To: Director
Consumer Policy Unit
Market Conduct Division
The Treasury
By email: consumerlaw@treasury.gov.au

Friday December 20, 2024

Dear Director,

The Digital Industry Group Inc. (DIGI) appreciates the extended opportunity to provide our views on the Treasury's Supplementary Consultation Paper *Unfair trading practices: Consultation on the design of proposed general and specific prohibitions*, released in November 2024 (Supplementary Consultation Paper).

By way of background, DIGI is a non-profit industry association that advocates for the interests of the digital industry in Australia. DIGI's founding members are Apple, Discord, eBay, Google, HelloFresh, Meta, Microsoft, Pinterest, Snap, Spotify, TikTok, Twitch, X and Yahoo. DIGI's vision is a thriving Australian digitally-enabled economy that fosters innovation, a growing selection of digital products and services, and where online safety and privacy are protected.

DIGI shares the Government's strong commitment to consumer protection, and is a key Government partner in this area. Our work to support consumer protections includes developing industry codes of practice for the digital industry; DIGI co-led the development of codes required under the Online Safety Act, and developed and oversees *The Australian Code of Practice on Disinformation and Misinformation*. In July 2024, DIGI launched *The Australian Online Scams Code* (AOSC), a proactive effort from the digital industry in line with the Government's wider legislative agenda in scams.

We thank the Treasury for the release of a Supplementary Consultation Paper, in addition to the Treasury's Consultation Regulation Impact Statement, titled *Protecting consumers from unfair trading practices*, released in August 2023 (Consultation RIS). In line with our request to provide stakeholders with additional opportunities for consultation in DIGI's submission to the Consultation RIS, we welcome this opportunity for further consultation.

At the outset, we wish to underscore that DIGI does not seek to support indefensible business practices. We consider that there are business practices economy-wide that must be restricted under Australian consumer law, and other relevant laws. DIGI welcomes economy-wide approaches to addressing consumer protection, providing consumers with a baseline of protections in both online and offline environments.

Australia already has very robust protections in the ACL that are capable of addressing the primary concerns flagged in the discussion paper. In our previous submission to the Consultation RIS, DIGI expressed a preference for Option 1, while refuting the description of Option 1 as the 'status quo' in light of the reform of the Privacy Act Review and other relevant reforms. As the reform proposal for a prohibition on unfair trading practices intersects with the current reform of the Privacy Act, DIGI considers

that the Privacy Act Review, led by the Attorney-General's Department, should take precedence in informing the Government's response to any data-related issues identified in this consultation.

We recognise that the Supplementary Consultation Paper is designed to further explore Option 4 in the Consultation RIS to introduce a combination of general and specific prohibitions on unfair trading practices; while this submission engages with the proposals that might form Option 4, our analysis serves to substantiate the need for Option 1. Fundamentally, this submission questions whether there is a gap in the law. We posit that the issues identified are already covered under the ACL, or will be covered under a reformed Privacy Act.

Additionally, our submission raises concerns about the application of the proposals in a digital environment, which could disadvantage eCommerce, over forms of retail commerce. Under the Australian Consumer Law (ACL), Australian consumers and small businesses have some of the most robust protections in relation to standards of fairness, quality and safety anywhere in the world. We caution against transplanting concepts in European consumer law that have no prior application nor body of precedent in Australian law.

We hope that the information enclosed in this submission is useful as you consider approaches to these issues, and we would welcome the opportunity to meet to discuss this input further.

Best regards,

Sunita Bose
Managing Director, DIGI

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Section 1: The bigger picture

1. The gap is unclear

1.1. DIGI believes that Australian Consumer Law (the ACL) largely already addresses the concepts advanced as 'unfair trading practices' in the Supplementary Consultation Paper. These are covered through both general protections (e.g., misleading or deceptive conduct, unconscionable conduct, unfair contract terms) and specific protections (e.g., false or misleading representations, unsolicited selling, pyramid schemes and consumer data rights).

1.2. The existing ACL outlines established principles, standards and concepts that are well understood by the ACCC and the courts. There have been a series of reforms relating to 'unfair' behaviour, including unfair contract terms for small businesses (2016), unfair contract terms extended to consumers (2021) and unfair contract terms being made illegal (2023).To the extent that these principles are not well understood by consumers and industry, Treasury should consider a work programme that increases the clarity of rights and responsibilities for consumers, and industry, perhaps through a consolidated website that provides links and information about their obligations and rights under the various regulatory frameworks.

1.3. DIGI urges Treasury to undertake a comprehensive review of the various applicable regulations, as well as emerging Government policy, in order to identify with more precision whether an actual gap exists. This should include, but not be limited to, the Privacy Act, the Government Response to the Privacy Act Review Report, the ACL, Competition and Consumer Act 2010, the Online Safety Act, The Spam Act, Franchising Code, Grocery Code and relevant state fair trading regulations.

1.4. DIGI is concerned that some aspects of the proposals create duplication, particularly with the landmark reform that is currently underway of Australia's Privacy Act and expected to

be further advanced in 2025. This creates the risk of potential double jeopardy where multiple penalties are levied at the same business for the same conduct. A new unfair trading practices prohibition could create a different standard of practice to that ultimately set at the conclusion of the Government's multi-year review of the Privacy Act.

1.5. DIGI considers that the Privacy Act Review, led by the Attorney-General's Department, should take the primary lead in determining how the Government should respond to the data-related practices. Accordingly, DIGI urges close consultation between Treasury's Unfair Trading Practices team and the Attorney-General's Department's Privacy Act Review team.

2. Comparisons to other markets

2.1. Further, DIGI considers that overall the Australian legal framework is as robust as the unfair practices laws in comparable jurisdictions.

2.2. Annexure 1 to the EU's Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market (EU UCPD) contains a specific prohibition approach which includes a non-exhaustive list of 31 specific practices that broadly covers bait advertising, phony 'free' offers, manipulation of children, false claims about cures, hidden advertisements in media, pyramid schemes, false offers of prizes and gifts, phony 'special' advantages, false use of limited offers, and persistent unwanted offers. Analysis undertaken by law firm Clayton Utz examined these 31 specific EU UCPD practices against provisions in Australia's ACL which can be used to capture the same unfair practice. Their analysis shows that most, if not all, of the specific practices on that list can already be regulated using an existing ACL provision[1].

2.3. A comprehensive 2016 comparative analysis of overseas consumer policy frameworks reveals 'high levels of convergence between the consumer policy frameworks of Australia and several jurisdictions chosen for comparison.'[2] It finds that the specific 'highly unfair trading conduct' covered in the UK, US, Canada and Singapore regimes is covered in Australian regulation[3], as well as through comparable general protections[4]. DIGI cautions against a sole focus on emerging overseas regulatory developments to justify domestic regulation, without consideration of the Australian regulatory context, which often has foundational differences. This can lead to bias toward new regulation to address consumer concerns, rather than more efficient approaches that address emerging issues and gaps through existing regulatory frameworks. As noted in this submission, we are concerned that the proposals in the Supplementary Consultation Paper transplant

[1]Corrigan, M., Richmond, E., & Pourahmary, H. (16/9/21), T*he ACCC is calling for a new ban on unfair trading practices in business – why, and what it would mean*, https://www.claytonutz.com/knowledge/2021/september/the-accc-is-calling-for-a-new-ban-on-unfair-trading-practices-in-business-why-and-what-it-would-mean

[2] Corones, S., Christensen, S., Malbon, J., Asher, A., Paterson, J.M. (2016), *Comparative analysis Of overseas consumer policy frameworks,* accessed at https://consumer.gov.au/sites/consumer/files/2016/05/ACL_Comparative-analysis-overseas-consumer-policy-frameworks-1.pdf

[3] Corones et. al (2016), p. 2-4

[4] Corones et. al (2016), p. 2-3

elements of EU consumer law without close analysis of their applicability in an Australian context.

3. Disadvantaging eCommerce and innovation

3.1. DIGI is concerned that the proposals may inadvertently disadvantage eCommerce, over forms of retail commerce. Fundamentally, selling goods and services relies on persuasion. In bricks and mortar retail, persuasion includes visual merchandising, placement of products in store and wayfinding. For example, the furniture store IKEA's layout is well known to obfuscate the exit, and likely intentionally designed to lead to more impulse purchasing, which could arguably be considered as a 'trap', 'dark pattern' or 'distorting or manipulating'. The Supplementary Consultation Paper's proposals appear to cover eCommerce techniques, without consideration of their analogue in retail stories.

3.2. While the Supplementary Consultation Paper's proposals appear to draw inspiration from the EU, it is worth noting that Europe's reforms have been shown to impact competitiveness and productivity. An extensively researched report prepared for the European Commission on the Future of European Competitiveness expresses concern with "inconsistent and restrictive regulations, which is driving investment away from Europe and to the United States". Further, it finds that between 2008 and 2021, close to 30% of the 'unicorns' founded in Europe – i.e. start-ups that went on to be valued at over USD 1 billion – relocated their headquarters abroad. The report highlights the need to remove regulatory hurdles to address Europe's slowing productivity growth relative to the United States[5].

Summary of recommendations in Section 1

A. DIGI urges Treasury to undertake a comprehensive review of the various applicable regulations, as well as emerging Government policy, in order to identify with more precision whether an actual gap exists. This should include, but not be limited to, the Privacy Act, the Government Response to the Privacy Act Review Report, the ACL, Competition and Consumer Act 2010, the Online Safety Act and relevant state fair trading regulations.

B. Outside of regulatory reform, Treasury should consider a work programme that increases the clarity of rights and responsibilities for consumers, and industry, perhaps through a consolidated website that provides links and information about their obligations and rights under the various regulatory frameworks.

C. DIGI considers that the Privacy Act Review, led by the Attorney-General's Department, should take the primary lead in determining how the Government should respond to the data-related practices. DIGI urges close consultation between Treasury's Unfair Trading Practices team and the Attorney-General's Department's Privacy Act Review team.

[5]European Commission, EU competitiveness: Looking ahead, https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en

D. Accordingly, DIGI urges close consultation between Treasury's Unfair Trading Practices team and the Attorney-General's Department's Privacy Act Review team.

E. DIGI cautions against a sole focus on emerging overseas regulatory developments to justify domestic regulation, without consideration of the Australian regulatory context, which often has foundational differences.

Section 2: Analysis of the proposal

4. General prohibition

4.1. As Treasury's Consultation RIS acknowledged, "unfairness is an inherently subjective concept, and that "a reform which is poorly framed or ill-defined could create uncertainty, stifle innovation and competition, and be difficult to enforce." DIGI agrees that the concept of 'unfairness' is subjective, and carries a risk of uncertainty for business. Over time, judicial interpretation of a prohibition on 'unfair' trading practices' would see the breadth of behaviours and consumers covered under the statutory provisions expand and evolve. It would take significant time for a corpus of judicial decision making to evolve, creating business uncertainty in the interim.

4.2. For example 'unfair' could capture legitimate actions taken by businesses where they refuse a consumer service. For example, digital services routinely disable accounts when their users violate their Terms of Service through posting objectionable content, or engaging in unacceptable behaviour; the user affected is likely to consider these actions to be 'unfair'.

4.3. While we appreciate the Supplementary Consultation Paper's proposal for a general prohibition aims to create more specificity than the Consultation RIS, we remain concerned about the uncertainty created from the elements of the proposed general prohibition.

4.4. Guidance would be required on how the ACCC would interpret 'unreasonably distorts', 'manipulates', and 'economic decision-making or behaviour'. It is worth noting that the EU UCPD from where these terms are borrowed is accompanied by a 121 page guidance document. For example, it is unclear the point at which 'manipulation' or 'distortion' would become 'unreasonable'.

4.5. Relatedly, we note that the Supplementary Consultation Paper invites comments on whether 'unreasonable' is the appropriate threshold. We recommend that Treasury consider instead exploring an exclusion for conduct that is reasonably necessary to protect a business's legitimate interest, which would be similar to the Unfair Contracts Terms (UCT) regime. Currently, the concept of 'unfairness' in the UCT regime under section 24 of the ACL includes the provision "is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term".

4.6. The general prohibition also captures conduct "likely' to cause material detriment (financial or otherwise)". DIGI questions whether 'likely' captures conduct that is 'sufficiently serious'. We recommend that Treasury consider a threshold, similar to

'serious harm' in Australia's Model Defamation Provisions, that differentiates consumer inconvenience or annoyance from meaningful harm. In the United States, the Federal Trade Commission defines an act or practice as 'unfair' when it causes or is likely to cause 'substantial injury' to consumers, cannot be reasonably avoided by consumers, and is not outweighed by countervailing benefits to consumers or to competition. A similar threshold would prevent minor claims or disputes being advanced, and incurring costs for all parties when no genuine harm has taken place.

EU concepts in AU law

4.7. DIGI is concerned that the proposal transplants concepts from European Union's Unfair Commercial Practices Directive (EU UCPD) that have no prior application in Australian law. Specifically, 'unreasonably distorts', 'manipulates', 'economic decision-making or behaviour' have no historical basis or body of precedent in Australian law. The EU UCPD has also developed under an entirely different legal system to address the harmonisation of divergent regional consumer protection laws.

4.8. Furthermore, we consider that types of conduct covered under the EU UCPD protections already exist in the ACL, specifically:

4.8.1. EU UCPD Art 5 (3) referring to particularly vulnerable groups is covered in the ACL's sections 20—22 on 'unconscionable conduct'.

4.8.2. Art 6 in relation misleading actions and Art 7 in relation to misleading omissions are covered in:

4.8.2.1. the ACL's section 18 on misleading or deceptive conduct.

4.8.2.2. Omitting material information could amount to unconscionable conduct under section 21, particularly where there is trickery in the omission, or it involves vulnerable clients, per ACCC v Quantum Housing Group Pty Ltd [2021] FCAFC 40.

4.8.2.3. Specific provisions relating to false or misleading representations, under the ACL's section 29.

4.8.3. EU UCPD Art 8 regarding aggressive commercial practices, Art 9 regarding harassment, coercion and undue influence, are covered under the ACL's:

4.8.3.1. Unconscionable conduct (sections 20—22)

4.8.3.2. Unsolicited consumer agreements (Part 3–2, Division 2),

4.8.3.3. Harassment and coercion (section 50)

4.8.3.4. Offering rebates, gifts, prizes (section 32)

Penalty regime

4.9. It is also worth emphasising that the EU UCPD has much lower penalties for breaches, where penalties are in the order of €EU2 million or 4% of turnover, as opposed to the ACL's penalties of up to at least AU$50 million or 30% of turnover.

4.10. Australia's existing penalty regime is disproportionate compared to other jurisdictions. Assuming the ACL's wider penalty regime cannot be amended as part of this reform process, this underscores the need for clarity for business and appropriate thresholds.

4.11. Further, DIGI understands that these penalties apply immediately once the new prohibition takes effect, without an implementation period. An implementation period is essential, in order to set entities up for successful compliance, and to provide time for the interpretation of any new concepts advanced in this reform through judicial decision-making.

5. Grey list

5.1. 'Grey lists' can be useful in interpreting the scope of other ACL protections, such as the UCT regime. In that regime, DIGI understands that the grey list functions as a guide as to the type of conduct that might be unfair and informs the general prohibition. However, it is unclear whether the grey list proposed in relation to the Unfair Trading Practices regimes informs or supplements the general prohibition.

5.2. DIGI is also concerned that some of the focuses of the grey list emphasise online transactions, and cause a divide between standards required for physical transactions. We do not consider that it is Treasury's intent to have fewer protections for physical transactions than online transactions, and therefore further attention is required to ensure parity.

5.3. More broadly, we consider that the grey list contains subjective elements that do not provide sufficient certainty to businesses, and are highly context specific. Therefore, the grey list should be more appropriately placed in guidance form rather than in the legislation itself.

Omission of material information

5.4. As noted in 4.8.2, DIGI considers that omissions, not just positive actions, are well captured under the ACL, including its prohibition against misleading or deceptive conduct. For example:

5.4.1. In ACCC v TPG Internet Pty Ltd [2013] HCA 54, TPG advertised a broadband plan as 'unlimited ADSL2+ for $29.99 per month' but failed to disclose that the plan required a bundled home phone service for an additional $30 per month. TPG's fine print disclosures were inadequate to cure the misleading dominant message.

5.4.2. Hardy v Your Tabs Pty Ltd (in liq) [2000] NSWCA 150 concerned the sale of a pizza franchise. The NSW Court of Appeal found that the respondent engaged in misleading and deceptive conduct because they failed to advise the applicant

that the reason for the sale was that a competing franchise was starting in the local area.

5.4.3. In Fleetman Pty Ltd v Stone [2005] FCAFC 80, the Full Court affirmed a decision by a Federal magistrate that the appellant, a car dealer, had engaged in misleading conduct under s 52 of the Trade Practices Act 1974 (Cth) by failing to advise the respondent that a car it purchased was a prior year model.

Provision of material information in an unclear, unintelligible, ambiguous or untimely manner

5.5. DIGI considers that this is covered under the ACL's section 18 relating to misleading and deceptive conduct, and section 29 relating to false and misleading representations. These sections would cover situations where a consumer is misled because material information was not clearly and conspicuously disclosed to them. This is further covered in the ACL's section 21 relating to unconscionable conduct.

Impeding the ability of a consumer to exercise their contractual or other legal rights

5.6. DIGI considers that the notion of 'impeding a consumer from exercising their contractual or other rights', to the extent that this relates to consumer rights (vs. small business rights) is intrinsically linked to whether informed consent was obtained by the consumer. Therefore, DIGI considers that all of the existing and emerging regulation across the Privacy Act and the ACL included in relation to 'inducing consumer consent or agreement to data collection through concealed data practices', listed from 2.4 to 2.7, applies here.

5.7. Depending on the specific circumstances, Sections 18 and 29 of the ACL in relation to misleading or deceptive conduct may apply here. Misleading consumers as to their legal rights (for example in relation to their rights under the consumer guarantees) is prohibited under the ACL and commonly enforced by the ACCC.

5.8. In addition, Section 21 in relation to unconscionable conduct may apply where the practices cause detriment to consumers, and Section 23 in relation to unfair terms of consumer contracts and small business contracts where the practices are represented in contractual terms.

5.9. Additionally, state fair trading regulations include relevant provisions. For example, section 47A of the NSW Fair Trading Act requires the disclosure of prejudicial terms relating to supply of goods or services, requiring that "*A supplier must, before supplying a consumer with goods or services, take reasonable steps to ensure the consumer is aware of the substance and effect of any term or condition relating to the supply of the goods or services that may substantially prejudice the interests of the consumer*".

Design elements, and dark patterns

5.10. DIGI agrees that consumers should be able to make informed choices in their online interactions and be protected from exploitative or manipulative practices. We consider that the Privacy Act Review proposals are the most appropriate method by which to

address such behaviour. DIGI is also of the view that further clarity is needed on what might constitute a 'dark pattern' to differentiate this activity from benign marketing that occurs in an online and offline environment, by private as well as Government organisations. For example, is a 'dark pattern online' analogous to a supermarket placing low-priced consumer items at the checkout counter to entice further purchases? Is it analogous to a clothing store offering a discount at the checkout counter if customers provide an email address to be added to their mailing list, without providing a printed privacy policy to the consumer? Such practices are common in offline and online retail environments, and we believe that further analysis and differentiation of the 'dark patterns' concept needs to occur, with a focus on consumer harm.

5.11. Consideration needs to be given to business practices or design strategies that have a reasonable justification, or are a byproduct of some other legitimate objective, that a business may be trying to achieve. For example, a business may employ interface strategies that encourage users to take action in areas considered to be in their best interests, such as when services 'nudge' users to review their privacy or security settings; however, not all users may agree with the legitimacy of this business intent.

5.12. While DIGI has concerns about the definitional notion of 'dark patterns', to the extent that this refers to the use of data-driven targeting to influence consumer consent, DIGI considers that the existing provisions under the Australian Privacy Principles apply – specifically APP 1, 3, 4, 5, 6, 7 – which contain relevant provisions in relation to ensuring informed consumer consent and notice.

5.13. Additionally, the Government has agreed in principle to a number of relevant proposals made by the Attorney-General's Department in the Privacy Act Review Report (PARR). In addition to the fair and reasonable test acknowledged in the Supplementary Consultation paper, and PARR Proposals 10.1, 11.1 and 12[6].

5.14. Specifically in relation to targeting and consumer autonomy, in its response to the PARR, the Government indicated that *'further consideration will be given to how to give individuals more choice and control in relation to the use of their information for targeted advertising, including layered optouts and industry codes which could specify how to give individuals more control over how their information is used in online advertising*[7]*.'*

5.15. Furthermore, the Government also agreed in principle to PARR Proposal 20.1b to amend the Privacy Act to include a definition of 'targeting', differentiated from what it considers to be more traditional forms of direct marketing.

5.16. We also consider that Section 18 of the ACL in relation to misleading or deceptive conduct may apply here, depending on the specific circumstances. In *ACCC v Trivago*, the Federal Court found that Trivago had breached the ACL by misleading consumers when representing that its website would quickly and easily help users identify the best deal or cheapest rates available for a given hotel. In fact, Trivago used an algorithm which placed significant weight on which online hotel booking site paid Trivago the highest cost-per-click fee in determining which rates to highlight on its website and as a result

[6] Attorney General's Department, Privacy Act Review Report, https://www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report
[7] Attorney-General's Department (28/09/2023), p. 12

often did not highlight the cheapest rates for consumers.[8]

6. Specific prohibitions

Subscription-related practices

6.1. In general, in relation to subscription-related practices, it is important to ensure a level playing field and parity with different digital and physical products and services across the economy. Proposals should enable flexibility across different types of products and services. General standards, rather than prescriptive approaches, will ensure that the rules are adaptable to a range of services and are less likely to require updates in future.

6.2. There should also be a conceptualisation of what is an annoyance as opposed to a consumer harm. For example, a consumer may find it annoying to click through several screens to cancel a subscription, but this may cause less potential financial burden, than a requirement to wait on hold with a call centre, or attend a facility in person to cancel a service. In this section of the submission, we offer more specific commentary on the elements of the proposal in relation to subscription-related practices:

Pre-sale disclosure of material information

6.3. DIGI is generally supportive of a requirement for businesses to clearly disclose material information relating to subscriptions prior to customers signing up to them. However, we discourage prescriptive lists of specific information that must be disclosed. Such an approach risks being both over and under-inclusive, and can lead to large blocks of text that are less likely to be read and understood by consumers. Instead, we recommend a flexible standard whereby the material subscription terms must be disclosed to consumers prior to purchase. That said, if a list of required disclosures is included, it should be as short as possible and enable sufficient flexibility to be applicable across all types of subscription services.

6.4. A requirement for material information to be provided in a specific form would be difficult to implement across a wide variety of different platforms and services. Instead, the same flexible standard that generally applies to disclosures in advertising should be applied to subscription disclosures, i.e., they should be clear (easy to understand) and prominent (difficult to overlook).

6.5. Should any prescriptive requirements in relation to subscriptions be retained, we advance the following specific recommendations:

6.5.1. With regard to the proposal to include '…the date by which, and how, the consumer can end the contract to avoid being charged…' we would recommend replacing 'the date by which' with 'the timeframe in which.' This is because it is not always possible to calculate the exact date a consumer will be charged prior to sign-up, such as in situations where the anniversary of a sign up falls on a

[8]ACCC (22/4/22), Trivago to pay $44.7 million in penalties for misleading consumers over hotel room rates, https://www.accc.gov.au/media-release/trivago-to-pay-447-million-in-penalties-for-misleading-consumers-over-hotel-room-rates

weekend or public holiday. Additionally, it is not technically possible in all scenarios to include dynamic fields in disclosure text. With this change, businesses would still be required to disclose when the consumer will be charged, but would take into account that it may not be possible for businesses to communicate the exact date.

6.5.2. We recommend against requiring businesses to include 'the indicative cost per annum'. Rather, we recommend an obligation to provide information on how the price will be calculated. This is favourable because:

6.5.2.1. Most subscriptions offered renew on a monthly basis and enable consumers to cancel at any time. In that context, the price for a full year is not relevant and could confuse consumers into thinking that a one-year commitment is required.

6.5.2.2. There are subscription business models where it is difficult to provide an indication of annual (or monthly) costs based on customer-led variations in their behaviour or choices. This has also been acknowledged within subscription regulations in other countries, for example, the UK's Digital Markets, Competition and Consumer Bill[9].

Notification requirement

6.6. DIGI agrees that, as general good business practice, reminders can be a suitable tool to help consumers keep track of their active subscriptions. However, mandating a reminder before each automatic renewal may be problematic in all cases, such as situations where there is a delivery of physical goods on subscription which, in and of itself, serves as reminder. The US FTC proposed an exclusion of physical goods in the draft Negative Option Rule before reminder notices were removed entirely from the draft for the final rule: *"In connection with sales with a negative option feature that do not involve the automatic delivery of physical goods, it is a violation of this Rule and an unfair act or practice in violation of Section 5 of the FTC Act for a negative option seller to fail to provide consumers reminders, at least annually, identifying the product or service, the frequency and amount of charges, and the means to cancel."*[10]

6.7. While we believe that reminder notices could be an appropriate measure for subscription contracts that automatically renew for long periods (bi-annually or annually), requiring frequent reminders for short-term contracts that renew weekly or monthly would overwhelm consumers. Consumers often have multiple subscriptions, so care must be taken to avoid notice fatigue, so as not to inundate consumers with an excessive number of notices about auto renewals.

6.8. Alternatively, to ensure that all consumers receive reminder notices periodically regardless of how frequently a subscription renews, an annual or bi-annual notice requirement could be imposed for all subscription durations. This balances the need for consumers to receive reminders that they are still subscribed, while not imposing a

[9] UK Public General Acts, *Digital Markets, Competition and Consumers Act 2024*, s. 258, https://www.legislation.gov.uk/ukpga/2024/13/section/258
[10] Federal register, Negative Option Rule, https://www.federalregister.gov/documents/2023/04/24/2023-07035/negative-option-rule

requirement that results in very frequent reminders that may be more likely to be ignored by consumers.

6.9. For example, the UK has adopted an approach, requiring businesses to send reminders only every six months for active subscriptions or when a subscription automatically renews for six months. (*"Where a trader enters into a subscription contract with a consumer … the trader must give to the consumer a notice (referred to in this Chapter as a "reminder notice") in respect of each renewal payment that relates to the end of a relevant six-month period. (2)A "relevant six-month period" for the purposes of subsection (1) is—(a)the period of 6 months beginning with the day after the day on which the contract was entered into, and (b)each subsequent period of 6 months beginning with the day after the day on which the consumer last became liable for a renewal payment in respect of which a reminder notice was required under subsection"*)[11]

6.10. Finally, such notifications should not have to include how much the consumer has spent on the subscription to date, as consumers often subscribe to products and services continuously for extended periods. Including this requirement would mean businesses must retain transaction records over extended numbers of years, creating privacy concerns for consumers and data retention considerations and costs for businesses. Consumers simply need to know when, how much and how often they will be charged, rather than historical information.

Opt-in requirement

6.11. We believe this requirement is generally not needed, as providing pre-contractual information about the terms of free trials or introductory offers should suffice to inform customers adequately. It is also important to consider the high risk of customers missing an opt-in request, which could lead to an unintended end of the contract. This could result in an interruption to a consumer's service, including missed deliveries of physical goods or software. Should Treasury seek to include additional communication at the end of a free trial, a reminder notice would be a more balanced and practical solution for both consumers and businesses.

6.12. Introductory offers should be differentiated from free trials, where opt-in requirements are being considered, as customers are already paying for these subscriptions and are less likely to forget about them than in situations where they have entered into a free trial. Further consideration should be given to the application of this proposal to regular deliveries of physical products which serve as a regular reminder, making it highly unlikely for customers to forget about their subscription.

6.13. The need for Option 3's opt-in requirement prior to the end of a trial would not be required if Option 1 and Option 2 were advanced. A notification, coupled with clear disclosures at sign-up sufficiently addresses concerns regarding consumers potentially being caught off guard by trials that convert to paid subscriptions, while also not creating unnecessary hurdles to consumers continuing to receive subscription products and services.

[11] UK Public General Acts, *Digital Markets, Competition and Consumers Act 2024*, s. 258, https://www.legislation.gov.uk/ukpga/2024/13/section/258

Removing barriers to cancelling a subscription

6.14. Ending a subscription contract typically involves multiple steps, such as creating an account, providing contact details, entering payment information, and selecting a suitable subscription offer. In many cases, consumers are also required to verify their contact information via email or phone. This should be considered when developing a policy solution that ensures that businesses make the process for terminating a subscription as straightforward and easy as the process for subscribing to it.

6.15. We agree that subscriptions should be easily cancellable online. The UK Digital Markets, Competition, and Consumer Act (DMCCA) requires that consumers must be able to end a subscription contract in a way that is straightforward and without taking steps that are not reasonably necessary to complete the cancellation. We recommend a similar principles-based approach. The UK DMCCA does not prohibit traders from making offers or seeking feedback from consumers during the exit mechanism, provided that the arrangements for exiting a contract comply with the DMCCA's requirements. Offers or feedback must not frustrate or unreasonably elongate the exit process. We find this reasonable and fair since many consumers actively seek discounts when cancelling. Further, some customers use the cancellation process to initiate a pause in their subscription.

6.16. Additionally, it should be noted that further communication and checks can be needed in multiple situations during the cancellation process. For example, an entity may need to communicate with the customer about how they will approach any outstanding payments they owe or services owed to them. These additional checks can also be important from a security perspective, in situations of unauthorised account takeover.

6.17. Including a requirement that cancellation of subscriptions should be straightforward is reasonable and fair for both businesses and consumers. However, cancellation is a very different process than signing up, so the ease of signing up cannot always be mirrored in the cancellation process. Sign up processes can also involve multiple steps such as entering contact information, creating an account, verification and entering payment information. A clear but flexible standard, such as that cancellation must be easy to locate, understand and complete supports the policy goal that it should be straightforward to cancel subscriptions while enabling flexibility for businesses to implement cancellation mechanisms that are appropriate to their services and platforms.

6.18. Further, services need to retain flexibility to manage for consumers who seek to game subscriptions. For example, a consumer may sign up for a heavily discounted first month and then cancel, and re-signs up at a later date to access the discount again. If this becomes a repeated action that means they are not acting in good faith, then services should be able to take action to prevent this from occurring.

6.19. In response to the Question 23, we highlight for Treasury that the UK government undertook a thorough impact assessment on interventions and options related to harms arising from subscription services[12].

[12] UK Department for Business, Energy, and Industrial Strategy, *Consumer and competition reform: Subscriptions regulations Impact Assessment*, https://assets.publishing.service.gov.uk/media/60f672b98fa8f50c76838794/rccp-subscriptions-traps-ia.pdf

Drip pricing & dynamic pricing

6.20. Drip pricing may be a breach of the misleading and deceptive conduct, false representations and single price provisions, on the basis that the business is representing at the start of the customer journey that the product or service is a particular amount, where in fact the customer will have to pay that amount and more (e.g., fees, tax etc.) to acquire the product or service. A case example lies in ACCC v Bloomex Pty Ltd [2024] FCA 243.

6.21. Dynamic pricing could also amount to bait advertising, as covered under the ACL section 35, if the business, at the time of specifying the upfront price for a product or service, did not have reasonable grounds to believe that they would be able to supply that product or service at that price for a reasonable period or in reasonable quantities.

Online account requirements

6.22. In relation to the proposal to potentially prohibit mandatory account creation for online purchases, DIGI questions the applicability of such a provision particularly when it relates to the provision of services digitally. An account is usually required for users to access customer support, particularly when there is an issue with a product or service; therefore such a proposal could run counter to the intent behind the overall reform to improve customer outcomes. Any overcollection of data, or misuse of it, should be addressed in the reformed Privacy Act and in the existing Spam Act.

Barriers to accessing customer support

6.23. DIGI agrees that adequate access to customer support is important. The reform should avoid prescription on the means and method by which this support is provided, recognising that services across the economy are innovating with how to provide customer service in scalable and efficient ways. Prescriptive requirements relating to customer service support in the ACL which presuppose a traditional business model may not reflect the nature or diversity of digital services, and may overlook the ways in which people engage online.

7. Penalties and remedies

7.1. DIGI is concerned that the Supplementary Consultation Paper proposes that penalties be available for contraventions immediately i.e. from the commencement of the unfair trading prohibition. This is in stark contrast to the way other consumer law regimes have been introduced. For example, a staged approach was taken to introducing the unfair contract terms (UCT) prohibitions into the regime. The UCT regime came into effect in 2010 however, prior to 9 November 2023, it was not an offence to include a UCT in an agreement, and no penalties applied.

7.2. This staged approach gave businesses time to adapt and see how the prohibition would be interpreted before being subject to significant pecuniary penalties. The ACCC undertook various reviews and issued guidance, which businesses used to understand the meaning of ‘unfair’ in the UCT context, and a body of court precedent was available prior to penalties being introduced.

7.3. The result of this is that companies are not being given a grace period to come into compliance with the new requirements. Any changes advanced by this reform process may involve updates to purchase and cancellation flows that take time to plan, implement and test. We recommend a one year transition period to enable businesses to plan in a way that lessens disruption while also requiring compliance within a reasonable period.

7.4. As already noted, the ACL's penalties are far higher than the EU's laws which have provided some inspiration for the proposals. As noted, in the EU there are lower penalties of €EU2 million or 4% of turnover, as opposed to at least AU$50 million or 30% of turnover. In this context, we consider that penalties should only be imposed for material violations, not mere technical violations. For example, if a notice is required to be sent 30 days prior to renewal, a company that sends the notice 29 days prior should not be fined.

7.5. If general or specific prohibitions with penalties are to be pursued, these should be introduced in a staged approach similar to the approach taken to the introduction of the UCT regime, with an initial transition period where penalty provisions do not apply. As noted, the UCT prohibitions were first introduced to consumers (2010), then to business (2016), and then included penalties (2023). This is particularly important because of the uncertainty as to exactly what conduct is captured by any new general prohibition. A transition period is needed to allow time to develop court precedent so that businesses have sufficient clarity as to how the provision is interpreted before penalties apply.

Summary of recommendations in Section 2

F. If a general prohibition is advanced, we recommend that Treasury consider instead exploring an exclusion for conduct that is reasonably necessary to protect a business's legitimate interest, which would be similar to the Unfair Contracts Terms (UCT) regime.

G. If a general prohibition is advanced, we recommend that Treasury consider a threshold, similar to 'serious harm' in Australia's Model Defamation Provisions, that differentiates consumer inconvenience or annoyance from meaningful harm

H. DIGI understands that penalties apply immediately once the new prohibition takes effect, without an implementation period. An implementation period is essential, in order to set entities up for successful compliance, and to provide time for the interpretation of any new concepts advanced in this reform through judicial decision-making.

I. In relation to the grey list, DIGI considers that it would be more appropriately placed in guidance form rather than in the legislation itself.

J. In relation to subscription practices, general standards, rather than prescriptive approaches, should be adopted so the rules are both adaptable and future-proof.

K. DIGI is generally supportive of a requirement for businesses to clearly disclose material information relating to subscriptions prior to customers signing up to them. However, we discourage prescriptive lists of specific information that must be disclosed, and instead

recommend a flexible standard, such as that the 'material subscription terms' must be disclosed prior to purchase, and that disclosures should be clear and prominent.

L. Should any prescriptive requirements in relation to subscriptions be retained, we advance a number of practical recommendations in relation to communication of timeframes.

M. In relation to the subscription notification requirement, annual or bi-annual notice requirements consistent with the UK would help mitigate 'notice fatigue' and consumers ignoring reminders.

N. In relation to the subscription notification requirement, there should not be requirements for business to calculate the lifetime value of a consumer's subscription to date in the notification.

O. Should Treasury seek to include additional communication at the end of a free trial, a reminder notice would be a more balanced and practical solution for both consumers and businesses.

P. We agree that contracts commenced online should also be cancellable online. However, we believe this should not be required in an overly prescriptive manner, and recommend a principles-based approach consistent with the UK Digital Markets, Competition, and Consumer Act (DMCCA).

Q. The reform should avoid prescription on the means and method by which customer support is provided, recognising that services across the economy are innovating with how to provide customer service in scalable and efficient ways.

R. If general or specific prohibitions with penalties are to be pursued, these should be introduced in a staged approach similar to the approach taken to the introduction of the UCT regime, with an initial transition period where penalty provisions do not apply.