



Unfair trading practices

Consultation on the design of proposed general
and specific prohibitions

November 2024

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In the spirit of reconciliation, the Treasury acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples.

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About this consultation process

In September 2022, Commonwealth, State and Territory Consumer Ministers agreed that the Commonwealth would lead a public consultation on options to address unfair trading practices on behalf of all jurisdictions.

Treasury released the *Protecting Consumers from Unfair Trading Practices Consultation Regulation Impact Statement* (Consultation RIS) on 31 August 2023, inviting submissions by 29 November 2023. The Consultation RIS sought evidence on the nature and extent of unfair trading practices, and the extent of any consumer and small business harm arising from potential gaps in the Australian Consumer Law (ACL). It presented four policy options for consideration.

This consultation paper builds on the previous unfair trading practices consultation. As foreshadowed by the Commonwealth Government on 16 October 2024, the consultation paper seeks feedback on the design elements of general and specific prohibitions on unfair trading practices. It also seeks information on the benefits to consumers and compliance costs for business associated with the proposed prohibitions.

Once the consultation process has concluded, a Decision Regulation Impact Statement (Decision RIS) will be prepared, outlining the evidence gathered and the preferred policy approach. The Decision RIS will be published by the Office of Impact Analysis on the Department of the Prime Minister and Cabinet website.

In accordance with the Intergovernmental Agreement for the Australian Consumer Law, options to amend the ACL will be considered and agreed in consultation with States and Territories.

Making a submission

Treasury welcomes written submissions on the issues raised in this supplementary consultation paper. Submissions should be provided to:

Email	consumerlaw@treasury.gov.au
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Mail	Director Consumer Policy Unit Market Conduct Division The Treasury Langton Crescent PARKES ACT 2600
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Enquiries	Enquiries can be initially directed to consumerlaw@treasury.gov.au
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Submissions must be received by 13 December 2024.

Information on making a submission is available in Treasury's [Submission Guidelines](#)

Publication of submissions

All submissions to the consultation process will be published, unless authors have indicated they would like all or part of their submission to remain confidential. Specifically, all information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless it is indicated that you would like all, or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. Anyone who would like part of their submission to remain confidential should provide this information marked as such in a separate document.

A request made under the *Freedom of Information Act 1982* for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Background

Consultation RIS

The Consultation RIS sought evidence on the nature and extent of unfair trading practices, and the extent of any consumer and small business harm arising from potential gaps in the Australian Consumer Law (ACL). Four policy options were presented for consideration:

- Option 1: Status quo (no change).
- Option 2: Amend statutory unconscionable conduct.
- Option 3: Introduce a general prohibition on unfair trading practices.
- Option 4: Introduce a combination of general and specific prohibitions on unfair trading practices.

Consultation outcomes

Treasury received 79 submissions from a wide range of stakeholders and held bilateral meetings and roundtables attended by consumer and industry groups, academics and government stakeholders.¹

Overall, stakeholder views varied both on the existence, and extent, of gaps in the ACL. A range of stakeholders submitted that there is conduct or practices of concern which are unlikely to be captured by existing protections in the ACL. Some submitted that the ACL is insufficiently responsive to changing business practices, particularly online. Other stakeholders considered that practices of concern could be addressed through the existing ACL protections (including misleading or deceptive conduct) and industry-specific regulation (such as existing industry codes) and through reform to the *Privacy Act 1988* (Cth) (the Privacy Act).

Of the four policy options presented in the Consultation RIS, Option 4 (combined general and specific prohibitions) received the most stakeholder support. Proponents of Option 4 considered the combination would provide the most comprehensive regulation of unfair trading practices, while also providing clarity around compliance obligations. These stakeholders considered that Option 4 would be sufficiently flexible to respond to new commercial practices which emerge as a result of new technology and changing business models.

A number of stakeholders also advocated for Option 1 (the status quo), arguing it is not clear that there is any gap to be filled because Australia already has a comprehensive consumer protection framework regulating unfair trading practices. These stakeholders considered that introducing a prohibition of a subjective concept such as 'unfairness' may create uncertainty and regulatory risk, resulting in a high compliance burden on businesses. Option 2 (amend statutory unconscionable conduct) and Option 3 (introduce a general prohibition on unfair trading practices) each garnered much less support.

Stakeholders also raised issues that could potentially be addressed by alternative policy options to those presented in the Consultation RIS. For example, amending existing ACL prohibitions or introducing specific prohibitions to target identified gaps in the law.

Several stakeholders submitted that any unfair trading practices protections should extend to both consumers and small businesses because both groups experience harm from such practices, while

¹ Public submissions are available at <https://treasury.gov.au/consultation/c2023-430458>.

others expressed concern that extending protections to business-to-business transactions may impede the principles of freedom of contract in commercial arrangements and cause uncertainty.

On 16 October 2024, the Commonwealth Government announced it will seek stakeholders' views on the design of a general and specific prohibitions on unfair trading practices. This consultation builds on Option 4.

The problem

The ACL sets minimum baseline standards for business conduct and promotes fair trading by creating a range of rights and protections. This includes general prohibitions against misleading or deceptive conduct, unfair contract terms, and unconscionable conduct, as well as the prohibition of some specific unfair practices (such as bait advertising and pyramid schemes). A summary of these general and specific prohibitions under the ACL is included at Appendix A.

However, consultation and research has identified several examples of unfair trading practices that cause (or are likely to cause) consumer harm, but which fall into existing gaps or grey areas within the ACL. These gaps or grey areas can be attributed to various factors, most notably the increasing complexity and sophistication of online marketplaces and associated technologies which provide new opportunities for businesses to influence consumer decision-making. In both online and offline environments, the combined effects of globalisation of supply chains, changing business models and, in some sectors, increased market concentration, have enhanced the ability of businesses to engage in unfair practices to the detriment of consumers.

Although the ACL provides a range of protections against unfair practices, stakeholders noted that these provisions are outdated in some respects and therefore may be ill-equipped to address newer, emerging forms of misconduct, such as 'dark patterns', that distort or manipulate consumer choice online without being outright misleading.

Additionally, some stakeholders considered that there are established unfair business practices that have never been adequately addressed by the ACL. For example, where a business omits important information that is relevant to a consumer's purchasing decision, and this non-disclosure causes significant consumer detriment, this conduct may fall into a grey area if:

- It is not misleading, noting that it can be difficult to establish that a business engaged in misleading or deceptive conduct under the ACL in circumstances where material information is omitted;²
- It would not meet the high threshold for unconscionable conduct under the ACL,³ and
- It is not prohibited by any other section of the ACL.

Where these 'grey area' unfair practices occur, there may be detriment to consumers which goes unaddressed due to the inability to apply an ACL prohibition against the business conduct. Other businesses may take notice and engage in similar unfair practices, leading to a 'race to the bottom'. At

² There have been a number of cases where courts have considered circumstances where a business failed to disclose material information as not constituting misleading or deceptive conduct, see for example *Australian Competition and Consumer Commission v LG Electronics* [2019] FCA 1456 and *Australian Competition and Consumer Commission v Medibank Private Ltd* [2018] FCAFC 235 (*ACCC v Medibank*).

³ The high threshold for unconscionability has been demonstrated in a number of court cases, see for example *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2023] FCAFC 45 and *ACCC v Medibank*. Justice Beach stated in *ACCC v Medibank* at [353] that acting unfairly is generally not enough to establish statutory unconscionability.

the same time, businesses which do not engage in these unfair practices are competing on an uneven playing field against those that do.

Even where a business is engaging in an unfair practice that is prohibited under the ACL (for example, making misleading representations about delivery timeframes), there may be other related aspects of the conduct which are also unfair but currently out of scope of the ACL (for example, when a business ignores all contact from consumers about delivery delays post-sale). Enforcement action against a business confined to the misleading representations would not address the totality of its conduct and, while the business is likely to provide more accurate delivery estimates to consumers to meet its obligations under the ACL going forward, it may have no incentive to improve its post-sale communications with consumers.

Examples of potential unfair trading practices impacting consumers identified during consultation and in other research can be broadly categorised as follows:

- Conduct that distorts, manipulates or undermines consumer choice, without necessarily being misleading or deceptive, such as practices that create an undue sense of urgency or scarcity.
- Subscription related practices, including practices which make it difficult for consumers to cancel a subscription.
- Pricing-related practices, including drip pricing, dynamic pricing and hidden fees.
- Post-sale practices, including imposing unreasonable barriers to accessing customer support.

Stakeholders cited a range of harms and impacts to consumers resulting from unfair trading practices, including financial loss (for example, consumers making unintended or insufficiently informed purchasing decisions, the inability to cancel subscriptions or difficulties contacting businesses to resolve problems), time loss (for example, associated with website or app designs that are manipulative or make it difficult to take action), loss of privacy and psychological harms (for example, resulting from practices such as manipulative website or app design).

Finally, stakeholders and research note that Australia faces similar challenges to other countries in terms of adapting consumer protection laws in the context of technological change. Other international jurisdictions, such as the United Kingdom, the European Union and the United States have a general ban or prohibition on unfair trading practices and have introduced specific regulation targeting unfair commercial conduct resulting from evolving business practices, particularly digitally enabled commerce.

Subscription-related practices

Subscription contracts, which offer products and services on an ongoing basis using recurring payment methods, are common for digital services such as apps, online publications, streaming services, and software licenses. Some offline products and services, such as gym memberships, meal delivery and beauty treatment subscriptions, operate on a similar model. For many consumers and small businesses, subscription contracts can be a convenient and an efficient way to purchase products or services, while businesses offering subscription products and services can benefit from enhanced customer loyalty and a reliable revenue stream.

However, submissions to the Consultation RIS identified a range of subscription-related practices which can cause consumer and small business harm, including:

- Businesses not providing customers with the material information they need to make informed decisions about a subscription.

- Practices which make it difficult for customers to cancel their subscription, for example cancellation processes that are difficult to navigate, overly complex or time consuming.
- Subscriptions which quietly renew or automatically rollover from a free trial or promotional period to a paid or full price subscription.

In the 2023 Australian Consumer Survey,⁴ 25 per cent of respondents reported difficulty cancelling subscriptions and 23 per cent of respondents reported being automatically subscribed to a paid service after a free trial period ended.⁵ A survey conducted by the Consumer Policy Research Centre (CPRC) in 2024 found that 75 per cent of Australians with subscriptions have had a negative experience when trying to cancel a subscription. The CPRC survey also found that 48 per cent of Australians with subscriptions have spent more time than intended trying to cancel a subscription, and 32 per cent have felt pressured into keeping a subscription they wanted to cancel.⁶

Stakeholders submitted these subscription-related practices can distort consumer choice and cause consumers and small businesses to pay for subscriptions they don't want or may no longer use. This can result in financial loss and, when a subscription is hard to cancel, a loss of time. Businesses that create barriers to customers cancelling a subscription may prevent or inhibit customers from switching from one provider to another. This may weaken incentives to innovate and make it more difficult for new entrants to win market share.

Drip pricing practices and hidden fees

Drip pricing is when a price is advertised at the beginning of an online purchase, but then extra fees and charges are gradually added during the purchasing process, for example, booking, service, handling, administration and/or infrastructure fees. This can result in financial harm to consumers as they end up paying more than they initially intended or expected to. Drip pricing practices can also make it more difficult for consumers to understand and compare the true price of different goods and services offered by competing providers. This can impair consumer decision-making and undermine competition by harming businesses that do not engage in drip pricing practices or use hidden fees to mask the true cost of goods or services.

Concerns have been raised about drip pricing practices, particularly in the context of accommodation bookings, airline and event ticketing, with stakeholders advocating for greater transparency regarding additional fees charged when making bookings or purchasing tickets.

Drip pricing is also often combined with pressure techniques which can unreasonably distort consumer choice. This can take the form of critical pricing information being hidden or dripped into the purchasing journey only after consumers have invested their time and are committed to purchasing a good or service, with pressure also being applied to complete that purchase. For example, a consumer may be enticed by a lower price for a hotel booking, but during the purchasing process, extra service, booking and handling fees are added which results in a higher final price for that item. When combined with manipulative pressure techniques such as countdown timers and scarcity warnings (for example, 'only 2 rooms left'), a consumer may feel pressured to continue with the purchase even if they feel uncertain about the higher final price.⁷

⁴ Australian Consumer Survey 2023 Full Report 2023 <https://consumer.gov.au/consultations-and-reviews/australian-consumer-survey>.

⁵ Although it is unclear whether this includes those knowingly subscribed.

⁶ Consumer Policy Research Centre, *Let me out - Subscription trap practices in Australia*, 2024. <https://cprc.org.au/report/let-me-out>.

⁷ See also the section on Dark patterns below.

The ACL prohibits businesses from engaging in misleading or deceptive conduct, or making false or misleading representations as to price. In addition, the ACL already includes some provisions relevant to drip pricing (see Appendix A for further detail). It prohibits businesses from disclosing part of the price for a good or service without also disclosing the minimum quantifiable price, subject to some exceptions. Enforcement action has previously been taken against businesses, including airlines, engaging in drip pricing practices.⁸

It is noted that the provisions relevant to drip pricing require disclosure of the minimum *quantifiable* price. This means that if a business cannot quantify fees on an individual per item basis at the time of making the price representation, they are not required to disclose these fees until later in the transaction. These types of fees which cannot be quantified on a per item basis are often referred to as ‘whole of transaction’ fees or ‘per transaction’ fees. While some businesses will clearly state up-front that additional transaction fees will be applied later in the purchasing process, so that consumers know to expect them, other businesses do not make such disclosures which can surprise consumers when these fees are added later in the purchasing process.

There can also be differences in how businesses display their fees to consumers more broadly. For example, while some businesses will incorporate certain types of fees in the single up-front price displayed to consumers, others will display a single up-front price which also breaks down the individual fee components comprising that single up-front price. These differences in pricing disclosure can cause confusion for consumers as it may suggest that certain charges are only applied by certain businesses, when this may not be the case.⁹

Dynamic pricing

Dynamic pricing is commonly used to refer to the practice of varying prices for a good or service based on factors such as real time demand. There is growing concern about the use of dynamic pricing models in relation to ticketing, specifically the potential for dynamic pricing to be used to raise the price of event tickets *during* the course of a purchasing process, often far beyond the price initially displayed for a particular ticket category. As this price increase occurs in a short period of time (during the purchasing process/queue) and the final price may not be revealed until the time of purchase, consumers can feel blindsided and shortchanged. This practice can confuse and unreasonably distort consumer choice by masking true prices.

For the purposes of this paper, dynamic pricing where the price increases during the course of a purchasing process is distinct from ‘surge’ pricing. ‘Surge’ pricing, where prices are raised in response to increased demand for items in low supply, is already a well-established business practice in Australia. This means the price of a good or service on an app or website can change, but once the consumer commences the transaction, the price is set. For example, in the ride-share sector where companies raise their prices when there is high demand for rides and limited driver availability. Surge pricing is also commonly used in the air travel and hotel sectors.

Problematic dynamic pricing practices may be paired with other tactics that exert pressure on consumers, such as timeout counters and scarcity notifications. In combination, these practices can create pressure for consumers to act quickly for fear of the price increasing further – potentially

⁸ See for example, <https://www.accc.gov.au/media-release/viagogo-to-pay-7-million-for-misleading-consumers>, <https://www.accc.gov.au/media-release/activ8me-to-pay-250000-in-penalties-and-refund-customers-for-misleading-conduct>, <https://www.accc.gov.au/media-release/jetstar-and-virgin-to-pay-penalties-for-misleading-drip-pricing-practices>.

⁹ This confusion is particularly likely to arise where individual fees are disclosed that do not bear an obvious connection to the good or service being acquired. For example, infrastructure fees that could be considered part of a business’ running costs.

beyond their capacity to pay – or missing out altogether, particularly if they have spent a significant amount of time queuing in order to acquire the good or service.

Dynamic pricing itself is not prohibited under the ACL, although businesses still must ensure they do not engage in misleading conduct through using dynamic pricing practices.¹⁰ Whether dynamic pricing is misleading will depend on the circumstances in each case, including any representations about pricing and demand that have been made to consumers.

The ACL also prohibits businesses from engaging in bait advertising, which is when businesses promote prices (often on sale) on products that are not available in reasonable quantities for a reasonable period of time, having regard to the nature of the market and advertisement. Bait advertising will not generally be misleading if a business discloses that the item on offer is in short supply. Further detail on the bait advertising provision is included at Appendix A.

There are some similarities between bait advertising and dynamic pricing practices. For example, both practices can have the effect of drawing large numbers of consumers into the store or online marketplace offering items in short supply, so that if the consumer misses out they may be enticed to purchase an alternative higher cost item.

However, the bait advertising provisions are unlikely to protect consumers from dynamic pricing in the context of hotel room bookings or ticket sales if businesses engaging in these practices clearly disclose that there is a limited supply of items. Some businesses might even advertise this scarcity for marketing purposes.

Online account requirement

Some online retailers may provide consumers with the option to make an online purchase as a ‘guest’, but for other retailers, setting up an account (with login) and providing personal information is a prerequisite for making a purchase. This can result in consumers being required to disclose more personal information than is reasonably necessary in order to purchase the product or service.

Consumers have complained about being required to complete a lengthy sign-up process to create an account (particularly in circumstances where the transaction is a one off) and receiving unwanted marketing material as a consequence of creating an account. In the 2023 Australian Consumer Survey,¹¹ 19 per cent of respondents reported experiencing unnecessary collection of information and no control over what data is collected when making online purchases.

Barriers to accessing customer support

Responses to the Consultation RIS raised concerns about post-sale practices employed by businesses which seek to impede consumers’ access to customer support when they have a problem with a good or service. Examples of the practices highlighted in submissions include designing customer service systems in a manner which makes it unreasonably difficult for consumers to contact a business (such as not providing a point of contact for consumers or requiring consumers to use a particular service channel, like a chat bot), requiring consumers to provide unnecessary information in order to access benefits or obtain a remedy, and unreasonably long delays in providing customer service.

The ACL does not specifically prohibit businesses from failing to provide a direct point of contact, or failing to respond to consumer requests for support more broadly (for example, by not replying to queries on stock availability or delivery issues).

¹⁰ See the ACCC’s guidance on price displays: <https://www.accc.gov.au/consumers/pricing/price-displays>.

¹¹ Australian Consumer Survey, 2023, <https://consumer.gov.au/consultations-and-reviews/australian-consumer-survey>.

However, businesses must meet certain obligations under the ACL when a consumer requests a remedy for a faulty good or service. The ACL contains a basic set of guarantees for consumers who buy goods and services from Australian suppliers, importers and manufacturers. The type of remedy depends on the circumstances but may include a repair, replacement, refund or having the service performed again.

Stakeholders reported during consultation that consumers can find it difficult to enforce their consumer guarantee rights where the business does not provide a direct point of contact or requires the consumer to navigate a complex customer service system. Similar issues have been raised in relation to businesses which offer subscriptions, with some consumers reporting difficulties cancelling a subscription because they have been unable to contact a business to make a cancellation request or a business has not been adequately responsive to a cancellation request.

Consumers have also faced increased difficulties in contacting businesses post-sale due to the recent rise in e-commerce and growth in new business models, such as drop-shipping, which add further complexity to the retail supply chain.¹² Where these models are used, consumers may face added difficulties, including not knowing which business to contact for support. Retailers may also avoid or be unable to adequately respond to queries about stock or delivery problems if they have little oversight or control over the products.

The government recently consulted on proposed new penalties for businesses that do not provide a consumer guarantee remedy when required under law.¹³

Dark patterns

A significant proportion of consumer transactions are now made online and involve digital shopfronts and product and service listings. These channels enable businesses to design, tailor and influence the shopping experience, while allowing for convenient access to a vast array of options for consumers. This also provides an enhanced capability for businesses to collect information about consumers which then informs future design choices, with the potential for feedback loops targeted at securing consumer sales.

Dark patterns, also called deceptive patterns, refer to a range of mostly design-related elements used in consumer-facing interfaces (like websites and apps) and choice architecture. They are sometimes described as ‘tricks’ used in websites and apps to get people to do things they otherwise would not do.¹⁴ The central characteristics of dark patterns are that they distort, impair, subvert, or otherwise manipulate consumer decisions and actions, undermining autonomy. They can influence consumer choice by exploiting cognitive and behavioural biases or by exploiting how people learn or solve problems.¹⁵


Dark patterns provide businesses with the opportunity for quick and highly targeted interactions with consumers. They can be deployed on a large scale using modern technology and digital interfaces. This unprecedented speed and scale, and opportunities for targeting, distinguish dark patterns and their impacts from more conventional marketing practices.

¹² Under a drop-shipping business model, businesses take orders from consumers for products they do not have in stock, and then outsource these orders to third parties to fulfil and deliver to the consumer.

¹³ Department of Treasury, *Consumer guarantees and supplier indemnification under the Australian Consumer Law – Consultation on the design of proposed new civil prohibitions and penalties*, Australian Government, 2024, available at <https://treasury.gov.au/consultation/c2024-583535>

¹⁴ H Brignull, M Leiser, C Santos, and K Doshi, 2023 ‘Deceptive patterns – user interfaces designed to trick you’: <https://www.deceptive.design/>.

¹⁵ OECD, 2022, ‘Dark commercial patterns’, OECD Digital Economy Papers, No. 336, page 8, OECD Publishing, Paris, <https://doi.org/10.1787/44f5e846-en>.



Where businesses have access to personal information about a consumer, they can target messaging to consumers, including by taking advantage of the information asymmetry in a way that may unfairly influence consumer's decision making. This can be through websites and apps changing what is presented to a consumer, with personalised messaging, notifications, suggestions and other design adjustments.

Dark patterns may also nudge users towards consenting to more privacy intrusive practices, or encourage users to choose more privacy intrusive settings that do not reflect their own privacy preference.¹⁶

Some dark patterns add complexity and obstacles that frustrate and exhaust consumers, such as confusing and complex menus and pre-selected checkboxes which can make it easy for consumers to confirm business-favoured choices, while other options (like rejecting third-party cookies or finding an option to cancel a subscription) may be difficult for consumers to access. In some cases, businesses may force consumers to a particular action by not providing alternatives, or by omitting or obfuscating material information. These obstructive tactics require consumers to work to overcome obstacles to reach their preferred outcome which may differ from the business's preferred outcome.

Another group of dark patterns of concern are those designed to exert unreasonable pressure on consumers during a purchase. Examples of these practices include displaying countdown timers or low stock notifications which businesses use to create a heightened sense of urgency and scarcity, for the purposes of provoking more impulsive consumer action, and 'confirmshaming' where a consumer is unfairly made to feel bad about a choice (including stoking guilt).

The use of a single dark pattern may not, on its own, unreasonably distort consumer choice or result in material consumer detriment. However, when businesses combine multiple dark patterns to confuse, shame, direct or frustrate consumers into making a particular decision when transacting online, it can be much more difficult for the consumer to identify and/or resist these techniques to avoid harm.

Many dark patterns also intersect with other potentially unfair practices highlighted in this paper, including subscription practices and hidden fees.

Some stakeholders highlighted the potential for dark patterns to unfairly encompass legitimate marketing activities. These stakeholders cautioned against establishing a prohibition which does not sufficiently distinguish responsible marketing behaviour from conduct designed to manipulate consumers into making decisions which violate their intentions or best interests.

¹⁶ These issues were raised in submissions to the Review of the *Privacy Act 1988*, conducted by the Attorney-General's Department, Australian Government (<https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988>).

Policy proposal

Amend the Australian Consumer Law to introduce general and specific prohibitions on unfair trading practices

This paper seeks feedback on a proposal to amend the ACL to address unfair trading practices by introducing both:

- A principles-based general prohibition designed to address unfair practices of the kind identified in the Problem section of this paper, while being flexible enough to address new and emerging problematic conduct.
- Specific prohibitions that can effectively address particular unfair practices.

In addition to seeking feedback on the design elements of a general and specific prohibitions, this paper also seeks further information on the likely benefits to consumers and likely compliance costs for businesses associated with the proposal.

General prohibition

The proposed general prohibition would be principles-based, addressing unfair trading practices that cause consumer harm but cannot be addressed by the ACL's current provisions. The general prohibition would be designed to provide sufficient certainty as to its application while avoiding regulatory overreach or unintended consequences (including undermining established ACL provisions).

Submissions to the Consultation RIS highlighted the difficulties in capturing conduct that constantly evolves with rapid developments in technology. While specific prohibitions may be effective in addressing some current unfair trading practices, a general prohibition would provide a safety net to address other known practices and have the flexibility to evolve as new practices emerge in a similar way to other general principles-based provisions of the ACL, such as misleading and deceptive conduct.

Elements of a general prohibition

Some stakeholders highlighted the difficulties in defining 'unfair' in the context of a prohibition of general application, with a number noting that elements of many of the unfair trading practices prohibitions that have been implemented internationally are already addressed by existing ACL protections.

The concept of 'unfair' is not novel and has a specific definition for the purposes of the ACL's unfair contract terms regime (further information regarding this regime is at Appendix A). That definition looks at whether the contract term would cause a significant imbalance in the parties' rights and obligations, is reasonably necessary to protect the advantaged party's legitimate interests, and would cause detriment if relied on.¹⁷ Unfairness is also relevant to unconscionable conduct, with the court

¹⁷ Section 22 of the ACL.

able to have regard to whether any undue influence or pressure was exerted on, or any ‘unfair tactics’ used against, the customer in determining if conduct is unconscionable.¹⁸

In light of stakeholder feedback and the policy problem outlined in this paper, it is proposed that a general prohibition on unfair trading practices capture a business’s conduct where it:

- **unreasonably distorts or manipulates, or is likely to unreasonably distort or manipulate, the economic decision-making or behaviour of a consumer, and**
- **causes, or is likely to cause, material detriment (financial or otherwise) to the consumer.**

It is also proposed that the ACL specify a non-exhaustive list of examples of conduct (referred to in this paper as a ‘grey list’) which may, depending on the circumstances, meet this test. It is proposed the list include the following examples drawn from stakeholder feedback:

- **the omission of material information,¹⁹**
- **the provision of material information to a consumer in an unclear, unintelligible, ambiguous or untimely manner,²⁰ including the provision of information in a manner that overwhelms, or is likely to overwhelm, a consumer,**
- **impeding the ability of a consumer to exercise their contractual or other legal rights,²¹ or**
- **use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision.²²**

Conduct Element

Stakeholders argued that manipulative practices are increasingly prevalent, especially online.²³ The design of user interfaces can manipulate consumers into taking certain actions, often exploiting behavioural biases. The ACCC submitted that manipulative and exploitative design practices can significantly undermine consumer choice and autonomy while practices such as requiring the provision of unnecessary information in order to access benefits, can dissuade consumers from exercising their rights.²⁴ Consumers generally face information asymmetries and bargaining power imbalances in most, if not all, transactions, making them more vulnerable to unfair trading practices.²⁵

Distortion is similarly harmful when it impacts a consumer’s ability to make informed decisions and when key information would alter the consumer’s understanding about the goods or services on offer. Stakeholders also argued that consumers’ purchasing decisions can be unfairly influenced by the use of emerging technology, including dark patterns, which may result in consumers not being presented with true choice but a distorted version of what is available to them. While this type of conduct may

¹⁸ Section 24 of the ACL.

¹⁹ ACCC submission, page 16; Swetha Meenal Ananthapadmanaban and Jeannie Marie Paterson submission, page 6; CPRC Joint submission, page 27; Law Council of Australia submission, page 16; National Legal Aid submission, page 6.

²⁰ ACCC submission, page 16; Swetha Meenal Ananthapadmanaban and Jeannie Marie Paterson submission, page 6; CPRC Joint submission, page 27; Law Council of Australia submission, page 15; National Legal Aid submission, page 6.

²¹ ACCC submission, page 16; CPRC Joint submission, page 16; Law Council of Australia submission, page 15.

²² CPRC, 2022, ‘Duped by Design’, <https://cprc.org.au/report/duped-by-design-manipulative-online-design-dark-patterns-in-australia/>.

²³ CPRC, 2022, ‘Duped by Design’, <https://cprc.org.au/report/duped-by-design-manipulative-online-design-dark-patterns-in-australia/>.

²⁴ ACCC submission, pages 8-9.

²⁵ ACCC submission, page 8.

not overtly deceive consumers, it shapes their understanding and may undermine their autonomy to make free and informed decisions.

Manipulation or distortion of consumer decision making are concepts which already exist in some overseas consumer protection frameworks. Article 5 of the European Union's Unfair Commercial Practices Directive (UCPD) defines a commercial practice as unfair if it is contrary to the requirements of professional diligence and materially distorts, or is likely to materially distort, the economic behaviour of the average consumer.²⁶ The EU's Digital Services Act prohibits online platform providers from designing, organising or operating their services in a way that deceives or manipulates recipients of their service or otherwise materially distorts or impairs recipients' ability to make free and informed decisions.²⁷

Introducing an unfair trading prohibition that captures conduct that unreasonably manipulates or distorts consumer decision-making seeks to address dark patterns which attempt to steer consumers towards/away from action or towards decisions that they would not normally take (see the section on Dark Patterns below).

This paper also seeks feedback on whether the concept of 'unreasonableness' should be incorporated into the general prohibition. The CPRC joint submission argued the use of 'unreasonable' draws in an objective standard and supports a commonsense approach, enabling a balance to be applied when considering what is reasonable in the circumstances, including relevant business factors.²⁸ The CPRC submitted that what is unreasonable would depend on the nature of the product, service, business, consumer and context.²⁹ It is intended that by confining the application of the prohibition to only conduct which is unreasonable, common-place and legitimate marketing tactics employed by businesses will not be captured.

An alternative approach could be instead to include a legitimate interest element as the third limb of the proposed general prohibition, drawing upon another element of the unfair contract term test. The unfair contract terms provisions provide that a term of a consumer contract is unfair if it is not reasonably necessary to protect the legitimate interests of the party advantaged by the term.³⁰ This limb acts as a rebuttable presumption, meaning the onus is on the advantaged party to prove that the term is necessary to protect its legitimate interest.³¹ The ACCC submitted that an appropriately framed legitimate interest element could balance concerns about ensuring the unfair trading practices provision does not capture objectively reasonable business conduct, and can help provide greater certainty around the provision.³² Others thought legitimate business interest is an unnecessary consideration, arguing it places the focus on the business instead of the impact to the consumer and could have a chilling effect on the operation of the prohibition.³³

Consideration has also been given to whether the prohibition should draw from the definition of unfair in the UCPD and include a requirement to act in accordance with 'professional diligence'.

²⁶ Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market (UCPD) (European Union), Article 5.

²⁷ Digital Services Act (European Union), Article 25 Online interface design and organisation. Article 25 also allows the Commission to issue guidelines on how this applies to specific practices, notably giving more prominence to certain choices, repeatedly requesting the recipient to make a choice where that choice has already been made, and making the procedure for terminating a service more difficult than subscribing to it.

²⁸ CPRC Joint submission, page 32.

²⁹ CPRC Joint submission, page 29.

³⁰ Paragraph 24(1)(b) of the ACL.

³¹ Subsection 24(4) of the ACL.

³² ACCC submission, page 15.

³³ CPRC Joint submission, page 32; Swetha Meenal Ananthapadmanaban and Jeannie Marie Paterson submission, pages 3-4.

‘Professional diligence’ means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity.³⁴ Good faith is an established concept under Australian common law, it requires parties to an agreement to exercise their powers reasonably and not arbitrarily or for some irrelevant purpose.³⁵ As the proposed formulation of the test would prohibit unreasonable conduct, this paper does not propose including an additional limb to the test which incorporates professional diligence or good faith.

Detriment Element

The proposed provision includes a harm element that draws on established legal principles and international examples to ensure an adequate threshold for enforcement. This will assist in providing certainty for businesses and assist regulators with determining when intervention is justified.

Detriment is an established principle used in the unfair contract terms regime and is a concept already familiar to Australian regulators and businesses.³⁶ Detriment is not limited to financial loss, it allows courts to consider situations where there may be other forms of detriment that affect the consumer. This is especially relevant in the context of the digital economy, where detriment may be more difficult to quantify on an economic basis, and may include emotional detriment, inconvenience or loss of autonomy.³⁷ The unfair contract terms regime uses a three-part test to determine if a term is unfair, including a requirement that the term would cause detriment whether financial or otherwise if applied or relied on.

It is proposed that the general prohibition require that the conduct cause, or be likely to cause, material detriment. Material as a concept is generally understood as being relevant and not insignificant. This framing is to ensure that the proposed prohibition is directed at conduct that is sufficiently serious, and provides more certainty for businesses about what practices will be in scope. The proposed prohibition would not require regulators to demonstrate that material detriment to the consumer has actually eventuated, but rather it allows an assessment as to whether conduct is ‘likely’ to cause detriment to the consumer.

Grey List

It is proposed that the general prohibition be accompanied by a non-exhaustive list of examples of conduct (a ‘grey list’) which may, depending on the circumstances, satisfy the general prohibition test. The unfair contract terms provisions provide such a list in section 25 of the ACL, which outlines, ‘examples of the kinds of terms of a consumer or small business contract that may be unfair.’ The ACCC submitted that this approach will provide greater clarity and guidance to businesses and consumers about certain types of conduct which will be likely to be considered an unfair trading practice falling within the general prohibition.³⁸ This approach also helps guide regulators when considering whether to take action.

The first example is omission of material information. Stakeholders argued that case law around existing protections, including misleading omissions, is inconsistent and complex, and therefore fails to provide adequate protection when information is omitted. Courts will generally only consider silence to be misleading where the circumstances of the matter mean there is a ‘reasonable expectation’ that

³⁴ Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market (UCPD) (European Union), Article 2 (h).

³⁵ ACCC, ‘Acting in good faith under the franchising code’ www.accc.gov.au.

³⁶ Subsection 24(1)(c) of the ACL; Law Council Australia Submission, page 7.

³⁷ ACCC submission, page 14.

³⁸ ACCC submission, page 16.

a fact, if it exists, will be disclosed.³⁹ This example draws on international examples of prohibitions on misleading omissions, where the information would be relied on to make an informed decision when purchasing a good or service.⁴⁰

The second is provision of material information in an unclear, unintelligible, ambiguous or untimely manner, including provision of information in a manner or form that overwhelms, or is likely to overwhelm, a consumer. The development of case law regarding misleading and deceptive conduct generally has not provided protection against information being provided in a manner that induces confusion or is too difficult to digest, due to the quantity of that information or accessibility. Similar to the first example on the grey list, this item aims to ensure consumers are provided with a complete understanding about the goods or services they are considering acquiring.

The third example is impeding the ability of a consumer to exercise their contractual or other legal rights. This item targets business practices that seek to dissuade consumers from exercising their legal rights. This could include, for example, a business requiring a consumer to provide irrelevant information in order to access a benefit they are entitled to, or a business not providing consumers with a reasonably accessible contact point for customer service or complaint resolution (for example, only offering a communication channel that is inadequate or difficult to access).

The final is use of design elements in online consumer interfaces that unduly pressure or obstruct a consumer in making an economic decision. This specifically targets the use of dark patterns that can cause consumer detriment.

Dark Patterns

It is proposed that a general prohibition on unfair trading practices capture conduct that involves the unreasonable use of dark patterns where that conduct causes, or is likely to cause, material consumer detriment. Individual dark patterns can be harmful but often it is the cumulative effect of these patterns that manipulates or distorts consumer choices and behaviours.

The proposed fair and reasonable requirement under the Privacy Act would also discourage entities from using dark patterns to nudge consumers towards consenting to more privacy intrusive practices, or encouraging users to choose more privacy intrusive settings. The requirement for personal information handling to be fair and reasonable would apply even if an individual has consented to their personal information being collected, used or disclosed for a particular purpose.

Given the volume and variety of design patterns, this consultation paper invites stakeholders to comment on whether any dark patterns of concern fall outside the scope of the proposed general prohibition. To inform stakeholder feedback, the types and use of dark patterns, and some international approaches, are discussed in Appendix B.


Remedies for a breach of a general prohibition

ACL regulators have a range of compliance and enforcement tools available to address potential contraventions of the law, including providing guidance and education, dispute resolution, warnings, administrative resolutions, infringement notices, enforceable undertakings and legal action.

Responses to the Consultation RIS which supported unfair trading practices reform typically advocated for a range of remedies, including civil pecuniary penalties, to be available for any breach of a specific or general unfair trading practices prohibition. These stakeholders argued that penalties should be

³⁹ See *ACCC v AGL South Australia* [2014] FCA 1369 and ACCC submission, page 7.

⁴⁰ See for example Article 7, European Union *Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market* and Part 2, UK *Consumer Protection from Unfair Trading Regulations 2008*.



sufficiently high to deter contraventions (particularly by large businesses) and should be in line with the current maximum penalties for breaching existing consumer protection provisions.⁴¹

Other stakeholders considered that if a general unfair trading practices prohibition is adopted, the approach to implementing any penalties framework should mirror that taken with respect to unfair contract terms where penalties did not apply initially. This approach would recognise that action may be required by businesses to ensure their systems and processes comply with a new law, particularly where there has been little or no judicial consideration of how the law will operate in practice.

This paper seeks feedback on how penalties should apply to a breach of a general prohibition, and the most appropriate approach for implementing any penalty regime.

⁴¹ For some provisions of the ACL, including unfair contract terms and unconscionable conduct, the maximum pecuniary penalty a court may impose for a contravention by an individual is \$2.5 million. For a corporation, for those provisions it is the greater of \$50 million, or if the court could determine the value of the benefits reasonably attributable to the contravention, 3 times that value. If the court could not determine the value of the benefits, it is 30 per cent of the company's adjusted turnover during the breach period for the relevant contravention (Subsection 224(3A) of the ACL.).

Focus questions – general prohibition

1. Is the proposed general prohibition sufficiently clear to provide certainty regarding its application? If not, how could it be clarified?
2. Do the proposed elements for a general prohibition accurately reflect the gaps in the ACL that an unfair trading practices intervention could address?
3. Are there any unfair practices that would not be addressed by the proposed elements and existing ACL protections?
4. Should the proposed prohibition only apply where the conduct is unreasonable (that is, where it *unreasonably* manipulates or distorts, or is likely to *unreasonably* manipulate or distort, the economic decision making or behaviour of a consumer)? Or would an alternative approach of only capturing conduct where it is not reasonably necessary to protect the business's legitimate interests provide a better level of protection for consumers?
5. Is the requirement that detriment or likely detriment be 'material' appropriate?
6. Does the proposed grey list provide adequate guidance for businesses and regulators regarding how the courts will interpret the prohibition? Are there any additional examples that should be listed?
7. What would be the likely benefits to consumers associated with introducing the proposed general prohibition into the ACL? Where possible, please provide quantitative information.
8. Would there be compliance costs for businesses if the proposed general prohibition is introduced into the ACL? Would small businesses be disproportionately impacted noting that ACL reforms apply economy wide? Where possible, please provide quantitative information.
9. What additional resources (for example guidance material) may be required to support businesses, including small businesses, with implementing changes to their practices?
10. What is the maximum civil penalty a court should be able to impose for a breach of the proposed general prohibition?
11. Should civil penalties commence when a general prohibition commences, or following a transition period? If you support a phased approach, is a two-year transition period adequate to give businesses confidence around the operation of the law before penalties apply?
12. Would a general prohibition on unfair trading practices, as proposed in this paper, adequately address the use of dark patterns that cause consumer detriment? If not, how should dark patterns be addressed?
13. Where unfair trading practices have been prohibited overseas, what lessons can be used to inform Australia's approach?



Focus questions – dark patterns

14. Are there specific types of dark patterns that cause particular consumer harm?
15. Are there particular sectors, applications, or channels (e.g. e-commerce software and platforms) where dark patterns are prevalent?
16. What are the likely costs to businesses, and benefits to consumers, of addressing dark patterns through an unfair trading practices prohibition?

Specific prohibitions

The government has identified specific problematic conduct, raised through consultation or research, which could be addressed by the introduction of specific prohibitions, or by reform to existing provisions of the ACL. Areas of focus are:

- subscription-related practices,
- drip pricing,
- dynamic pricing,
- online account requirements, and
- barriers to accessing customer support.

The government is considering enacting specific prohibitions in addition to the general unfair trading practices prohibition. As noted elsewhere, the ACL currently provides protections against certain specific unfair business practices, such as bait advertising and pyramid selling schemes.

Subscription-related practices

This paper considers options for introducing provisions into the ACL to address unfair subscription-related practices, include prohibiting businesses from offering a subscription contract without meeting certain requirements. The reform options may also be combined. Reform to the ACL to prohibit unfair subscription-related practices would provide the ACCC and other ACL regulators with an enhanced ability to target this conduct, and prompt businesses to review and improve their current subscription practices.

Other international jurisdictions have pursued specific regulation to address unfair subscription-related practices. The UK's *Digital Markets, Competition and Consumer Act 2024* will require traders offering a subscription contract to provide consumers with reminder notices at key points and provide arrangements for ending a contract that are straightforward and involve only steps that are reasonably necessary.⁴²

In October 2024, the U.S Federal Trade Commission adopted a final 'click-to-cancel' rule requiring businesses to make cancelling a subscription as easy as signing up. The FTC will also require businesses to provide important information about the terms of their subscription and obtain consumers' express informed consent before charging them. Germany's *Fair Consumer Contracts Act 2022* mandates the inclusion of a cancellation button that is easily accessible and which allows consumers to submit a subscription cancellation request by clicking a further button.

Options to address unfair subscription-related practices

Four reform options that the government is considering are set out below. These options relate to different aspects of the subscription process, and could be combined. It is proposed that any subscription-related reform apply to business-to-business transactions, as well as consumer-to-business transactions.

⁴² The Act has received royal assent, but the subscription provisions are not yet in force.

Option 1 – Pre-sale disclosure of material information

Introduce a requirement that businesses clearly disclose certain material information about a subscription contract to the customer prior to signing up the customer to the subscription. Material information could include:

- The fact that the customer is entering into a subscription contract.
- Whether, and for how long, the subscription contract will continue unless the customer takes steps to end the contract.
- For ‘free trials’ or introductory offers, whether the customer will be charged if steps are not taken to end the contract before a certain date and, if so:
 - the date by which, and how, the customer can end the contract to avoid being charged.
- The frequency with which the customer will become liable for payments.
- The minimum total amount for which the customer will become liable under the contract and, potentially, the indicative cost per annum.

Businesses could be required to disclose this information in a form which supports informed consumer decision making.

Option 2 – Notification requirement

Introduce a requirement that businesses notify customers:

- Before the end of any contract period if the contract will automatically renew unless cancelled.
- Before the end of any free trial or introductory offer period if the customer will become subject to an ongoing subscription unless cancelled.
- When issuing a receipt for each payment of a subscription, with an option to cancel or modify the subscription easily and quickly (for example, in a manner that is at least as easy as signing up).

Businesses could also be required to set out specific information in a notification, such as how much the customer has spent on the subscription to date, the date and amount of the next payment, and instructions for how to cancel the subscription contract.

Option 3 – Opt-in requirement

Introduce a requirement that businesses seek an active ‘opt in’ from a customer before the end of a free trial or introductory offer period, in order to sign up to an ongoing subscription.

Option 4 - Removing barriers to cancelling a subscription

Introduce a requirement that businesses make the process for terminating a subscription as straightforward and easy as the process for subscribing to it.

This could include requiring businesses which offer the ability to sign up to a subscription online to also offer the ability to cancel the service online. Businesses could also be required to provide customers with a straightforward and easy to locate mechanism for cancelling a subscription that is at least as easy as signing up.

Remedies for a breach of a specific prohibition of unfair subscription related practices

It is proposed that the full range of remedies (as outlined in the above section on Remedies for a Breach of the General Prohibition), including civil pecuniary penalties, should be available for a breach

of any specific prohibition of unfair subscription-related practices. Given the narrow and targeted scope of the proposed specific prohibition of unfair subscription-related practices, it is proposed that civil pecuniary penalties commence at the same time as the prohibition commences.

Focus questions – subscription related practices

17. How can the ACL be amended to introduce specific prohibitions to address unfair subscription-related practices? What is your preferred reform option, or combination of options, and why?
18. Do you consider that the proposed specific prohibition should apply to all businesses that offer products or services using a recurring payment model or should certain businesses/sectors be exempt? For example, sectors already subject to relevant industry specific regulation (for example, telecommunications).
19. If you support Option 1 (pre-sale disclosure), what material information should businesses be required to provide to customers at the point of sale?
20. If you support Option 1, should businesses be required to provide material information in a specific form? If so, please provide further details.
21. If you support Option 2 (notification requirement), what information should businesses be required to include in a notification?
22. If you support Option 4 (removing barriers to cancelling a subscription), what obligations should be imposed on businesses to make cancellation processes more straightforward for customers?
23. What are the anticipated costs to business, if any, and benefits to consumers and small businesses, of each option? In your response, please indicate if you are, or represent, a business that offers goods or services by subscription. Please provide any views on the most efficient, or least burdensome, approach to addressing problematic subscription practices.
24. Do you agree civil penalties should commence at the same time as the proposed new prohibitions take effect, or should civil penalties commence following a period of compliance (and what would be an appropriate transition period)? What is the maximum civil penalty a court should be able to impose for a breach of a specific prohibition?

Drip pricing practices

Drip pricing occurs where a headline price is advertised, but the application of fees increases that price as the customer moves through the purchasing process.

The ACL currently prohibits a person disclosing part of the price for a good or service without also disclosing the minimum quantifiable price for the good or service (also known as the 'single' price) at least as prominently, with some exceptions.⁴³ This is in addition to ACL protections against misleading and deceptive conduct, and false or misleading representations with respect to price.

⁴³ Section 48 of the ACL.

In the United Kingdom, the *Digital Markets, Competition and Consumers Act 2024* (DMCC), recently expanded the existing prohibition against the omission of material information from an invitation to purchase (for example, an advert or a product listing) to combat drip pricing. The DMCC requires businesses to provide upfront information on the total price of a product, including fees, taxes, or other payments the customer will incur. If the total price cannot be reasonably calculated in advance due to the nature of the product, the DMCC requires businesses to disclose to the consumer how the price will be calculated.

This paper seeks feedback on the adequacy of the existing prohibitions in the ACL in addressing drip pricing practices.

Dynamic pricing

This paper also seeks feedback on whether the practice of ‘dynamic pricing’, whereby the price of a product or service that was presented upfront to the consumer increases during the purchasing process (for example, when in a queue to purchase concert tickets), is adequately addressed by existing provisions of the ACL.

As discussed above, the ACL does not specifically prohibit dynamic pricing, although the current ACL protections against misleading or deceptive conduct, or false or misleading representations as to price, still apply. The ACL also contains a specific prohibition against bait advertising, which may have some application in the context of businesses offering a limited supply of online service or ticket bookings depending on the relevant circumstances.⁴⁴

This paper seeks feedback on:

- the adequacy of the existing prohibitions in the ACL in addressing dynamic pricing practices, and
- whether the use of dynamic pricing should be prohibited under the ACL (for example, by introducing a specific prohibition on businesses increasing the price of a product during the purchasing process).

Online account requirements

A requirement for consumers to set up an account and provide personal information in order to make an online purchase can result in consumers disclosing more personal information to a business than is reasonably necessary for the business to provide the product or service. It may also result in consumers receiving unwanted marketing materials.

The Privacy Act, which includes the Australian Privacy Principles (APPs), governs the regulation of personal information in Australia, including how businesses subject to the Privacy Act (APP entities) collect and retain personal information. APP 3 provides that an APP entity must only collect personal information which is reasonably necessary for one or more of the entity's functions or activities. APP 11 provides that an APP entity must take reasonable steps to destroy or de-identify the personal information it holds once it is no longer needed for the purpose for which the personal information may be used or disclosed under the APPs.

The Government Response to the Privacy Act Review Report, released in September 2023, agreed in principle to introduce a requirement into the Privacy Act that the collection, use and disclosure of personal information by APP entities be ‘fair and reasonable’ in the circumstances. This would require APP entities to assess their personal information handling practices from the perspective of a

⁴⁴ Section 35 of the ACL.

reasonable person, and consider matters such as whether an individual would reasonably expect the personal information to be collected, used or disclosed in the circumstances. It would operate to give individuals more control over how their personal information is used and disclosed. The fair and reasonable requirement would assist in protecting individuals from unreasonably excessive collection of personal information, such as through the mandatory creation of online accounts to make a purchase.

With respect to marketing materials, the *Spam Act 2003* (Cth) prohibits the sending of commercial electronic messages (including marketing emails and text messages) without the consent of the receiver.

This paper seeks feedback on whether reform to the ACL is needed to address pain points for consumers relating to mandatory account creation for online purchases. Options to address this practice could involve requiring retailers to provide a 'guest' check out option.

Focus questions – drip pricing practices, dynamic pricing, online account requirements

25. What unfair drip pricing practices causing consumer harm do you consider are not adequately covered by the existing ACL provisions?
26. What reforms to the ACL may be required to address any unfair drip pricing practices? For example, should businesses be specifically required to disclose 'per transaction' fees up-front before consumers enter a purchasing process? What other reform options should be considered?
27. What reforms to the ACL are required to protect against dynamic pricing where businesses increase the price of the goods or services during the course of the purchasing process? Should the ACL be amended to specifically prohibit this practice?
28. Can you provide any specific examples of dynamic pricing, where businesses have increased the price of the goods or services during the course of the purchasing process, in an Australian or international context?
29. Do you consider reform to the ACL is necessary to address consumer harms associated with businesses requiring account creation for online purchases? If so, is requiring a retailer to provide a 'guest' check-out option appropriate to address the consumer harm? Are there other options that should be considered?
30. Should any prohibitions relating to dynamic pricing and online account requirements also apply to protect small businesses in their dealing with other businesses?
31. What are the likely costs to business, and benefits to consumers, of introducing prohibitions to address these practices?

Barriers to accessing customer support

This paper seeks feedback on whether a general prohibition on unfair trading practices would be sufficient to address consumer harm arising from businesses failing to provide consumers with adequate access to customer service support.

In the context of consumer guarantee-related matters, the government has separately been consulting on proposed new penalties for businesses that fail to give consumers a remedy when required under the ACL. With respect to general access to support, there is no obligation for businesses to provide a point of contact or respond adequately to general consumer queries or requests (for example about delivery issues).

Focus questions – barriers to accessing customer support

32. Would a general prohibition on unfair trading practices, as proposed in this paper, adequately address consumer harm arising from a business's failure to provide a direct point of contact or access to customer support? If not, should there be a specific prohibition and how could this be designed?
33. Should any such prohibition also apply to protect small businesses in their dealings with other businesses?
34. What are the likely costs to business, and benefits to consumers, of introducing prohibitions to address these practices?

Other considerations

Application to business-to-business dealings

Several stakeholders to the Consultation RIS advocated for any unfair trading protections to extend to small businesses. These stakeholders argued that, due to bargaining power imbalances and a lack of resources/time to challenge actions in court, small businesses face many of the same challenges as consumers when it comes to experiences of unfair trading. Submissions identified a range of examples of unfair trading practices which stakeholders considered are causing harm to small businesses. The ACCC's submission referenced its 2020 Perishable Agriculture Goods Inquiry⁴⁵ which found unfair practices from supermarkets and processors caused significant harm to primary producers, including dairy and chicken farmers.⁴⁶

Other stakeholders raised concerns about extending a general unfair trading practices provision to small businesses, arguing business certainty or freedom of contract in commercial dealings between businesses could be negatively impacted if protections were extended to small businesses.⁴⁷ While not raised specifically in the context of business-to-business transactions, some stakeholders generally recommended waiting until the impact of recent government action (such as the unfair contract terms reforms) could be assessed before any unfair trading practice prohibition is introduced.⁴⁸

Introducing protections for business-to-business transactions could also carry significant risk and uncertainty for businesses especially where those businesses may already operate within additional regulatory regimes such as industry codes.

⁴⁵ ACCC, 2020, Perishable agricultural goods inquiry report, <https://www.accc.gov.au/about-us/publications/perishable-agricultural-goods-inquiry-report>.

⁴⁶ ACCC submission, page 11.

⁴⁷ See, for example, the Shopping Centre Council of Australia submission, page 11.

⁴⁸ See for example Association for Data-Driven Marketing and Advertising (ADMA) submission, page 5,

Previous significant amendments to the consumer law to introduce protections against unconscionable conduct and unfair contract terms were first applied to business to consumer transactions, before protections were then expanded to business to small business transactions.

Protection against unconscionable conduct was introduced into the *Trade Practices Act 1974* for consumer transactions in 1986, with the provision containing a list of matters that courts could take into consideration when determining if conduct was unconscionable.⁴⁹ In 1998, a new separate provision was introduced to protect small businesses in business-to-business transactions. The new prohibition contained a separate and expanded list of matters that a court could take into consideration within this new context. This list contained both procedural and substantive elements that were more targeted at business-to-business transactions, based on learnings developed from the consumer context, which provided more commercial certainty for small businesses when the provision was introduced.⁵⁰ When the ACL was established in 2011 the distinction between consumer and small business unconscionability was removed in favour of a more consolidated approach.

Similarly, the unfair contract terms protections were introduced for consumers in 2010, then expanded in 2016 to standard form small business contracts that met specific criteria. In 2022 the government strengthened the unfair contract terms protections by introducing a civil penalty regime prohibiting the use and reliance on unfair contract terms and lifting the eligibility threshold for small businesses to include a larger number of small businesses.⁵¹

Notably, international approaches have tended to focus general unfair trading practices prohibitions on protecting consumers, noting the United States extends the general protection to business-to-business transactions.

It is proposed that a staged approach be adopted for the introduction of a general prohibition on unfair trading practices, applying initially to business-to-consumer dealings. This would enable the impact of the law to be developed through case law and ensure any emerging issues can be addressed, and more commercial certainty about the operation of the provision achieved, before it is applied generally to any business-to-business dealings.

Whether any specific protections applying to business-to-consumer transactions would be available to protect small business in their dealings would be considered on a case-by-case basis.

Focus questions – Application to business-to-business dealings

35. Do you have views regarding the staged approach for the introduction of a general prohibition on unfair trading practices applying initially to business-to-consumer dealings? At what point do you think the application of a general prohibition should be considered for business-to-business dealings?


Financial services

This paper seeks feedback on a proposal to amend the ACL to introduce general and specific prohibitions on unfair trading practices. Treasury notes that some stakeholders to the Consultation RIS

⁴⁹ Section 52 of the *Trade Practices Revision Act 1986*.

⁵⁰ Liam Brown, 'The impact of section 51AC of the Trade Practices Act 1974 (Cth) on commercial certainty', *Melbourne University Law Review*, vol 28, 2004, page 600.

⁵¹ Section 23 of the ACL, amended by the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022*.



argued in favour of extending any unfair trading practices prohibitions to financial services regulated by the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) to ensure alignment between the ACL and financial services law.

There are important differences between the ACL and financial services law in Australia which mean that mirroring any changes to the ACL requires careful consideration. Once options to amend the ACL have been considered and agreed in consultation with States and Territories, the government will consider what changes are required to financial services regulated by the ASIC Act to ensure appropriate alignment across the ACL and financial services laws.

Appendix A: Existing general and specific prohibitions under the ACL

Misleading or deceptive conduct

Section 18 of the ACL prohibits businesses from engaging in conduct which is misleading or deceptive or is likely to mislead or deceive. The prohibition in its current form was first introduced in 1974 in the *Trade Practices Act 1974* (Cth). It applies even if the intention was not to mislead or deceive.

Misleading or deceptive conduct is assessed against whether an 'ordinary' or 'reasonable' member of the relevant class of people to whom the conduct was directed are likely to be misled. A substantial body of case law has developed since the introduction of the prohibition, and it is now generally well understood by both consumers and business, and a well-accepted tenet of consumer laws in Australia. 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.

Unconscionable Conduct

The ACL contains two protections against unconscionable conduct:

- Equitable unconscionable conduct, a concept from the courts of equity which prohibits conduct that is unconscionable 'within the meaning of the unwritten law' (section 20). This applies where one party takes unconscientious advantage of a special disadvantage of another.⁵²
- A prohibition on unconscionable conduct in connection with goods or services (section 21). This is designed to address a broader range of conduct than equitable unconscionable conduct.⁵³

Unconscionable conduct under section 21 of the ACL is a general ban on conduct which is particularly harsh or oppressive. To be considered unconscionable, the conduct must be against good conscience as judged against the norms of society. There are several matters the court may consider in determining whether conduct, or a system of conduct or pattern of behaviour, is unconscionable, including:

- the use of undue influence, pressure or unfair tactics by the stronger party
- the price or other terms on which the weaker party could have got the same or similar products or services from another business
- whether the stronger party acted unreasonably in not informing the weaker party about key risks that the stronger party should have known the weaker party was not aware of
- whether the parties acted in good faith.⁵⁴

Section 22 of the ACL contains a list of matters or factors that a court may have regard to when determining whether conduct was unconscionable.⁵⁵ Generally, one factor is not itself sufficient to meet the threshold.

⁵² See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

⁵³ Paragraph 21(4)(a) of the ACL

⁵⁴ Australian Competition and Consumer Commission, Unfair business practices, (n.d.), <https://www.accc.gov.au/business/selling-products-and-services/unfair-business-practices#:~:text=a%20referral%20link.-,Unconscionable%20conduct,towards%20consumers%20or%20other%20businesses.>

⁵⁵ Section 22 of the ACL.

Unfair contract terms

This protection provides courts with the ability to declare contract terms in standard form consumer and small business contracts unfair and impose significant penalties. In Part 23 of the ACL, a term of a contract is unfair if it:

- causes a significant imbalance in the parties' rights and obligations
- is not reasonably necessary to protect the legitimate interests of the supplier
- would cause significant financial or non-financial detriment to a party.

Unfair Practices

Some specific trading practices are unlawful under Part 3-1 of the ACL. Examples of existing ACL specific protections include false or misleading representations about, for example, the price of goods, availability of repair facilities, or the existence of warranties. They also include protections against bait advertising (discussed further below), accepting payment without intending to supply goods or services, certain practices in the unsolicited supply of goods or services, participating in or persuading someone to participate in a pyramid scheme, coercion, undue harassment or physical force in connection with the supply or possible supply of goods or services, or the payment for them.

Bait advertising

Section 35 of the ACL prohibits businesses from engaging in bait advertising. Bait advertising is when a business advertises goods or services at a specified price, and there are reasonable grounds for believing that the business will not be able to supply the advertised goods or services at the advertised price for a reasonable period or in reasonable quantities, having regard to the nature of the market and the advertisement. Bait advertising will not generally be misleading if a business discloses that the item on offer is in short supply.

Provisions relevant to drip pricing

Section 48 of the ACL prohibits businesses from disclosing part of the price for a good or service without also disclosing the minimum quantifiable price (as a single figure), at least as prominently as the part price. The single price must include any tax, duty, fee, levy or other additional charges (such as GST or airport tax). It should also include any optional fees or charges pre-selected for the consumer during the purchasing process unless and until they are de-selected by the consumer.

The requirement under section 48 has some exceptions, including:

- optional charges or extras that cannot be quantified at the time of making the representation
- price representations made by a business exclusively to a body corporate (i.e. another business)
- service contracts that provide for periodic payments to be made during the term of the contract.

Appendix B: Dark patterns

Categories of dark patterns

The Organisation for Economic Co-operation and Development (OECD)'s taxonomy for commercial dark patterns – summarised in Box 1 – illustrates some key types of dark patterns.


Box 1: OECD Categories of dark patterns⁵⁶

- **Forced action** – Dark patterns involving forced action seek to force the consumer to do something in order to access a specific functionality. Specifically, the consumer may be forced to register or be tricked into thinking it is necessary, or be forced into disclosing more personal information than desired, or, in the case of a free service, than required to use it fully.
- **Interface interference** – Dark patterns involving interface interference aim to privilege specific actions from the consumer favourable to the online business through the framing of information, and may exploit framing or anchoring effects or default bias.
- **Nagging** – Nagging dark patterns involve repeated requests to the consumer to do something favourable to the business, such as turn on notifications or location-tracking, and may thereby exploit the consumer's limited willpower or time.
- **Obstruction** – Obstruction-related dark patterns aim to make a task flow or interaction more difficult than it may inherently need to be with the intent to dissuade an action, and thus may exploit consumer inertia, or limited willpower or time. An example is making it easy to sign up to a service or opt in to privacy-intrusive settings but hard to cancel the service or opt out to more privacy-friendly settings.
- **Sneaking** – Sneaking dark patterns seek to hide, disguise, or delay the divulging of information relevant to the consumer's decision, particularly regarding costs, and may exploit limited attention, default bias, the anchoring effect or sunk cost fallacy in consumers.
- **Social proof** – Dark patterns involving social proof attempt to trigger a decision based on observations of other consumers' behaviour, and can thus exploit social proof bias. Examples include notifications about other consumers' activities or testimonials about their recent purchases.
- **Urgency** – Dark patterns involving urgency impose a real or fake temporal or quantitative limit on a deal to pressure the consumer into making a purchase, thus exploiting the scarcity heuristic. Accordingly, such dark patterns may also be referred to as scarcity cues or claims. Examples include low stock and high demand messages or a countdown timer to indicate an expiring deal or discount.

Conduct types and consumer impact types

Dark patterns are prevalent in design interfaces worldwide. A global internet sweep found that 75.7 per cent of websites and mobile apps examined employ at least one practice, and 66.8 per cent

⁵⁶ OECD, 2022, 'Dark commercial patterns', OECD Digital Economy Papers, No. 336, pages 10-11 OECD Publishing, Paris, <https://doi.org/10.1787/44f5e846-en>.



employ two or more.⁵⁷ The International Consumer Protection and Enforcement Network (ICPEN) report found that examples of sneaking and interface interference were encountered frequently. In some cases, it is likely to be challenging to identify and address these practices which are causing harm to consumers as these design elements are used so widely and may closely resemble, or be only a few degrees removed from, normalised commercial practices.

How and where dark patterns are presented will also depend on the interface.⁵⁸ For example, design implementations will often be different for desktop websites as opposed to mobile applications. Display sizes (such as a high-resolution computer monitor compared to a small handheld smartphone) will dictate how and where design elements and information are arranged and presented to consumers. This can result in inconsistent experiences between devices, in terms of the extent and reach of the dark pattern.

Size and types of businesses

Consumer-facing businesses with a digital presence all have the capacity to implement dark patterns. These businesses will vary in type and product and service offerings (e.g. ongoing or non-ongoing), the size/value of a transaction, the size of impacted consumer cohorts, and the types and volume of information collected from consumers. The norms and practices of sectors may also mean that there are particular practices that are more prevalent in some industries than others.

The European Union provides an example of entity-based interventions explicitly regulating dark patterns. The Digital Services Act (DSA) prohibits dark patterns specifically by providers of online platforms. These rules apply to entities designated by the European Commission as being very large online platforms (VLOPs) or very large online search engines (VLOSEs), which are those with 45 million users in the EU (representing 10 per cent of the EU population) per month. The DSA however operates in addition to other rules regulating conduct with reference to dark patterns, including those contained within the General Data Protection Regulation (GDPR) and the EU Data Act which apply widely across users and entities.

Third-party entities including UX/UI design tools and e-commerce platforms

Many businesses use third-party tools and platforms to design and manage their online presence. E-commerce platforms, shopping cart software, UX/UI design software all provide services that facilitate businesses to run their sites, including how they market and present goods and services, account options and settings, and payment handling. Interface design resources, design app stores and plug-ins enable businesses to deliver targeted marketing, promote upselling and cross-selling, implement countdown timers and other functions directly into their consumer-facing interfaces.

⁵⁷ ICPEN Sweep finds majority of websites and mobile apps use dark patterns in the marketing of subscription services, Global, 9 July 2024: <https://icpen.org/news/1360>.

⁵⁸ Gunawan, J. et al., 2021, 'A Comparative Study of Dark Patterns across Web and Mobile Modalities', *Proceedings of the ACM on Human-Computer Interaction*, Vol. 5/CSCW2, pp. 1-29, <https://doi.org/10.1145/3479521>.

Box 2: Some international approaches to defining dark patterns

OECD: A user experience (UX) designer, Harry Brignull, coined the term “dark patterns” in 2010 to describe “tricks used in websites and apps that make you do things that you didn't mean to, like buying or signing up for something”. The term, which is today widely used among computer and behavioural scientists working on user interface design, applies to a wide variety of online practices in user interfaces that steer, deceive, coerce, or manipulate consumers into making choices, including regarding purchases, their personal data or attention time, which may not be in their best interests. Prominent examples include user interfaces that trick a consumer into buying a product by falsely claiming it will sell out fast or by hiding important information. Dark patterns may also make it harder for consumers to make a choice in their interest, such as cancelling an unwanted service or selecting privacy-friendly settings.⁵⁹

EU Data Act: Dark patterns are design techniques that push or deceive consumers into decisions that have negative consequences for them. Those manipulative techniques can be used to persuade users, in particular vulnerable consumers, to engage in unwanted behaviour, to deceive users by nudging them into decisions on data disclosure transactions or to unreasonably bias the decision-making of the users of the service in such a way as to subvert or impair their autonomy, decision-making and choice. Common and legitimate commercial practices that comply with Union law should not in themselves be regarded as constituting dark patterns.⁶⁰

European Data Protection Board (EDPB) General Data Protection Regulation (GDPR) [Guidelines 03/2022](#) on deceptive design patterns in social media platform interfaces: how to recognise and avoid them: “deceptive design patterns” are considered as interfaces and user journeys implemented on social media platforms that attempt to influence users into making unintended, unwilling and potentially harmful decisions, often toward a decision that is against the users’ best interests and in favour of the social media platforms interests, regarding the processing of their personal data. Deceptive design patterns aim to influence users’ behaviour and can hinder their ability to effectively protect their personal data and make conscious choices.

EU Digital Services Act (DSA) Article 25

Online interface design and organisation

1. Providers of online platforms shall not design, organise or operate their online interfaces in a way that deceives or manipulates the recipients of their service or in a way that otherwise materially distorts or impairs the ability of the recipients of their service to make free and informed decisions.
2. The prohibition in paragraph 1 shall not apply to practices covered by Directive 2005/29/EC or Regulation (EU) 2016/679.
3. The Commission may issue guidelines on how paragraph 1 applies to specific practices, notably:
 - (a) giving more prominence to certain choices when asking the recipient of the service for a decision;
 - (b) repeatedly requesting that the recipient of the service make a choice where that choice has already been made, especially by presenting pop-ups that interfere with the user experience;
 - (c) making the procedure for terminating a service more difficult than subscribing to it.

⁵⁹ OECD, 2022, ‘Dark commercial patterns’, OECD Digital Economy Papers, No. 336, pages 8-9, OECD Publishing, Paris, <https://doi.org/10.1787/44f5e846-en>.

⁶⁰ Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (38).