

Submission

# Unfair trading practices

Submission from consumer advocates on  
Treasury's Consultation on the design of  
proposed general and specific prohibitions

19 December 2024

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## About the submission

The development of the submission was led by the Consumer Policy Research Centre (CPRC) in consultation with various consumer groups.

This submission is being jointly made by Consumer Policy Research Centre and the following organisations:

- [AMES Australia](#)
- [Australian Communications Consumer Action Network \(ACCAN\)](#)
- [Care](#)
- [CHOICE](#)
- [Consumer Action Law Centre](#)
- [WA Consumer Advocacy Network / Consumer Credit Legal Service \(WA\)](#)
- [Consumers' Federation of Australia \(CFA\)](#)
- [Energy Consumers Australia \(ECA\)](#)
- [Financial Counselling Australia \(FCA\)](#)
- [Financial Rights Legal Centre \(FRLC\)](#)
- [Justice and Equity Centre](#)
- [Mob Strong Debt Help](#)
- [Mortgage Stress Victoria \(MSV\)](#)
- [Queensland Consumers Association \(QCA\)](#)
- [Redfern Legal Centre](#)
- [Super Consumers](#)
- [Westjustice](#)

### Contacts for submission

Erin Turner  
Chief Executive Officer

Marianne Campbell  
Senior Research and Engagement Advisor

Submission made via email, to [consumerlaw@treasury.gov.au](mailto:consumerlaw@treasury.gov.au).

### Statement of Recognition

We acknowledge the Traditional Custodians of the lands and waters throughout Australia. We pay our respect to Elders, past, present and emerging, acknowledging their continuing relationship to land and the ongoing living cultures of Aboriginal and Torres Strait Islander Peoples across Australia.

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# A fairer deal – Reforming unfair business practices

Unfair business practices cost people time, money and wellbeing, and erode trust in markets. While the existing legislative framework addresses some extreme forms of exploitation, it remains insufficient to counter the nuanced and systemic nature of unfair practices, particularly in the digital age.

This submission represents combined efforts and consistent perspectives from the consumer sector. It builds on our past submissions to Treasury, which identified more than 50 examples of unfair business practices that harm consumers and should be captured by reforms.<sup>1</sup>

It is essential that any ban on unfair business practices captures financial services. Consumer organisations want to see an economy-wide ban on unfair trading, with legal provisions in both the Australian Consumer Law (ACL) and the Australian Securities and Investments Commission (ASIC) Act.<sup>2</sup> This approach would maintain consistency in consumer protection across sectors and address potential regulatory loopholes.

While industry is quick to voice compliance costs of these proposed prohibitions, there is current consumer detriment from not introducing such prohibitions. Our modelling shows that for the third of Australians experiencing financial detriment as a result of experiencing dark patterns online (34%), if each person lost just \$5 by a deceptive and manipulative design, the financial loss at a population level would amount to more than AUD \$46 million. Building on this, if each person lost \$50 per year to subscriptions traps, the amount lost at the population level would be close to half a billion Australian dollars.<sup>3,4</sup> Other research conducted by ING shows that Australians could save an average of \$1,261 a year by cutting back on subscriptions and other regular outgoings they have forgotten about or don't use.<sup>5</sup>

An unfair trading prohibition should be implemented as soon as possible, with strong penalties for non-compliance. Many businesses operating ethically and transparently will not need to make any changes to their operations to accommodate this legal change – they are already doing the right thing.

We know unfair practices exist. We know these practices are not fully captured by current consumer protections. We know that bans on unfair trading practices are used effectively in other countries. It is long past time that Australia introduced its own ban on unfair trading practices, and if adopted, our recommendations would enhance consumer protections in Australia, aligning the ACL with global best practices.

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<sup>1</sup> Consumer Policy Research Centre (2023). *Make unfair illegal*. Submission from consumer advocates on Treasury's Consultation Regulatory Impact Statement, Protecting consumers from unfair trade practices. Available at:

<https://cprc.org.au/submission/make-unfair-illegal>

<sup>2</sup> Ibid.

<sup>3</sup> Consumer Policy Research Centre (2022). *Duped by design – Manipulative online design: Dark patterns in Australia*. Available at: <https://cprc.org.au/report/duped-by-design-manipulative-online-design-dark-patterns-in-australia/>

<sup>4</sup> Based on ABS Estimated Resident Population figures as at March 2024. Available at: <https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/mar-2024>

<sup>5</sup> <https://blog.ing.com.au/money-matters/saving/unused-or-forgotten-subscriptions/#article-3685>

## Summary of recommendations

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<b><u>Recommendation 1</u></b>	<p>Australia should adopt the US legal approach to unfair trading which provides clear guidance and includes the reference to “unfair”.</p> <p>If Treasury chooses to adopt the EU model, it should simplify language and align definitions where possible.</p>
<b><u>Recommendation 2</u></b>	<p>Treasury should not include “legitimate business interests” in the definition of unfair practices, ensuring a stronger focus on protecting consumers and addressing harmful business conduct.</p>
<b><u>Recommendation 3</u></b>	<p>We propose that the grey list includes <b>prohibition of any business practices or design elements that unreasonably inhibit access to, or enjoyment of, a good or service already purchased.</b></p>
<b><u>Recommendation 4</u></b>	<p>We propose that the grey list includes a <b>prohibition of any conduct or practice that causes or exacerbates consumer vulnerability.</b></p>
<b><u>Recommendation 5</u></b>	<p>To ensure fairness and consistency, the <b>unfair trading prohibition must apply to all sectors economy-wide, which includes financial services.</b> Australian, state and territory governments need to maintain the alignment between the ACL and the ASIC Act in relation to economy-wide consumer protections.</p> <p>A carve-out for financial services would lead to unequal protections for consumers, undermine the intent of an economy-wide prohibition, and fail to address systemic issues in financial services.</p>
<b><u>Recommendation 6</u></b>	<p>Implement a ban on dark patterns – including subscription traps, and data grab (both discussed below) – as a logical and urgent step to ensure consumer protection in the digital age.</p>
<b><u>Recommendation 7</u></b>	<p>We support penalties for unfair trading practices adopting the proportional approach currently used by the ACCC for breaches of the ACL.</p> <p>Treasury should introduce <b>immediate, proportionate penalties</b> based on the scale and benefit of the misconduct to harmonise regulatory measures, creating consistency in enforcement.</p>
<b><u>Recommendation 8</u></b>	<p>For legislation to be effective, it needs to be supported by regular surveillance and enforcement by the regulator to educate and shift the market towards a more consumer-centric approach to the digital economy. <b>Australia needs well-resourced Federal and state regulators</b> with the capacity</p>

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and capability to audit and enforce breaches in the complex digital environment.

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**Recommendation 9**

Subscription traps should be addressed by combining the options outlined in the consultation paper. Treasury should prioritise reforms that make it as easy to cancel as it is to sign up and that require active opt-in after a free trial period. These measures should be supported by clear disclosure at the point of sign-up and before regular charges are made. The ACCC should undertake independent user testing to inform guidance for businesses as to an effective framework for removing barriers.

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**Recommendation 10**

The Government should introduce specific reforms that will:

- Clearly ban drip pricing, including disclosure of any “per transaction” fees before a purchase process.
- Clearly ban dynamic pricing after the purchase process has commenced.
- Require that companies clearly disclose when dynamic pricing is used and the factors that determine variations in pricing.

Require that a “guest” check out option is required for online shopping, removing unnecessary data gathering in the purchase process.

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**Recommendation 11**

The ban on unfair trading practices should **offer protections to small businesses**.

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**Recommendation 12**

Treasury should extend specific prohibitions of unfair business practices to **capture greenwashing**, mirroring protections being rolled out in the EU.

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# General prohibition

## Our position on the proposed definition

Answering focus questions 1, 2 and 5 from the consultation paper

### Borrowing from an existing international definition that works

We note that the Treasury has put forward a definition of unfair trading that aligns more with the EU model for unfair trading than the US model.

Treasury has used and adapted key aspects of the EU definition in ways that risk Australian courts applying the law in fewer situations than would apply in the EU.

Specifically, Treasury has included use of the term “material” / “materially” in conjunction with “detriment”, used in the EU definition. While we acknowledge that using this framing ensures conduct is sufficiently serious, its inclusion differs from Australia’s existing unfair contract terms and unconscionable conduct laws, the inconsistency of which could create confusion from businesses and courts.

### General prohibitions against unfair practices across jurisdictions

We have a preference for greater simplicity in the drafting, ideally using the US definition, which has also been in operation for longer than the EU definition with more case law to understand its application. The US regulator has also taken more court action using its provision, with EU regulators favouring negotiated outcomes with businesses – this means the US version is more tested. We know it works to protect consumers.

The tables below show the comparison of Treasury’s proposal for the general prohibition in Australia, compared to other international prohibitions; the US comprising our preferred model.

**Table 1. Treasury’s proposed general prohibition for Australia**

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A ban on business conduct which:

- Unreasonably distorts or manipulates, or is likely to 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
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**Table 2. Examples of definitions used in international general trading prohibitions**

**The US prohibition<sup>6</sup>** Section 5 of the Federal Trade Commission Act (FTC Act) (15 USC 45) prohibits “unfair or deceptive acts or practices in or affecting commerce.”

An act or practice may be found to be unfair where it:

- causes or is likely to cause substantial injury to consumers
- cannot be reasonably avoidable by consumers, and
- is not outweighed by countervailing benefits to consumers or to competition

**The EU prohibition<sup>7</sup>** A commercial practice shall be unfair if:

- (a) It is contrary to the requirements of professional diligence, and
- (b) It materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers

**The UK prohibition<sup>8</sup>** A commercial practice is unfair if:

- (a) It contravenes the requirements of professional diligence; and
- (b) It materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product

### Recommendation 1

Australia should adopt the US legal approach to unfair trading which provides clear guidance and includes the reference to “unfair”.

If Treasury chooses to adopt the EU model, it should simplify language and align definitions where possible.

<sup>6</sup> Section 5 of the Federal Trade Commission Act (US). Available at: <https://www.federalreserve.gov/boarddocs/supmanual/cch/200806/ftca.pdf>

<sup>7</sup> Unfair Commercial Practices Directive (Europe). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>

<sup>8</sup> The Consumer Protection from Unfair Trading Regulations 2008 (United Kingdom) is available at: <https://www.legislation.gov.uk/uksi/2008/1277/regulation/3>

## There is no room for “legitimate business interests” in the proposed definition

Answering focus question 4 from the consultation paper

Considering “legitimate business interests” in the definition of unfair practices is unnecessary and counterproductive for several reasons.

Focussing on “legitimate business interests” shifts attention from the impact on consumers to the conduct of businesses. In existing laws such as the prohibition on unconscionable conduct, this focus has failed to lower the threshold for misconduct, limiting the effectiveness of consumer protections by emphasising the business’ justifications rather than the harm caused.

The use of “legitimate interests” in unfair contract provisions differs fundamentally from its use in general prohibitions. While unfair contract provisions aim to ensure a fair allocation of risks and obligations, an unfair trading prohibition addresses subtle and systemic practices that restrict consumer choice or access. Applying a “legitimate interests” test to general prohibitions risks legitimising unfair practices that are common across industries. For example, subscription traps and other dark patterns can be extremely common practices in some sectors. Businesses may be able to argue that, in order to compete with others in their sector, they have a legitimate interest in continuing to use otherwise harmful tactics.

Case law demonstrates the risks of a “legitimate interests” test, as courts often defer to industry norms or business models, even when these practices harm consumers. For example, in *Jetstar v Free* and *Paciocco v ANZ*, courts prioritised business interests over consumer impact, legitimising practices like subscription traps and unjustifiable fees. This approach undermines fairness and fails to meet community expectations.<sup>9</sup>

Lastly, we note that adopting language from the US definition would address the legitimate interest issue. Use of the words “outweighed by countervailing benefits to consumers or competition” would exempt or afford protection for legitimate business practices consistent with competition/efficient operation of markets.

### Recommendation 2

Treasury should **not include “legitimate business interests”** in the definition of unfair practices, ensuring a stronger focus on protecting consumers and addressing harmful business conduct.

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<sup>9</sup> CPRC et. al. (2023), *Consumer group submission to the inquiry into unfair trading practices – making unfair illegal*. Available at: <https://cprc.org.au/wp-content/uploads/2024/02/Submission-Unfair-trade-practices-Treasury-November-2023.pdf>

## The grey list should be expanded

Answering focus questions 3 and 6 from the consultation paper

### The grey list needs to clearly capture post-sale conduct

While the US provides a simple and usable general definition and framework in Section 5 of the FTC, *it does not define specific acts or practices* that constitute “unfair methods of competition”. This has led to a longstanding debate about the scope of the FTC’s enforcement authority.<sup>10</sup>

Treasury’s proposed ‘grey list’ is sufficiently broad to effectively capture a variety of potential practices. It balances the benefits of a principles-based law to stop unfair business practices with the benefits of clarifying key matters to make the law easier to apply.

#### Table 3. Treasury’s proposed grey list

- the omission of material information,<sup>11</sup>
- the provision of material information to a consumer in an unclear, unintelligible, ambiguous or untimely manner,<sup>12</sup> 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,<sup>13</sup> or
- use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision.<sup>14</sup>

#### Missing from the grey list includes:

- any practice or design element that unreasonably inhibits access to, or enjoyment of, a good or service already purchased.

We know that today, many goods and services today require post-sale support for functionality (e.g. software-as-a-service, smart devices), a recent study showing that 89% of smart products don’t provide consumers with information about how long they can expect to receive software updates.<sup>15</sup>

The inclusion of this clause in the grey list would provide a focus on conduct or practices that occur following the purchase of a product or service, including customer service and after-sales support.

<sup>10</sup> Whitecase (2024). Available at: <https://www.whitecase.com/insight-alert/uncertainty-remains-more-one-year-after-ftc-announces-new-unfair-methods-competition#:~:text=In%201914%2C%20Congress%20passed%20the.in%20or%20affecting%20commerce%22%20unlawful.>

<sup>11</sup> ACCC submission; Swetha Meenal Ananthapadmanaban and Jeannie Marie Paterson submission; CPRC et al submission; Law Council of Australia submission; National Legal Aid submission.

<sup>12</sup> Ibid

<sup>13</sup> ACCC submission; CPRC Joint submission; Law Council of Australia submission.

<sup>14</sup> CPRC (2022), *Duped by Design – Manipulative online design: Dark patterns in Australia*. Available at: <https://cprc.org.au/report/duped-by-design-manipulative-online-design-dark-patterns-in-australia/>

<sup>15</sup> FTC (2024). Smart products surveyed fail to provide consumers with information on how long companies will provide software updates. Available at: <https://www.ftc.gov/news-events/news/press-releases/2024/11/smart-products-surveyed-fail-provide-consumers-information-how-long-companies-will-provide-software>

The existing ACL does not specifically regulate post-sale standards of conduct. While the other general prohibitions can be relevant, practices such as designing customer service systems which impose unreasonable barriers to access to support or a consumer remedy are unlikely to be addressed by existing prohibitions.<sup>16</sup> This is also relevant in terms of product/service designs which have added costs or subscriptions unreasonably built into the product design, not clearly disclosed, and inhibit reasonable access to the good or service already purchased.

### Recommendation 3

We propose that the grey list includes **prohibition of any business practices or design elements that unreasonably inhibit access to, or enjoyment of, a good or service already purchased.**

### The grey list should address consumer vulnerability

In our previous joint consumer submission, our sector proposed that unfair trading prohibitions addressed if the conduct or practice causes, exploits or exacerbates consumer vulnerability.

Consumer law was developed on the premise that there was an imbalance between consumers and businesses, contributing to consumer vulnerability in the marketplace.<sup>17</sup> However, a focus on information asymmetries in its development has resulted in the position that consumers need to be active and engage with information. Rather than telling people to ‘shop around’, there is a need to make vulnerability a core value of consumer protection to promote inclusion and fairness.<sup>18</sup>

We want to reiterate the importance of prohibiting any exploitative practice or one that targets a known or potential consumer vulnerability. If enacted and enforced, an unfair trade practices provision could contribute to economic transactions being conducted in a way that is equitable, particularly for those experiencing vulnerability who are unable to protect their own interests.

### Recommendation 4

We propose that the grey list includes a **prohibition of any conduct or practice that causes or exacerbates consumer vulnerability.**

<sup>16</sup> CPRC et al (2023). *Consumer group submission to the inquiry into unfair trading practices – making unfair illegal*. Available at: <https://cprc.org.au/wp-content/uploads/2024/02/Submission-Unfair-trade-practices-Treasury-November-2023.pdf>

<sup>17</sup> This aligns with the Intergovernmental Agreement for the Consumer Law, Clause F(4). Available at: [https://consumer.gov.au/sites/consumer/files/2015/06/acl\\_iga.pdf](https://consumer.gov.au/sites/consumer/files/2015/06/acl_iga.pdf)

<sup>18</sup> See Christine Reifa and Harriet Gamper (2021). *Economic theory and consumer vulnerability: exploring an uneasy relationship*, in *Vulnerable Consumers and the Law* (ed. Christine Reifa and Séverine Sainer), Routledge.

## Economy-wide provisions should automatically apply to financial services

Answering focus question 3 from the consultation paper

An economy-wide prohibition, reflected in both the ACL and the ASIC Act, is required, similar to the US prohibition which applies to all persons engaged in commerce, including banks.<sup>19</sup>

This reform is crucial for maintaining consistency in consumer protection across sectors, addressing potential loopholes and preventing regulatory arbitrage. Exempting financial services from the unfair trading prohibitions would incentivise relevant businesses to exploit regulatory loopholes, creating confusion among consumers.

When the ACL was introduced, its provisions were mirrored in the ASIC Act to ensure a seamless national economy and reduce regulatory complexity. However, Treasury's current approach to exclude financial services from this reform creates risks of delay, misalignment, and uneven consumer protection standards.<sup>20,21,22,23</sup>

Past reforms have already caused discrepancies, such as significantly higher penalties under the ACL compared to equivalent provisions in the ASIC Act, undermining community and business expectations of fairness.

Additionally, excluding financial services could incentivise businesses to structure contracts or activities to evade the new requirements, creating regulatory loopholes and exposing consumers to harm. This is particularly concerning for unregulated credit products, as demonstrated by the use of “buy now, pay later” (BNPL) schemes. These have operated in Australia outside licensing requirements for 9-11 years, presenting significant consumer risks, particularly to First Nations people and vulnerable consumers, who have historically been targeted by unfair practices in financial services.<sup>24</sup> The exclusion of financial services from the ACL opened a loophole for exploitation. The Government invested the better part of 7 years reviewing the matter, developing and passing a remedial policy vis-a-vis the Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024, which only recently passed in late November 2024.<sup>25,26</sup>

A high profile example includes business practices engaged in by Cigno Australia, a Gold Coast based company that was involved in providing short-term, high-fee loans to consumers, often targeting financially vulnerable individuals. Operating without an Australian Credit Licence,

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<sup>19</sup> Section 5 of the Federal Trade Commission Act (US). Available at:

<https://www.federalreserve.gov/boarddocs/supmanual/cch/200806/ftca.pdf>

<sup>20</sup> Competition and Consumer Legislation Amendment Act 2011

<sup>21</sup> Treasury Laws Amendment (Australian Consumer Law Review) Act 2018, schedule 7

<sup>22</sup> Treasury Laws Amendment (Australian Consumer Law Review) Act 2018, schedule 2

<sup>23</sup> Treasury Laws Amendment (Acquisition as Consumer—Financial Thresholds) Regulations 2020

<sup>24</sup> ASIC (2018). *REP 600 Review of buy now pay later arrangements*. Available at:

<https://download.asic.gov.au/media/3iyh2qki/rep600-published-07-dec-2018-20230524.pdf>

<sup>25</sup> Super Consumers Australia and Financial Rights Legal Centre (2023). *Make unfair illegal in financial services*. Submission from SCA and FRLC. Available at: <https://superconsumers.com.au/wp-content/uploads/2023/12/SCA-FRLCunfairtradingandfinancialservciesNov23.pdf>

<sup>26</sup> Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024. Available at:

[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd2324a/24bd083#:~:text=of%20the%20Bill-The%20Treasury%20Laws%20Amendment%20\(Responsible%20Buy%20Now%20Pay%20Later%20and,laws%20in%20the%20Treasury%20portfolio.](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2324a/24bd083#:~:text=of%20the%20Bill-The%20Treasury%20Laws%20Amendment%20(Responsible%20Buy%20Now%20Pay%20Later%20and,laws%20in%20the%20Treasury%20portfolio.)

Cigno employed business models designed to circumvent national credit laws, leading to significant consumer harm.<sup>27</sup>

#### **Case Study – provided by Consumer Credit Legal Service (CCLS)**

Rachel (not her real name) was enticed through a social media site to enter a competition for a free glamour photoshoot to the value of several hundred dollars. After entering, Rachel excitedly learnt she had won the competition and organised a time to attend the photoshoot.

During the photoshoot, Rachel found out that while the photoshoot was free, she still needed to pay for the photos. Immediately after the photoshoot, Rachel was then exposed to high pressure sales tactics by the photo studio to purchase some, or all, of her photos through various expensive packages. Rachel was also told if she did not purchase the photos before leaving, that they would be immediately, permanently deleted.

At the end of this process, when Rachel found out the total cost (in excess of \$10,000) Rachel was reluctant to proceed with the purchase. However, the photo studio advised Rachel that she could pay in instalments using a BNPL provider. The photo studio then filled in the application form for Rachel and provided advice on what information was required to get her application approved.

Within a few days, Rachel attempted to cancel her purchase with the photo studio. However, the photo studio had already been fully paid by the BNPL provider and the photo studio refused to cancel the purchase.

Rachel made complaints to both the photo studio and the BNPL provider, but was unsuccessful in getting a remedy.

After she sought CCLS's help, CCLS provided advice to the client and then wrote a letter on the client's behalf to the photo studio, raising various allegations regarding the competition, the photoshoot process and the process of obtaining BNPL funds. After some negotiation, CCLS was able to obtain an outcome that involved a substantial decrease in the amount payable that resulted in a refund through the BNPL provider.

**Rachel's story is not isolated.** CCLS has seen this type of conduct in relation to other clients it has helped. Typically, these matters involve:

- Winning a photo studio competition for glamour or family photographs
- The consumer not properly understanding until later that there is a significant cost associated with purchasing any photographs taken on the day
- Pressure being put on the consumer to agree to purchase an expensive package of photographs at the end of the photoshoot (usually in the several thousands of dollars)
- No cooling off period or expensive cancellation fees
- Use of BNPL to fund the purchase of the photographs at the photo studio
- When attempting to cancel the purchase a few days later, being told it is too late as work has already commenced, and
- Having to continue to pay the BNPL provider while trying to resolve the issue.

<sup>27</sup> ASIC (2024). *ASIC wins Federal Court case against Cigno Australia and BSF Solutions*. Available at: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-111mr-asic-wins-federal-court-case-against-cigno-australia-and-bsf-solutions/>

In all of these cases, the consumer has stated that they would not have gone to the photo studio if they had known much earlier the true cost of purchasing the photographs, that they felt pressured during the process, and that they felt trapped to agree to buy something in order that they could leave.

This example perfectly illustrates how interconnected business practices captured under the ACL and the ASIC Act can be and why it is essential that laws capture all aspects of unfair business practices.

Below are four clear reasons why unfair business practices need to be applied to financial services, creating an economy-wide protection.<sup>28</sup>

**Table 4. Reasons why unfair business practice protections need to be expanded to financial services**

<p><b>Some very harmful products and businesses exploit gaps in financial services licensing</b></p>	<p>Some products exploit the complexity of financial services laws, so that they remain unlicensed but avoid the application of the ACL. Examples include dealer-issued extended warranties, which are financial products but benefit from a licensing exemption.</p> <p>Firms that ‘assist’ consumers access to superannuation early for medical treatment, and charge a substantial fee, are typically unlicensed but may be providing a financial service.</p> <p>Not applying the unfair trading prohibition economy-wide will create an incentive to design products that escape the licensing perimeter and create substantial risks of consumer harm.</p>
<p><b>A ban on unfair business practices is different to licensing requirements of ‘efficient, honest, and fair’</b></p>	<p>Licensed credit and financial services providers are required to meet a general obligation to <i>“do all things necessary to ensure that financial services / credit activities covered / authorised by the licence are provided / engaged in efficiently, honestly, and fairly”</i>.<sup>29</sup></p> <p>This duty is a forward-looking obligation requiring licensees to take steps to achieve compliance with the statutory norm before any specific instance of non-compliance has arisen. Case law confirms that where courts do not meet the standard in relation to a particular individual, then this does not mean the obligation has been breached. In <i>ASIC v CBA</i> [2022] FCA 1422, the court determined that CBA’s failure to apply fee waivers to account holders were entitled to them did not of itself demonstrate a breach of the obligation.</p> <p>Further, the ‘efficient, honest, and fair’ duty does not enable a consumer to argue that the duty has been breached and seek a remedy; only a regulator can.</p>
<p><b>Other financial services laws do not replicate a ban on unfair business practices</b></p>	<p>Design and distribution obligations, while an important reform to ensure products better meet the needs and objectives of consumers, does not establish any individual consumer right or standard to specific transactions.</p> <p>The ban on unsolicited selling of financial products is vital, but it does not respond to the full extent of market practices today that undermine consumer autonomy or distort consumer choice. For example, it remains legal to offer services, like a ‘review’ of your superannuation.</p> <p>In ASIC’s review of cold calling business models used in superannuation, they express concern about these practices and refer to them as “deliberate attempts to avoid legal liability”.<sup>30</sup></p>

<sup>28</sup> Ibid

<sup>29</sup> Section 912A(1), Corporations Act 2001 (Cth); sec on 47(1)(a), National Consumer Credit Protection Act 2009 (Cth).

<sup>30</sup> ASIC (2024). Exposing high-pressure cold calling tactics and social media click-bait leading to superannuation switching. Available at: <https://asic.gov.au/about-asic/news-centre/news-items/exposing-high-pressure-cold-calling-tactics-and-social-media-click-bait-leading-to-superannuation-switching/>

Best interests duties, while important, do not respond to the full range of consumer concerns, including insurance brokers who call consumers unexpectedly after making an inquiry via an online quote process; or superannuation firms partnering with employee management software providers to use dark patterns, manipulate choice architecture, and embed fine print to steer people towards advertised funds. Often these strategies cost people time, money and ultimately their wellbeing, yet the onus is only on them as individuals to navigate these systems that haven't been designed with their best interests in mind.

**A ban on unfair business practices can improve the operation of financial services codes and dispute resolution**

An unfair trading prohibition will align well with standards that apply in external dispute resolution, including that determinations by the Australian Financial Complaints Authority (AFCA) must consider what is fair and reasonable in all the circumstances. This will enhance understanding of fairness among firms, and can lead to resolving disputes earlier.

While some (but not all) industry codes commit to a broad concept of fairness, applying a legislative unfair trading prohibition will support these industry promises by providing a consistent definition of fairness.

### Recommendation 5

To ensure fairness and consistency, the **unfair trading prohibition must apply to all sectors economy-wide, which includes financial services**. Australian, state and territory governments need to maintain the alignment between the ACL and the ASIC Act in relation to economy-wide consumer protections.

A carve-out for financial services would lead to unequal protections for consumers, undermine the intent of an economy-wide prohibition, and fail to address systemic issues in financial services.

# Our insights on dark patterns and the benefits of the general prohibition to consumers

Answering focus questions 7, 12, 14, 15 and 16 from the consultation paper

Dark patterns range from those that are ubiquitous and frustrating for consumers to those that are misleading and deceptive and can lead to significant consumer harm. CPRC's research into the prevalence and impact of dark patterns in Australia found the following:

- *Consumers are aware of dark patterns and describe them as “manipulative” or “deceptive”*: 58% of Australians are aware that organisations use specific types of design features to try and influence them to behave in a certain way.
- *Businesses from almost every sector were identified*: The top five categories included clothing and accessories, online marketplaces, tech products and services, social media, and department stores.
- *Negative impacts from dark patterns are rife*: 83% of Australians have experienced one or more negative consequences as a result of a website or app using dark pattern design features aimed at influencing their behaviour.
- *More than a third of consumers have experienced a negative financial impact from a dark pattern (34%)*: 20% of Australians spent more than they intended, 17% felt pressured into buying something, and 9% accidentally bought something.
- *Australians' emotional wellbeing is negatively impacted*: 40% felt annoyed when using a website or app, and 28% felt manipulated.
- *Australians are losing control over their personal information*: 29% created an account online they didn't want to, 29% accidentally signed up to something, and 25% shared more personal information than they wanted to (25%).

The dark patterns deemed most unfair involve a business taking advantage of its relative power to influence consumers. Some of these unfair practices have potential to cause financial or significant consumer harms. These dark patterns include **trick questions, redirection / nagging, subscription traps** (discussed in more detail later), **confirmshaming, false hierarchy**, and **data grab** (discussed in more detail later).<sup>31</sup>

## Quantifying the impact to consumers

Despite the growing ubiquity of dark patterns, it does not mean consumers have become accustomed to them or consider them as fait accompli; instead, it is deteriorating their experience in the digital economy. The benefits of the general prohibition would address consumer harm from the increasing prevalence of dark patterns, as well as other unfair business practices.

In terms of quantitative information requested by the supplementary consultation, CPRC has undertaken research focussing on the impacts of dark patterns in the digital environment, harm from which would be mitigated if prohibited.

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<sup>31</sup> CPRC (2022). *Duped by design – Manipulative online design: Dark patterns in Australia*. Available at: <https://cprc.org.au/report/duped-by-design-manipulative-online-design-dark-patterns-in-australia/>

CPRC found that 83% of Australians had experienced one or more negative consequences as a result of a website or app using design features aimed at influencing their behaviour. More than a third of Australians experienced financial detriment as a result, having accidentally bought something, spent more than intended, or felt pressured into buying something (34%).<sup>32</sup>

Modelling how much money this could cost Australians, if each Australian making up this 34% was duped out of \$5 by a dark pattern, the financial loss at a population level would amount to \$46,108,080. If each were duped \$50, the population amount lost would be \$461,080,800.<sup>33</sup>

### Recommendation 6

Implement a ban on dark patterns – including subscription traps, and data grab (both discussed below) – as a logical and urgent step to ensure consumer protection in the digital age.

## Our insights on the costs to businesses of the general prohibition

Answering focus question 8 from the consultation paper

There is no reason industry should assume the introduction of unfair trading prohibitions will impose costs on all businesses. Businesses engaging in transparent, fair and consumer-centric behaviours will not be required to make any changes; only businesses engaging in opaque and deceptive, unfair practices may face costs to bring their practices in line with what is fair to consumers.

Businesses have the opportunity to be at the forefront of consumer-centric change and to lead by best practice. When looking closely at cost implications to business, it is in the best interests of industry to engage in transparent, fair and consumer-centric practices, or increasingly face consequences such as consumers turning to user friendly competitors. Trust has been widely identified as a key component of well-functioning markets – “individuals and organisations will find it difficult (if not impossible) to operate effectively if they do not enjoy the trust and confidence of the community in which they are located”.<sup>34</sup>

CPRC’s consumer survey revealed a significant portion of consumers reported leaving platforms, losing trust in businesses or having negative feelings towards businesses using dark patterns. CPRC’s research into dark patterns in Australia echoes this, identifying substantial costs to business from customer churn: 18% had their trust in the organisation undermined, and 27% thought negatively of the organisation whose website/app it was, and 30% of Australians stopped using the website or app.<sup>35</sup>

<sup>32</sup> Ibid

<sup>33</sup> Based on ABS Estimated Resident Population figures as at March 2024. Available at:

<https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/mar-2024>

<sup>34</sup> The Ethics Centre (2018). *Trust, Legitimacy and the Ethical Foundations of the Market Economy*. Available at:

[https://ethics.org.au/wp-content/uploads/2019/02/The-Ethics-Centre\\_180410-on-trust-and-legitimacy.original.pdf](https://ethics.org.au/wp-content/uploads/2019/02/The-Ethics-Centre_180410-on-trust-and-legitimacy.original.pdf)

<sup>35</sup> CPRC (2022). *Duped by design – Manipulative online design: Dark patterns in Australia*. Available at:

<https://cprc.org.au/report/duped-by-design-manipulative-online-design-dark-patterns-in-australia/>

While in the short-term dark patterns may lead to a financial gain or enable data harvesting that can be monetised, in the long-term it can negatively impact businesses due to a loss of consumer trust and loyalty. Adjusting the mindset from a purely profit-driven perspective to a consumer-centric perspective may assist in reducing the prevalence of those negative outcomes and lead to better business outcomes in the longer-term.

## Penalties should be proportionate and introduced immediately

Answering focus questions 10 and 11 from the consultation paper

Businesses must be held accountable when their actions cause consumer harm. An unfair trading prohibition must allow for penalties, fines and other enforcement actions that adequately deter businesses from engaging or continuing in unfair business practices. The Australian Competition and Consumer Commission (ACCC) enforces penalties under the ACL which are designed to be proportionate to the severity of the breach and any benefits gained from the misconduct.

Penalties for unfair business practices should mirror similar penalties across the Competition and Consumer Act.

For corporations, penalties for anti-competitive conduct or breaches of consumer law are the greater of \$50 million, three times the value of the benefit obtained from the breach, or 30% of the corporation's adjusted turnover during the breach period if the benefit cannot be determined.

Individuals face penalties of up to \$2.5 million per breach for anti-competitive conduct and consumer law violations. Criminal cartel conduct may result in up to 10 years imprisonment and fines of up to \$626,000 per offence.

The ACCC can issue infringement notices for certain breaches, with penalties typically set at \$18,780 for corporations, \$187,800 for listed corporations, and \$3,756 for individuals. These measures aim to deter unlawful conduct and promote compliance with competition and consumer laws.<sup>36</sup>

In relation to a transition period, this should not be necessary; businesses acting in an ethical and transparent manner towards consumers will not require any changes to practices. It is only businesses causing consumer detriment and harm that will have to make changes, and it is important for this to occur immediately.

Consumers have been calling for unfair trading prohibitions for a long time. The risk of a transition period is that unscrupulous businesses could take advantage of this to ramp up unfair practices (including subscription traps).

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<sup>36</sup> ACCC, *Fines and penalties*. Available at: <https://www.accc.gov.au/business/compliance-and-enforcement/fines-and-penalties>

### Recommendation 7

We support penalties for unfair trading practices adopting the proportional approach currently used by the ACCC for breaches of the ACL.

Treasury should introduce **immediate, proportionate penalties** based on the scale and benefit of the misconduct to harmonise regulatory measures, creating consistency in enforcement.

## Enforcement of unfair trading practices is alive and well in the US

Answering focus question 13 from the consultation paper

In addition to Section 5 of the Federal Trade Commission (FTC) Act prohibiting unfair or deceptive acts or practices in or affecting commerce, the FTC enforces several laws against dark patterns (including subscription traps) and protects users against unfair, abusive, or deceptive marketing. These can be seen in the table below.

**Table 5. US Laws around dark patterns**

<b>The Deceptive Experiences To Online Users Reduction (DETOUR) Act</b> <sup>37</sup>	Introduced in July 2023 to prohibit large online platforms from using deceptive user interfaces, known as “dark patterns,” to trick consumers into handing over their personal data.
<b>The Restore Online Shoppers’ Confidence Act (ROSCA)</b> <sup>38</sup>	Prohibits any post-transaction third party seller from charging any financial account without disclosure and express informed consent.
<b>The Telemarketing Sales Rule (TSR)</b> <sup>39</sup>	Requires sellers and telemarketers to disclose all material restrictions, limitations, or conditions to purchase, receive, or use goods or services that they are offering to the consumer.

In recent decades, the FTC has brought numerous enforcement cases challenging harmful practices. By imposing civil penalties such as fines against businesses who violate dark pattern laws, the FTC can hold companies accountable and disincentivise future fraud. If a company is found liable, the FTC may secure monetary settlements intended for consumer redress. The amount assessed against a company is calculated per violation, and rates are linked to the rate of inflation.<sup>40</sup>

In one recent **case against Epic Games**, the maker of the online game Fortnite, the FTC finalised an order requiring Epic Games to pay \$245 million in consumer refunds. The company was accused of using dark patterns to trick players into making unwanted purchases and allowing children to incur unauthorised charges without parental involvement.<sup>41</sup>

Other examples demonstrating the FTC’s commitment to combating dark patterns include:

<sup>37</sup> Warner, Fischer Lead Bipartisan Reintroduction of Legislation to Ban Manipulative ‘Dark Patterns’, available at: <https://www.warner.senate.gov/public/index.cfm/2023/7/warner-fischer-lead-bipartisan-reintroduction-of-legislation-to-ban-manipulative-dark-patterns>

<sup>38</sup> Restore Online Shoppers’ Confidence Act, available at: <https://www.ftc.gov/legal-library/browse/statutes/restore-online-shoppers-confidence-act>

<sup>39</sup> Telemarketing Sales Rule, available at: <https://www.ftc.gov/legal-library/browse/rules/telemarketing-sales-rule>

<sup>40</sup> Consumer Financial Protection Bureau. *Consumer Financial Protection Circular 2023-01*. Available at: <https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2023-01-unlawful-negative-option-marketing-practices/#8>

<sup>41</sup> Federal Trade Commission (2023). *FTC Finalizes Order Requiring Fortnite maker Epic Games to Pay \$245 Million for Tricking Users into Making Unwanted Charges*. Available at: <https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-finalizes-order-requiring-fortnite-maker-epic-games-pay-245-million-tricking-users-making>

- **LendingClub:** In 2022, the FTC returned more than \$10 million to consumers after they were charged surprise fees for their loans. After promising no fees for its services, LendingClub hid additional information about fees behind tooltip buttons on its website, and in between larger, more prominent text.<sup>42</sup>
- **MyLife.com:** In 2021, the FTC and the Department of Justice obtained a \$21 million settlement against MyLife.com for using dark patterns in negative option marketing, misleading consumers about subscription services, and making cancellation challenging.<sup>43</sup>

Jurisdictions worldwide are taking action on dark patterns and it's time Australia did too. For legislation to be effective, it needs to be supported by regular surveillance and enforcement by the regulator to educate and shift the market towards a more consumer-centric approach to the digital economy. Australians who don't speak English as their first language should be engaged in their language as the reform roles out to ensure it's effective.

### Recommendation 8

For legislation to be effective, it needs to be supported by regular surveillance and enforcement by the regulator to educate and shift the market towards a more consumer-centric approach to the digital economy. **Australia needs well-resourced Federal and state regulators** with the capacity and capability to audit and enforce breaches in the complex digital environment.

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<sup>42</sup> Federal Trade Commission (2022). *Plaintiff, v. LendingClub Corporation*. Available at: <https://www.ftc.gov/legal-library/browse/cases-proceedings/162-3088-lendingclub-corporation>

<sup>43</sup> Federal Trade Commission (2021). *FTC, DOJ Obtain Ban on Negative Option Marketing and \$21 Million for Consumers Deceived by Background Report Provider MyLife*. Available at: <https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-doj-obtain-ban-negative-option-marketing-21-million-consumers-deceived-background-report>

# Specific prohibitions

Consumer groups including CPRC, CHOICE, Consumer Action Law Centre and Financial Rights Legal Centre, identified more than 50 examples of unfair practices as part of a joint submission to the Federal Government.<sup>44</sup> Treasury’s paper outlines four of these cases that demonstrate the need for reform in Australia. We understand these cases would be candidates for early regulatory action.

## Subscription-related practices

Answering focus questions 17, 18, 22, 23 and 24 from the consultation paper

### Our insights on subscription traps

Focussing on one specific but prolific dark pattern – the subscription trap – 2024 CPRC research showed that while subscribing to services is often quick and easy, cancelling these subscriptions can be a frustrating and time-consuming process, yet Australian laws do not require fair subscription practices.

Overall, 75% of Australians with subscriptions have had some form of negative experience when trying to cancel a subscription, close to half have spent more time than intended trying to cancel a subscription (48%) and a third have felt pressured into keeping a subscription (32%).<sup>45</sup>

Other research conducted by ING shows that Australians could save an average of \$1,261 a year by cutting back on subscriptions and other regular outgoings they have forgotten about or don’t use.<sup>46</sup>

CPRC’s research shows the need for a shift in business practices and law reform to genuinely protect consumers from harm. In comparison to consumers around the world, Australians should no longer be subjected to more complex and unnecessary steps to cancel the same service from the same provider. Businesses can make changes now to remove barriers to cancelling a subscription, but ultimately, laws should be updated to protect everyone from harmful subscription practices.

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<sup>44</sup> CPRC et. al. (2023), *Consumer group submission to the inquiry into unfair trading practices – making unfair illegal*. Available at: <https://cprc.org.au/wp-content/uploads/2024/02/Submission-Unfair-trade-practices-Treasury-November-2023.pdf>

<sup>45</sup> Consumer Policy Research Centre (2024). *Let me out – Subscription trap practices in Australia*. Available at: <https://cprc.org.au/report/let-me-out>

<sup>46</sup> <https://blog.ing.com.au/money-matters/saving/unused-or-forgotten-subscriptions/#article-3685>

## International approaches to address subscription traps

The UK's Financial Conduct Authority (FCA) addresses anti-cancellation behaviours deeming the imposition of unnecessary questions or steps before a customer is able to confirm their instructions to cancel an automatic renewal feature, as unfair, as well as having unreasonably longer call wait times to cancel the auto-renewal feature (compared to purchasing a new policy).<sup>47</sup>

In the US, the FTC has commenced proceedings against several companies for unfair or deceptive acts creating a deliberately complex cancellation process, including one major case against Amazon for the Amazon Prime service.<sup>48</sup> This lawsuit will explore how Amazon's design choices created additional costs for its very large subscriber base, demonstrating the potential high financial impact of unfair business practices. A trial is scheduled for June 2025.

Also, recently in the US in 2024, Adobe was sued by the FTC for allegedly making it difficult for consumers to cancel subscriptions and hiding termination fees, steering customers toward plans with concealed costs.<sup>49</sup>

In 2022, Vonage faced FTC action resulting in a \$100 million settlement for employing dark patterns that trapped customers in unwanted subscriptions and imposed junk fees when they attempted to cancel services.<sup>50</sup>

Since then, the FTC has introduced a "Click-to-Cancel" rule to simplify the cancellation of recurring subscriptions and memberships. This rule mandates that businesses must make the cancellation process as straightforward as the sign-up process, addressing consumer frustrations with complex cancellation procedures.<sup>51</sup>

The EU has also taken action using its Unfair Commercial Practices Directive to force Amazon to implement a simpler unsubscribe process. Despite Amazon using very similar tactics in Australia, at least until recently, there is no clear way for a regulator to take action against the company for the costs and harms caused to its customers.<sup>52</sup>

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<sup>47</sup> UK FCA, ICOBS 6A.6 Cancellation of automatic renewal. Available at: <https://www.handbook.fca.org.uk/handbook/ICOBS/6A/6.html>.

<sup>48</sup> Reuters (2024). *FTC lawsuit over Amazon's Prime program set for June 2025 trial*. Available at: <https://www.reuters.com/legal/litigation/ftc-lawsuit-over-amazons-prime-program-set-june-2025-trial-2024-06-12/>

<sup>49</sup> MarketWatch (2024). *Adobe sued by U.S. regulators for making it too difficult to cancel subscriptions*. Available at: <https://www.marketwatch.com/story/adobe-sued-by-u-s-regulators-for-making-it-too-difficult-to-cancel-subscriptions-2ecfdef5>

<sup>50</sup> Federal Trade Commission (2022). *FTC action against Vonage results in \$100 million to customers trapped by illegal dark patterns and junk fees when trying to cancel service*. Available at: <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-action-against-vonage-results-100-million-customers-trapped-illegal-dark-patterns-junk-fees-when-trying-cancel-service>

<sup>51</sup> FTC (2024). *Federal Trade Commission Announces Final "Click-to-Cancel" Rule Making It Easier for Consumers to End Recurring Subscriptions and Memberships*. Available at: <https://www.ftc.gov/news-events/news/press-releases/2024/10/federal-trade-commission-announces-final-click-cancel-rule-making-it-easier-consumers-end-recurring>

<sup>52</sup> Consumer Policy Research Centre (2022). *How Australia can stop unfair business practices*. Available at: <https://cprc.org.au/report/how-australia-can-stop-unfair-business-practices/>

## Multiple options need to be used to address subscription traps

The consultation paper outlines four options to address subscription traps. Each have limits as a stand-alone protection.

**Table 6. Options to address subscription traps, and the associated benefits and challenges**

Option	Benefits	Challenges
<b>Option one – pre-sale disclosure of information</b>	Allows informed and engaged consumers to compare options consistently.	Unlikely to radically reduce harm to consumers – there is no evidence that CPRC can point to show that information provision alone will reduce consumer harms.  Does not resolve the problem of difficult to exit processes.  Least likely to help people experiencing vulnerability.
<b>Option two – notification requirement</b>	Provides clear information about when a charge is coming, allowing people to consider costs and act.	Does not resolve the problem of difficult to exit processes.  Unlikely to help people experiencing vulnerability.
<b>Option three – opt-in requirement</b>	Addresses specific harmful practice of fake-free trials that result in surprise charges.	Does not resolve the problem of difficult to exit processes
<b>Option four – removing barriers to cancelling a subscription</b>	Reduces business practices that cause the greatest financial and wellbeing harms to consumers.  Reduces time and administration burdens on all consumers, most likely to help people experiencing vulnerability.	Doesn't address harmful "free trial" practices that result in surprise charges.

Our view is that option four and three are the most beneficial approaches to the problem of subscription traps, with the options targeting related but technically different aspects of the subscription trap phenomenon.

Options one and two have value but only when combined with options three and four.

Establishing a law that requires businesses to offer simple, easy opt-out cancellation options is not a new concept in Australia. In 2018, the National Consumer Credit Code was amended to allow easier online credit card cancellation options after a Senate Inquiry found that consumers could easily sign up for a credit card but typically had to take multiple complex steps to cancel.<sup>53</sup>

<sup>53</sup> Australian Government, *Consumer credit reforms*. Available at: <https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-09/Consumer-credit-reforms-fact-sheet.pdf>

In relation to timing of civil penalties, as stated above; businesses acting in an ethical and transparent manner towards consumers will not require any changes to practices. It is only businesses causing consumer detriment and harm that will have to make changes, and it is important for associated penalties for non-compliance to occur immediately.

### **Recommendation 9**

Subscription traps should be addressed by combining the options outlined in the consultation paper. Treasury should prioritise reforms that make it as easy to cancel as it is to sign up and that require active opt-in after a free trial period. These measures should be supported by clear disclosure at the point of sign-up and before regular charges are made.

The ACCC should undertake independent user testing to inform guidance for businesses as to an effective framework for removing barriers.

# Drip pricing practices, Dynamic pricing and Online account requirements

Answering focus questions 25, 26, 27, 28, 29 and 31 from the consultation paper

## Consumer challenges with dynamic pricing

The technology exists to allow businesses to rapidly set new prices for consumers, even when they are part-way through a purchasing process. Clearly banning the practice of adjusting prices after a consumer has commenced the purchasing process will send a clear signal that new technology needs to be applied fairly in Australian markets.

Another key issue with dynamic pricing is the lack of transparency over how pricing is set in terms of consumer data informing the pricing. For example, what models are involved? What data is being used? How frequently is the data being updated? Are consumers explicitly consenting to the use of their data?

Even more fundamentally, when is dynamic pricing being applied? In the few instances uncovered by researchers and consumer advocates, dynamic pricing isn't disclosed to consumers. A classic example is CHOICE's mystery shop of Tinder Plus, finding the company charged between \$6.99 to \$34.37 to subscribe to the premium service for one month.<sup>54</sup>

Not all dynamic pricing will be unfair to the consumer – we already accept that different prices are charged to different groups like with discounts for students or higher prices for ride share based on demand. However, the pre-condition for fair dynamic pricing is that consumers know when it is used and what factors determine the final price paid. We need to know if a business is setting pricing based on factors like age, gender, interests, past browsing behaviour or even other sensitive conditions like known health conditions. We cannot have a discussion about whether a business practice is fair without a baseline of transparency.

Any new requirements for dynamic pricing should require that pricing is final once the purchasing process commences and that consumers are clearly informed when dynamic pricing is being used and the factors behind variations in price.

Furthermore, while surge pricing appears to be out of scope of this consultation, we argue that surge pricing of essential goods (e.g. at supermarkets) deserves consideration in the context of regulating dynamic pricing. Surge pricing is happening in the US, and is a big concern as it facilitates real-time price gouging of essentials especially during emergencies (e.g. the pandemic), as well as costing people in financial hardship the most.<sup>55</sup>

## Drip pricing – benefits of clarity in the ACL

Similarly, drip pricing is a sales tactic where an initially advertised price is incrementally increased during the purchasing process through additional charges, such as booking or service fees. This practice can mislead consumers into paying more than they originally anticipated

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<sup>54</sup> CHOICE (2020). *Tinder's secret pricing shows how companies use our data against us*. Available at:

<https://www.choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/tinder-plus-op-ed>

<sup>55</sup> CNN (2024). *Surge pricing your groceries: What could go wrong?* Available at:

<https://edition.cnn.com/2024/08/22/business/surge-pricing-groceries-nightcap/index.html>

and is considered misleading under the ACL which prohibits false or deceptive representations about the price of products or services.

In 2015, the Federal Court of Australia found that Jetstar Airways and Virgin Australia engaged in misleading ‘drip pricing’ practices and were penalised \$545,000, and \$200,000 (respectively), for breaching the ACL by inadequately disclosing additional fees during the online booking process.<sup>56</sup>

While there have been clear court cases against drip pricing, this practice is still commonly used in online booking processes, creating a need for a more specific ban in legislation.

## Our insights in relation to online account requirements

Online retailers that require consumers to set up an account and provide personal information in order to make a purchase, are making consumers disclose more personal information than is reasonably necessary.

### **This practice is well recognised dark pattern known as the ‘Data Grab’.**

CPRC’s dark patterns research into found that the majority of Australians recalled being asked for more information about themselves than what was needed to access a product or service (89%), feeling substantial levels of concern and mistrust.

- Almost two in five Australians noted that the practice concerns them (39%), and
- One in three felt they couldn’t trust the business (33%).

This practice also has detriment to the business; nearly one in three Australians wanted to stop using the website or app (32%).<sup>57</sup>

These results are unsurprising given research has shown that 75% of Australians feel businesses have a high level of responsibility to provide protection against collection and sharing of personal information and eight out of ten consumers are uncomfortable with unnecessary sharing of their information.<sup>58</sup> This is particularly relevant given consumers feel helpless in having control over their own personal information. More than seven in ten Australians perceive that they lack control over online businesses collecting their personal information from, and sharing this information with, other businesses.<sup>59</sup>

The data grab dark pattern can have significant implications for consumers. Their personal information can be used to make predictions about them to drive commercially beneficial outcomes for businesses. Personal information can also be highly sensitive and if not used with care would violate a consumer’s privacy. Personal data can also be used to influence what someone consumes and at what price.

This business practice should be specifically banned by requiring that businesses offer a guest check out option as part of online shopping processes.

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<sup>56</sup> Jetstar and Virgin to pay penalties for misleading ‘drip pricing’ practices. Available at: <https://www.accc.gov.au/media-release/jetstar-and-virgin-to-pay-penalties-for-misleading-drip-pricing-practices>

<sup>57</sup> Consumer Policy Research Centre (2022). *Duped by design – Manipulative online design: Dark patterns in Australia*. Available at: <https://cprc.org.au/report/duped-by-design-manipulative-online-design-dark-patterns-in-australia/>

<sup>58</sup> Consumer Policy Research Centre (2020). *CPRC 2020 Data and Technology Consumer Survey*. Available at: <https://cprc.org.au/report/cprc-2020-data-and-technology-consumer-survey/>

<sup>59</sup> Kemp, K., Gupta, C., Campbell, M. (2024). *Singled out – Consumer understanding — and misunderstanding — of data broking, data privacy, and what it means for them*. Available at: <https://cprc.org.au/report/singled-out>

### Recommendation 10

The Government should introduce specific reforms that will:

- Clearly ban drip pricing, including disclosure of any “per transaction” fees before a purchase process.
- Clearly ban dynamic pricing after the purchase process has commenced.
- Require that companies clearly disclose when dynamic pricing is used and the factors that determine variations in pricing.
- Require that a “guest” check out option is required for online shopping, removing unnecessary data gathering in the purchase process.

## Barriers to accessing customer support

Answering focus questions 32, 33 and 24 from the consultation paper

### Insights into barriers to accessing customer support

For consumers, things can go wrong with goods and services, and the individual is entitled to use and enjoy the good or service already purchased. However, there is a point where customer service can be so lacking, so tricky or so appalling that it is unfair.

We likely need case law to fully explore the point when poor customer service becomes unfair, but until then we can easily point to extreme examples that should be captured by a ban on unfair trading practices. For example, companies that offer no phone or mail service for customer contacts, only an email or webform that customers report getting no response from. Or a telecommunications company that repeatedly promises to arrive at a home at a certain time to fix an issue but then doesn't do so – assuming a customer had to take time off work or faced other personal costs for multiple missed appointments; this would add up to an unfair outcome. Another example seen by consumer organisations, is where companies offer a “30 day change of mind” policy but then offer no practical option to contact the company in that period to allow for a refund or other promised remedy.

Interestingly, in the face of goods and services failures we see substantial proportions of consumers who never raise an issue or lodge a complaint with the business. This likely reflects a fatigue with poor customer support or a lack of trust that customer support will genuinely address issues.

### What are the barriers to complaining?

There is a substantial body of evidence showing that many consumers find it difficult to obtain remedies from suppliers and manufacturers for consumer guarantee failures. The 2023 Australian Consumer Survey found that 31% of surveyed consumers have not had their

problem resolved, while of the 69% of those whose issues were resolved, a third of those were not satisfied with the resolution.<sup>60</sup>

CPRC's recent research with customers of telecommunications companies and digital gamers emphasises this difficulty, showing that consumers *don't know how* to raise a complaint, *don't know where* to raise a complaint, are skeptical they'll receive a response (let alone a remedy), and believe that the time and effort isn't worth the recompense at the end of a likely arduous process.

1. In 2023 in a study of Australians with a telco connection, CPRC found that close to a third of Australians had experienced one or more serious issues with their telco or telco service, worthy of a complaint. 77% of these serious issues (of which we observed close to 3,000 within the past 12 months) were not raised or lodged because the individual was overwhelmed by the process.<sup>61</sup>
2. In 2024 in a study of Australian digital game players, CPRC found that close to half of players who incur financial or time loss from a game don't complain or seek support (42%). They cut their losses and do nothing further, due to a disbelief anything worthwhile will eventuate.<sup>62</sup>

This problem could be addressed by recommendation three in this submission – ensuring that the grey list adequately captures post-sale use and enjoyment of a product or service.

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<sup>60</sup> Australian Consumer Law (2023). *Australian Consumer Survey*. Available at: <https://consumer.gov.au/consultations-and-reviews/australian-consumer-survey/>

<sup>61</sup> CPRC (2024). *Barriers to effective dispute resolution in the telecommunications industry*. Available at: <https://cprc.org.au/report/barriers-telco-dispute-resolution>

<sup>62</sup> CPRC research conducted in 2024, yet to be published (early 2025).

# Other considerations

## Application to business-to-business dealings

Answering focus question 35 from the consultation paper

Unfair trading protections should extend to small businesses. Across consumer groups, we regularly see issues where large and powerful businesses use their market power in ways that cause unfair outcomes for small businesses. In many ways, small businesses face the same challenges as individual consumers when dealing with larger businesses.

CPRC has seen clear examples where small businesses are harmed by dark patterns from large businesses. For example, Adobe offers software that many small businesses rely on, from creative contractors to small businesses that create their own PDFs. In February 2023, CPRC referred an issue about Adobe’s subscription trap practices to the ACCC for action specifically due to harm caused to small businesses – we have yet to hear an outcome on this complaint and suspect action is challenging without an unfair trading practices ban.

As of February 2023, Adobe imposed a termination fee of a lump sum payment of 50% of the remainder of an annual subscription fee. This fee is imposed as a penalty for early termination of an annual subscription plan. As a consequence, if users were to cancel their subscriptions at the fourth month of their plan, they would lose access to the software and have to pay a lump sum of 50% of the subscription fee that they would have otherwise incurred for the remaining 8 months (of their annual subscription plan) as a penalty. The detailed termination clause, with information about the percentage payable upon cancellation of the annual subscription, is hidden within the fine print of the section ‘Subscription and cancellation terms’ and is not transparent.

### Recommendation 11

The ban on unfair trading practices should **offer protections to small businesses**.

# Specific prohibitions should stop greenwashing

## The harm caused by greenwashing

Many Australians want to purchase products with environmental benefits. CPRC research has found that 45% of Australians always or often use green claims when making purchases. However, people are finding it difficult to trust the information provided by companies, with at least 50% of people saying they're worried about the truthfulness of green claims.<sup>63</sup>

While regulators have power to stop businesses from making misleading claims, greenwashing is about more than just companies outright lying. CPRC's research has found that most ads using green claims are vague, unhelpful and unclear. These vague ads give companies a "green halo" without helping customers to genuinely compare their options.

In partnership with the Australian Research Council Centre for Excellence for Automated Decision Making + Society (ADM+S), CPRC analysed 8,963 Facebook ads with a green claim. The research found that most ads in the set used vague and unhelpful terms. The top three most observed terms, often used without context for the consumer, were "clean", "green" and "sustainable".<sup>64</sup>

For example, an energy retailer was running an ad with a claim of "Same energy. Greener company." There was no context provided to the customer about what made the company "greener" or whether efforts made the company greener relative to its own past performance or competitor actions. Another example from the research is an ad from electronics company Panasonic which claims that the company is "for the planet". Again, a consumer can't use this information to compare the actions of this company to competitors. It is a claim that delivers a sense of doing good without any detail to back up actions.

In a recent mystery shop of more than 120 appliances conducted by CPRC in 2024 found that two in five large, energy-intensive home appliances had green claims at the point of sale – claims such as "eco-friendly", "resource efficient", and "energy-savvy" in the presence of green colour tones and environmental imagery, but in the absence of further substantiating information. In a series of eight discussion groups conducted around Australia, CPRC also found that 80% of participants would rely on green information when buying a large energy-intensive home appliance.<sup>65</sup>

## The need for a specific ban against greenwashing

These vague green claims cannot be easily dealt with by regulators using existing laws. In fact, regulators have struggled to get courts to confirm that even some specific green claims are misleading. For example, in *ACCC v Woolworths*, the court found that "biodegradable and compostable" products in the W Select Eco range were not false or misleading, even though the products would take significant periods of time to break down in composting conditions.<sup>66</sup> Similarly, in *ACCC v Kimberly-Clark*, Kleenex Cottonelle wipes using claims that they were

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<sup>63</sup> Consumer Policy Research Centre (2022). *The Consumer Experience of Green Claims in Australia*. Available at: <https://cprc.org.au/report/green-claims>

<sup>64</sup> Gupta, C., Bagnara, J., Parker, C., Obeid, A.K., (2023), *Seeing green - Prevalence of green environmental claims on social media*, Consumer Policy Research Centre + ADM+S. Available at: [https://cprc.org.au/wp-content/uploads/2023/12/CPRC\\_Seeing-Green-Report\\_FINAL.pdf](https://cprc.org.au/wp-content/uploads/2023/12/CPRC_Seeing-Green-Report_FINAL.pdf)

<sup>65</sup> Consumer Policy Research Centre (2024). *Consumer use and misuse of product information on large appliances*. Available at: <https://cprc.org.au/wp-content/uploads/2024/11/CPRC-ECA-Qualitative-Research-BRIEFING-NOTE14.pdf>

<sup>66</sup> *Australian Competition and Consumer Commission v Woolworths Group Limited* [2020] FCAFC 162.

“flushable” were not false or misleading despite evidence of the risk of harm to sewer systems.<sup>67</sup>

## What does effective regulation look like?

The EU has had a ban on unfair practices since 2005 and has already used this protection to limit the harms of greenwashing. In April 2024, the European Commission wrote to 20 airlines requesting that they substantiate green claims.<sup>68</sup> The action targets claims that airlines are moving towards net-zero greenhouse gas emissions without clear and verifiable commitments, targets or an independent monitoring system. Consumer groups in the EU are also calling for current laws to be used to stop claims that plastic bottles are “100% recycled” or “100% recyclable” even when this isn’t possible for all materials in a PET bottle.<sup>69</sup>

The EU has recently extended its unfair practices law to explicitly capture greenwashing. The Directive (EU) 2024/825 on Empowering Consumers for the Green Transition was finalised in February 2024 and will be enforced from September 2026.<sup>70</sup>

As part of this expansion to its unfair practices law, the EU has specified that companies will not be able to make use of generic environmental claims without evidence of “excellent environmental performance” relevant to the claim. Generic claims include eco-friendly, eco, green, nature’s friend, natural, animal-friendly, cruelty-free, sustainable, climate neutral, and generic claims based on offsetting alone.<sup>71</sup>

### Recommendation 12

Treasury should extend specific prohibitions of unfair business practices to **capture greenwashing**, mirroring protections being rolled out in the EU.

<sup>67</sup> Australian Competition and Consumer Commission v Kimberly-Clark Australia Pty Ltd [2020] FCAFC 107.

<sup>68</sup> European Commission (30 April 2024), *Press release: Commission and national consumer protection authorities starts action against 20 airlines for misleading greenwashing practices*. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_2322](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2322)

<sup>69</sup> BEUC (2023), *Unbottling greenwashing*. Available at: <https://www.beuc.eu/unbottling-greenwashing>

<sup>70</sup> Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information. Available at: <http://data.europa.eu/eli/dir/2024/825/oj>

<sup>71</sup> CPRC (2023). Submission to the Senate Inquiry – Greenwashing. Available at: <https://cprc.org.au/wp-content/uploads/2023/06/CPRC-Submission-Senate-inquiry-into-Greenwashing-June-2023.pdf>