing to utilise the existing suite of effective consumer protections and enforcement powers under the Australian Consumer Law to address consumer harms and concerning practices (including misleading or deceptive conduct, unconscionable conduct, unfair contract terms and specific unfair trading practices).
- **Recommendation 2:** the Government continue to focus on Privacy Act reforms as the appropriate lever to address potential harms and risks related to the collection and use of consumer data.

We appreciate the opportunity to contribute feedback to these proposed reforms and look forward to an ongoing consultation on them.