A. Summary

*Overview of concerns with the proposals set out in the Consultation Paper.*

* The Australian Consumer Law (**ACL**) already contains a regime which addresses unfair trading practices identified as missing by the consultation. The existing ACL regime sets out well-established principles, standards and concepts that are understood by those having to engage with the regime, including those who must comply with it (e.g., businesses), those who enforce it (e.g., the ACCC and the court), and those who benefit from it (e.g., consumers and small businesses).
* Overlapping reforms already in progress should have the opportunity to be enforced, and the full impact of those changes realised, prior to introducing a further prohibition. Since that time, further regulation has been proposed – see **Annexure 1**.
* Treasury’s proposal[[1]](#footnote-2) to adopt and adapt the European Union’s Unfair Commercial Practices Directive (**UCPD** or **Directive**) achieves the opposite effect of certainty: the proposed general Prohibition, drawn from the UCPD, is neither clear, coherent nor cohesive with the existing unfair trading protections found in the ACL. Adopting the UCPD in Australia shoehorns new and unfamiliar concepts into the ACL – concepts that have no historical basis or body of understanding in Australian law. This will lead to significant legal uncertainty – which impacts businesses’ ability to understand and then comply with the law.
* The legal uncertainty created means businesses face a significant regulatory risk given the proposed penalties.[[2]](#footnote-3)
* The proposals potentially prohibit – with the risk of significant penalties – standard and expected business activities. The act of selling relies on persuasion, and businesses employ a range of means to persuade customers to making decisions to purchase. In bricks and mortar retail, for example, this includes the way that businesses place and promote products in store, wayfinding, lighting, music and ambience. Online retail businesses likewise employ methods to persuade customers to make purchasing decisions. Without sufficient clarity, these standard practices could fall within ‘distorting or manipulating’ the economic decision-making of the consumer.
* The introduction of an unfair trading practices prohibition (**Prohibition**) is a substantial novel regulation that intervenes extensively in how business operate. Given the scope of the intervention proposed, the regulation needs to be clear, coherent and cohesive with the existing legal framework under the ACL.

# B. Should Australia copy an EU Directive?

## 1. *Existing Australian protections*

The Australian Consumer Law (**ACL**) already prohibits unfair trading practices, with 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). The Spam Act, Franchising Code, Grocery Code and Australian Privacy Principles also provide relevant protections, including ongoing reforms in those spaces – see **Annexure 1**.

These overlaps have been canvassed in various submissions made in response to the Unfair Trading Practices Consultation Regulation Impact Statement in November and December 2023.[[3]](#footnote-4) See too section G, below.

Calls for an unfair trading prohibition have been on the agenda for many years. In recent years, the ‘need’ for reform was first identified in the ACCC’s report into the competition and fair trading issues facing the horticulture and viticulture industries (**Horticulture Review**)[[4]](#footnote-5)and re-enlivened in 2018, in 2019 in ACCC’s Digital Platforms Inquiry Report, and again in 2021[[5]](#footnote-6). However, extensive reforms have been proposed to the ACL and other laws in the meantime. For example, at the time of the Horticulture Review in 2016:

* The UCT only applied to business-to-consumer contracts – since then, the reforms have been expanded to apply to business-to-business contracts, expanded the definition of small business to include operations of up to $10M or fewer than 100 persons, removed the upfront price payable threshold, and imposed penalties for contraventions.
* The penalties available for ACL breaches was $1.1M. That increased to $10M or 10% of turnover, and again to $50M and 30% of turnover during the breach period.

Some of the further ongoing reforms are set out at **Annexure 1**.

## 2. European Union Unfair Commercial Practices Directive

The Conduct Element of the Prohibition has largely been drawn from the definition of unfair under Article 5 of the UCPD, which prohibits business to consumer ‘unfair commercial practices’.[[6]](#footnote-7)

Article 5(2) of the UCPD defines a commercial practice as being unfair if:

* it is contrary to the requirements of professional diligence, and
* it materially distorts, or is likely to distort, the economic behaviour of the average consumer.[[7]](#footnote-8)

This definition of ‘unfair commercial practice’ under Article 5(2) contains a number of key concepts that are separately defined in the Directive and are integral to the question of ‘fairness’.

### *Professional diligence*

‘Professional diligence’ means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity’.[[8]](#footnote-9)

Treasury has not proposed to adopt this limb of the UCPD test, instead prohibiting ‘unreasonable conduct’ in the Conduct Element.[[9]](#footnote-10)

### *Materially distort economic behaviour*

The phrase ‘to materially distort the economic behaviour of consumers’ is defined in Article 2(e) of the UCPD to mean ‘using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to make a transactional decision that he would not have taken otherwise.’[[10]](#footnote-11)

This limb is captured in the Conduct Element, in an amended way.

## 2. There is no basis on which to adopt or substantially borrow from the UCPD

### *UCPD protections already exist in the ACL*

### The UCPD specifies the following types of conduct, each of which is captured by the ACL:

|  |  |
| --- | --- |
| * + 1. UCPD
 | * + 1. ACL equivalent
 |
| * + 1. Art 5(3) - referring to particularly vulnerable groups
 | Unconscionable conduct (sections 20—22) |
| * + 1. Art 6 – misleading actions
		2. Art 7 – misleading omissions
 | Misleading or deceptive conduct (section 18) Specific provisions relating to false or misleading representations (section 29)Unconscionable conduct (sections 20—22)Consumer guarantees |
| Art 8 – aggressive commercial practicesArt 9 – harassment, coercion and undue influence | Unconscionable conduct (sections 20—22) Unsolicited consumer agreements (Part 3–2, Division 2), Harassment and coercion (section 50) Offering rebates, gifts, prizes (section 32) |

### *The UCPD was designed for a very different legal context*

### Australia has the benefit of learning from the successes and failures of other jurisdictions which have implemented ‘frontier’ regulatory reform.

### As noted in the LCA Submission, the UCPD was introduced to harmonise divergent consumer protection regimes in the different member states, many of which had different legal traditions and concepts designed to protect consumers.[[11]](#footnote-12) This is not an issue that Australia must contend with.

### The UCPD is accompanied by a 129-page guidance document.[[12]](#footnote-13) This followed a 2016 guidance version. What this shows is that: 1/ There has been a need to provide considerable explanations about the interpretation of the UCPD. The mere fact of a 129-page guidance document highlights just how uncertain the core obligations were. 2/ While guidance documents may be compatible with the EC jurisdiction that is not how Australia’s regulatory system works. Under the Commonwealth legal system, guidance documents cannot of themselves resolve legislative uncertainty.

### Given the need for substantial clarity to be developed to support the UCPD, policy makers should be wary of importing head-line concepts from other jurisdictions. Particularly, as those concepts were developed for a regulatory system quite different to Australia’s.

Finally, uncertainty may be particularly costly in Australia, where an incorrect interpretation of the test leaves a business open to the possibility of significant pecuniary penalties (up to $50M or 30% of turnover). This is in contrast to the EU, where the European Commission can seek a maximum fine of 4% of trader turnover or EU$2 million if turnover cannot be determined. This difference highlights how disproportionate Australia’s existing penalty regime will be compared to other jurisdictions, especially given it is proposed these penalties will apply immediately once the new prohibition takes effect, rather than affording businesses any opportunity to understand how the new requirements will be interpreted before costly penalties apply.

## 3. The European Union model of over-regulation may actually harm Australia’s productivity

### *Over regulation – ie Europe the exemplar?*

### Noting the ACL already prohibits unfair trading practices and other practices referred to in the UCPD, yet further novel regulation may result in unwanted and unwarranted over-regulation, and/or unclear regulation, with significant and long-lasting impacts on competitiveness and productivity.

### The recent report from Mario Draghi on the Future of European Competitiveness suggests that the European Union is not the best exemplar for Australia, with growing concerns that ever-increasing regulatory burdens are stifling investment and innovation.[[13]](#footnote-14)The Draghi Report cited overregulation as a key obstacle to investment into the EU noting that, ‘[i]t will also be crucial to reduce the regulatory burden on companies.’[[14]](#footnote-15)The Draghi report expresses a serious concern with ‘inconsistent and restrictive regulations, which is driving investment away from Europe and to the United States’.[[15]](#footnote-16)

### If Australia is to introduce unfair trading practices reforms, it would do well to heed the research and conclusions of the Draghi Report and ensure that any new regulatory regime is carefully calibrated and appropriate to the circumstances to avoid unnecessary over-regulation.

### This is not the regime which Australia should follow. Australia has an opportunity to have a competitive advantage by maintaining its already flexible and appropriate approach to consumer law regulation.

### *Balance between innovation and regulation*

### The risk of over-regulation stifling investment and innovation is supported by an extensively researched report prepared for the European Commission: ‘between 2008 and 2021, close to 30% of the “unicorns” founded in Europe – that is to say, start-ups that went on the be valued at over USD 1 billion – relocated their headquarters abroad’.[[16]](#footnote-17) Draghi cites the innovation gap ‘at the root of Europe’s slowing productivity growth relative to the US’ and recommends ‘encouraging innovative start-ups to scale up in Europe by removing regulatory hurdles.’[[17]](#footnote-18)

### Draghi notes that ‘*this is not about deregulation: it is about ensuring the right balance between caution and innovation*.’[[18]](#footnote-19)

### This is a key conclusion relevant to the Prohibition – the Consultation Paper acknowledges that the ACL at least partly addresses each and every concern it identifies, but considers that the existing ACL may leave gaps or grey areas.[[19]](#footnote-20) Treasury must reflect carefully on:

### The extent of any gap

### Whether the Prohibition best addresses that gap

### Whether the Prohibition over-indexes for any perceived gap

### Whether the gap necessitates the immediate introduction of civil pecuniary penalties

### The likelihood and effect of the Prohibition (substance and penalties) striking the wrong balance: over-regulation, uncertainty, compliance costs, and deterring investment and innovation

# C. Uncertainties of the general prohibition

### The Consultation Paper states that the general prohibition would be “designed to provide sufficient certainty as to its application while avoiding regulatory overreach or unintended consequences.”

### When careful consideration is given to the elements and concepts proposed in the Consultation Paper that sensible objective is not supported.

## *Proposed scope of general prohibition on unfair trading practices*

The Consultation Paper states a general Prohibition on unfair trading practices captures conduct that:

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

In the Consultation Paper, Treasury has noted that the Conduct Element is intended to address, among other things, dark patterns which attempt to steer consumers to or from actions or away from decisions that they would not ordinarily take.[[20]](#footnote-21) A proposition that is fundamentally at odds with the purpose of advertising.

*Regulatory certainty, not uncertainty, should be Treasury’s objective*

If Treasury is to introduce a new Prohibition that sits alongside this existing regime, it should at the very least be clear, coherent and cohesive with the existing protections, including the principles and concepts forming part of these protections.

Article 5 of the UCPD is neither clear, coherent nor cohesive with the existing Australian regime. Adoption of the test under Article 5 would introduce new, unfamiliar concepts that have no basis in Australian law or jurisprudence and have never been applied or tested in the Australian context.

As noted above, the EC has had to provide extensive guidance in relation to the interpretation of the UCPD. In 2021 a 129-page guidance document was released ‘to facilitate the proper application of the Directive’.[[21]](#footnote-22) Treasury does not propose that this guidance be enacted. Therefore, at the same time as Australia imports novel concepts into our law, there will be a vacuum as to how those novel concepts should be interpreted.

Moreover, as shown below, the test proposed by Treasury only reflects some of the UCPD, subtracting certain elements and concepts but adding in wholly novel elements. This means whatever guidance could have been cleaned from EU, will be of dubious value.

Ultimately, it would require a court to interpret the meaning of these new concepts, which will result in more uncertainty (over a long period) as clarity will only be achieved when cases make their way through the courts.

This is further complicated because the unfair contract terms regime already contains a concept of “unfairness”, which will be different to the concept of “unfairness” proposed to be included in the Prohibition. Currently, the concept of “unfairness” in the unfair contract terms regime exists if the contractual term (a) would cause a significant imbalance in the parties’ rights and obligations arising under the contract; (b) is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.[[22]](#footnote-23) Introducing an alternative concept of unfairness in consumer law will likely create an inconsistency that will lead to confusion and delays in resolution of issues, especially in court proceedings.

Uncertainty hinders businesses’ ability to have clarity around what conduct will contravene the ACL (and consumers’ ability to understand when they can enforce their rights under the ACL), which in turn increases compliance costs, slows businesses down, and diverts resources into non-productive activities. Ultimately, the uncertainty and extent of the compliance burden will impede innovation in the Australian economy and lead to fewer and lower quality products and services being made available to Australian consumers. In turn, this may cause businesses to become more risk adverse leading to a potential reduction in competition and decreased consumer choice.

*Specific uncertainties raised by the Conduct Element under the proposed general Prohibition*

### There is a significant and serious lack of clarity and certainty on how the proposed general prohibition would work in practice, meaning that there is a significant risk of over-capture, or inconsistent capturing of conduct.

| Concept | Uncertainties |
| --- | --- |
| Unreasonableness | Treasury has proposed a test of ‘unreasonableness’ rather than ‘materiality’ (which is the language of the UCPD). While concepts of reasonableness already exist under the ACL,[[23]](#footnote-24) it is unclear what role ‘unreasonableness’ has to play in the Conduct Element proposed by Treasury. For example, at what point does ‘manipulation’ or ‘distortion’ become ‘unreasonable’, in circumstances where the words ‘manipulate’ and ‘distort’ already connote something that is perhaps exploitative and, by its nature, not reasonable? It is also not clear what level of conduct would be an unreasonable distortion or manipulation – for example, whether that connotes malice, falsehood or deception. Nor is it clear whether the test for unreasonableness would be subjective or objective.*The Consultation Paper invites comments on whether ‘unreasonable’ is the appropriate threshold. Would it be preferable to instead have a carve out for conduct that is reasonably necessary to protect a business’s legitimate interests (similar to the UCT regime)?* |
| Distortion  | Under the UCPD, a commercial practice will ‘materially distort’ the economic behaviour of consumers where it, among other things, ‘appreciably impairsthe consumer’s ability to make an informed decision’. This type of language is foreign to the ACL and it is unclear why it has been adopted, other than to reflect the UCPD. |
| Manipulation | The term ‘manipulate’ is not used in the UCPD, and it is unclear how this is intended to be interpreted in a way that is different from, and additive to, the term ‘distort’. What conduct is ‘manipulate’ intended to capture that ‘distort’ would not? Does it require an element of deception or trickery? Or is it enough to simply establish a choice architecture which favours one answer over another? If it requires an element of deception, what does it do that could not already be captured by existing misleading or deceptive conduct provisions?  |
| Economic decision making | The European Commission’s guidance on the interpretation and application of the UCPD states that what determines whether a commercial practice ‘materially distorts or is likely to materially distort’ the consumer’s economic behaviour is whether the commercial practice causes or is likely to cause the consumer to ‘take a transactional decision that he would not have taken otherwise’.[[24]](#footnote-25) The question of whether a consumer, as a result of certain conduct of the business, would or would not have made a certain economic decision is highly subjective and will require recourse to input from behavioural economists. |

### *Analysis of grey list examples*

The grey list, while helpful in principle, itself generates further questions. In particular, does the targeting of online transactions cause a divide between standards and disclosures in online and physical transactions. Is it intended that physical transactions should have fewer protections than online transactions?

*Conclusion on uncertainties*

### These uncertainties have material implications given the general prohibition reaches directly into the way Australian businesses operate. Any uncertainty or lack of clarity on how a business operationalises basic and necessary functions (for example, sign-up flows and pricing strategies) will necessarily increase costs, introduce delays, and regulatory over-capture. The effect of over-regulation and uncertainty is reduced productivity, innovation and investment (as found by the Draghi Report, cited above).

### This is not a workable situation for businesses. For businesses to have confidence that their operations are not at risk contravening a penalty provision, there needs to be clear and real-world consideration of how the prohibition is intended to work.

# D. Query need for the specific prohibitions

### Given the stated rationale for a general prohibition is to regulate for an evolving economy (i.e. to be sufficiently flexible to capture technological developments), the specific prohibitions ought not be necessary. Where there are certain practices that are problematic, in order to ensure flexibility, these should be dealt with by inclusion in the proposed grey list, rather than by any specific prohibition.

### The specific prohibitions appear to target online practices, but the draft Prohibitions are not framed that way. Is it intended that the specific prohibitions would also apply to bricks and mortar stores, or will they not be exposed to the same standards as online stores? Will the physical shopping experience have fewer protections than the online experience?

### Legislative reforms should not specifically target a few businesses in a sector but should apply equally to all businesses across Australia. This ensures: 1) a level playing field for all businesses which promotes competition between them; and 2) customers receiving the same protections regardless of the business and therefore having a consistent experience.

# E. Penalties

### *Does the ‘gap’ warrant penalties*

### As noted above, the Consultation Paper acknowledges that the ACL at least partly addresses each and every concern it identifies, but considers that the existing ACL may leave gaps or grey areas.[[25]](#footnote-26) The question is whether the gap or grey areas warrant penalties. For example, should penalties be imposed on a business that does provide information, but in a ‘difficult to digest’ format, for requiring customers to provide ‘irrelevant information’ to order to access benefits (and whether that captures loyalty programmes and other offers), or for not having a reasonably accessible contact point.

While contraventions of the UCPD does result in penalties, those penalties are not comparable to the ACL penalties – the UCPD penalties are 4% of trader turnover or EU$2 million if turnover cannot be determined, compared to the Australian penalties $50M or 30% of turnover.

### *Penalties should not apply from commencement*

### If penalties are to be introduced, they should only be introduced after a transition period, following commencement of the new prohibition, during which penalty provisions do not apply. This is particularly important where, as outlined above, there will be material and inherent uncertainty as to exactly what conduct is captured by any new general prohibition. In these circumstances, it is inappropriate to have penalties apply immediately from the commencement of any new prohibition.

### Instead, if a new prohibition is introduced, a staged approach ought to be adopted, in which there is an initial period during which a prohibition takes effect without any penalty provisions. This approach allows time for the regulator, business and consumers to understand exactly what is required under the new prohibition and for a body of practice to be established so that businesses and the regulator alike can calibrate their understanding of the scope of how any new prohibition and how it applies in practice.

### 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.

### The transition period enabled a body of case precedent to be developed. It also enabled the ACCC to undertake sectoral/industry reviews for particular conduct and to issue guidance, so that business had a better understanding of ‘unfairness’ under the UCT.

# F. Taking stock of the substantial body of recent reform before embarking on more

### Reform to the *Competition and Consumer Act* and the ACL has been the constant theme of recent years. **Annexure 1** lists the major reforms since the first Treasury consultation on unfair trading practices in November 2023. Each of these proposals need time to come into effect, or to be finalised.

### Allowing the impact of the substantial body of reform to be assessed over a reasonable time before further changing the regulatory framework is prudent. Once the regulatory dust has settled, a clearer view can be taken as to the true extent of any gaps, and from there, a coherent and calibrated policy response can be developed if necessary.

# G. Is there a ‘gap’ in the law that requires novel law reform

### A fundamental premise in the consultation paper is that there are gaps that need to be addressed and indeed can only be addressed by novel law reform. The support for this proposition in the Consultation Paper is various consumer surveys. Notable is a lack any technical assessment of existing legislation.

### The table below considers the general and specific Prohibitions and whether and how each is addressed by existing laws:

| **#** | **Potentially unfair trading practices identified in the consultation paper** | **Existing protections capable of addressing harm** | **Example potential application of existing protections** |
| --- | --- | --- | --- |
|  | Unfair trading practices, including: |  |  |
|  | The omission of material information; | ACL – section 18, 21 29, consumer guarantees | **Section 18 – Misleading or deceptive conduct / Section 29 – False or misleading representations**Omitting material information could be misleading or deceptive conduct or a false or misleading representation where, for example, the omission leads the consumer into error as to the nature of the product or service being offered. Remaining silent may constitute misleading or deceptive conduct if the circumstances give rise to a reasonable expectation that, if some relevant fact does exist, it will be disclosed.The ACCC provides examples on its website about silence being misleading if a businesses discloses some information but fails to disclose important details to the consumer relating to their purchasing decision.[[26]](#footnote-27)In relation to false or misleading representations, while there is uncertainty as to whether a representation can arise by silence, half truths may amount to false representations.**Case example**: *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; (2010) 241 CLR 357; *ACCC v LG Electronics Australia Pty Ltd* [2017] FCA 1047 at [53] **Section 21 – Unconscionable conduct**Omitting material information could amount to unconscionable conduct. This may be the case where, for example, there is an element of trickery in the omission, if the business is dealing with vulnerable clients, is systematically dishonest, or in bad faith in undermining a bargain. **Case example**: *ACCC v Quantum Housing Group Pty Ltd* [2021] FCAFC 40**Consumer guarantees**Consumer guarantees require products to be fit for purpose and match description. If the omission of material results in the product not being fit for purpose or matching their description, the omission would likely already result in a contravention of the ACL |
|  | The provision of material information to a consumer in an unclear, unintelligible, ambiguous or untimely manner, including the provision of information in a manner that overwhelms, or is likely to overwhelm, a consumer; | ACL – section 18, 21, 29, consumer guarantees | **Section 18 – Misleading or deceptive conduct / Section 29 – False or misleading representations**The provision of material information in an unclear, unintelligible, ambiguous or untimely way could be misleading or deceptive conduct or a false or misleading representation where, for example, the customer is led into error because material information was not clearly and conspicuously disclosed to them. **Section 21 – Unconscionable conduct****Consumer guarantees** (eg that products are fit for purpose and match description)Consumer guarantees require products to be fit for purpose and match description. If the material is unintelligible, ambiguous or untimely, which results in the product not being fit for purpose or matching their description, the conduct would likely already result in a contravention of the ACL |
|  | Impeding the ability of a consumer to exercise their contractual or other legal rights | ACL – section 18, 21, 23 & 29Consumer guarantees cannot be contracted out Privacy Act | **Section 18 – Misleading or deceptive conduct / Section 29 – False or misleading representations**Impeding the ability of a consumer to exercise their contractual or other legal rights could be misleading or deceptive/false or misleading if, for example, there is a representation that the customer does not have a certain right, or that the customer has to do something in return for exercising their right. **Case example:** *ACCC v Mazda Australia Pty Ltd* [2021] FCA 1493**Section 21 – Unconscionable conduct**Adopting business practices or designing a product or service in a way that impedes a consumer from exercising their contractual or other legal rights could amount to unconscionable conduct where it would be contrary to the norms of commercial behaviour to impede consumers from exercising rights they are entitled to. **Case example:**  *ACCC v Get Qualified Australia Pty Ltd (in liq) (No 2)* [2017] FCA 709**Section 23 - Unfair contract terms**A term that impedes the ability of a consumer to exercise their contractual rights is likely to be unfair. A term that permits one party to avoid or limit performance is an example of a UCT grey list term.**Consumer guarantees** cannot be contracted out of |
|  | Use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision. | ACL – section 18, 21, 23, 29, consumer guaranteesCCA – s 46Privacy Act; Industry Codes | **Section 21 – Unconscionable conduct** One of the indicia of unconscionable conduct under section 21 of the ACL is whether any undue influence or pressure was exerted on, or unfair tactics were used against, the customer. The use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision may amount to such undue influence or unfair tactics so as to contribute to a finding of unconscionable conduct.**Section 46 of the CCA – Misuse of market power**A business with market power that uses design elements in online consumer interfaces so as to unduly pressure, obstruct or undermine a consumer in making an economic decision may be considered to have misused their market power in breach of section 46 of the CCA if these elements have been designed for the purpose, or have the effect of, substantially lessening competition. |
|  | Subscription related practices (e.g., providing a subscription service without disclosing auto-renewal terms, or difficulties cancelling subscriptions) | ACL – sections 18, 21, 23 & 29  | **Section 18 – Misleading or deceptive conduct / Section 29 – False or misleading representations**Information relating to a subscription (including automatic renewals, recurring fees etc.) is material to a customer’s decision to acquire a product or service. Failure to prominently disclose this information to the consumer early in the purchasing journey may amount to misleading or deceptive conduct or a false or misleading representation (including because the information disclosed is only a half-truth).**ACCC enforcement action example:** eHarmony Inc[[27]](#footnote-28); hipages Group.[[28]](#footnote-29) E.g., hiPages admitted it likely engaged in misleading or deceptive conduct by failing to adequately disclose contract terms that allowed it to automatically renew subscriptions and charge an early termination fee. The ACCC media release terms this a subscription trap case**Section 21 – Unconscionable conduct** Failure to disclose this subscription related information may amount to unconscionable conduct where, for example, the subscription fee is particularly high and the business is dealing with particularly vulnerable customers who are unable to maintain these payments. Similarly, specifically designing a website or other customer interface to make it difficult to cancel could also amount to unconscionable conduct on the basis that it would likely be against good conscience to do so. **Section 23 - Unfair contract terms**A term that provides for automatic renewal of a standard form contract may be unfair, for example, where the renewal term is long, the subscription fee is high and the term has not been clearly notified to the customer.**Case example:** Automatic renewals: ACCC v Servcorp Ltd [2018] FCA 1044; ACCC v JJ Richards & Sons Pty Ltd [2017] FCA 1224; ACCC v Chrisco Hampers Australia Ltd (2015) 239 FCR 33 |
|  | Drip pricing | ACL – sections 18, 29 & 48  | **Section 18 – Misleading or deceptive conduct / Section 29 – False or misleading representations****Section 48 – Single price to be specified in certain circumstances**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. **Case example:** *ACCC v Bloomex Pty Ltd* [2024] FCA 243. ACCC acknowledges this to be a drip pricing case. |
|  | Dynamic pricing | ACL – sections 18, 29 & 35 | **Section 18 – Misleading or deceptive conduct / Section 29 – False or misleading representations**Dynamic pricing may amount to misleading or deceptive conduct or give rise to false or misleading representations if a business displays an upfront price for a good or service but then increases this price during the purchasing process without alerting the customer to the possibility of this change. In these circumstances, the ordinary and reasonable consumer would likely understand the upfront price to be the actual price to be paid, and for this price to be static, when this is not the case. **Section 35 – Bait advertising**Dynamic pricing could also amount to bait advertising, 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 | Privacy Act – APPsSpam Act | **Privacy Act – APP** The APPs and Privacy Act regulate the collection, use and disclosure of personal information. An organisation may only collect personal information where it is reasonably necessary for the organisation’s functions or activities (APP 3).. November 2024 Privacy Act reforms require enhanced transparency where personal information is used for automated decision-making that may significantly affect the rights or interests of an individualFurther reforms propose a fair and reasonable test: the collection, use and disclosure of personal information must be fair and reasonable in the circumstances, regardless of consent |
|  | Barriers to accessing customer support | Consumer guarantees including remedies  | Consumer guarantees cannot be contracted out of and must be complied with. Failure to provide a remedy would already breach the consumer guarantees. |

# H. Good principles of regulation

### To be considered good public policy, the proposed unfair trading practices reforms should by measured against the principles outlined in the Australia Government’s Guide to Policy Impact Analysis.[[29]](#footnote-30) As drafted, the current proposal does not satisfy the following aspects of the seven Impact Analysis questions outlined in the Guide:

### a crisply defined problem the Government is trying to solve via regulation – which provides a better scope to target approaches or solutions that will actually address the problem;

### clarity on the objectives required to solve the problem and the metrics for success;

### assessing the benefit of proposed intervention against the costs imposed (with a view to only proceeding if the benefits outweigh the regulatory burden involved).

### The current proposal should be more rigorously scrutinised against this framework.

1. Commonwealth Treasury, Unfair Trading Practices: Consultation on the design of proposed general and specific prohibitions (Consultation Paper, November 2024) (**Consultation Paper**). [↑](#footnote-ref-2)
2. The maximum penalty for a breach of the ACL is the greater of (a) $50 million; (b) three times the benefit obtained from the conduct; or (c) 30% of the adjusted turnover during the breach period if the benefit cannot be determined. [↑](#footnote-ref-3)
3. See, e.g., Appendix A to the Business Council of Australia’s Submission Regarding Treasury’s Unfair Tracing Practices Consultation Regulation Impact Statement, November 2023; and table at [70] of the Law Council of Australia’s Unfair trading practices—Consultation Regulation Impact Statement Submission, 12 December 2023 (**LCA Submission**). [↑](#footnote-ref-4)
4. https://www.accc.gov.au/media-release/accc-report-identifies-competition-and-fair-trading-issues-in-horticulture-and-viticulture [↑](#footnote-ref-5)
5. https://www.accc.gov.au/media-release/marking-10-years-since-the-transformation-of-australian-consumer-law [↑](#footnote-ref-6)
6. Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market (**UCPD**), https://eur-lex.europa.eu/eli/dir/2005/29/oj/eng. [↑](#footnote-ref-7)
7. UCPD, Article 5(2). [↑](#footnote-ref-8)
8. UCPD, Article 2(h). [↑](#footnote-ref-9)
9. UTP Consultation Paper, 14. [↑](#footnote-ref-10)
10. UCPD, Article 2(e). ‘Transactional decision’ is separately defined in Article 2(k) as ‘any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or refrain from acting. The concept of a ‘product’ refers to any goods or service including immoveable property, rights and obligations (Article 2(c)). [↑](#footnote-ref-11)
11. LCA Submission, 45. [↑](#footnote-ref-12)
12. UCPD Guidance: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229(05). [↑](#footnote-ref-13)
13. Mario Draghi, The future of European competitiveness: A competitiveness strategy for Europe (9 September 2024), 14 (**Draghi Report**). [↑](#footnote-ref-14)
14. Ibid. [↑](#footnote-ref-15)
15. Draghi Report, 2. [↑](#footnote-ref-16)
16. Address by Mr. Mario Draghi at the presentation of the report on the Future of European competitiveness in the European Parliament, 17 September 2024. [↑](#footnote-ref-17)
17. Ibid. [↑](#footnote-ref-18)
18. Ibid. [↑](#footnote-ref-19)
19. Consultation Paper, p.4. [↑](#footnote-ref-20)
20. Consultation Paper, p.14. [↑](#footnote-ref-21)
21. Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (2021/C 526/01), 32 (**UCPD Guidance**). [↑](#footnote-ref-22)
22. s24 of the *Australian Consumer Law*. [↑](#footnote-ref-23)
23. For example, one of the indicia of statutory unconscionable conduct under section 21(4) of the ACL is the extent to which the supplier *unreasonably* failed to disclose to the customer any intended conduct of the supplier that might affect the interests of the customer, and any risks to the customer arising from the supplier’s intended conduct. Similarly, under the unfair contract terms regime, a term will be unfair where it was *not* *reasonably* necessary to protect the legitimate interests of the person seeking to rely on that term (section 24(1) ACL). [↑](#footnote-ref-24)
24. UCPD Guidance, 32. [↑](#footnote-ref-25)
25. Consultation Paper, p.4. [↑](#footnote-ref-26)
26. ACCC, False or Misleading Claims (viewed 2 December 2024) ([https://www.accc.gov.au/business/advertising-and-promotions/false-or-misleading-claims#:~:text=Silence%20can%20be%20misleading,are%20relevant%20to%20their%20decision.](https://www.accc.gov.au/business/advertising-and-promotions/false-or-misleading-claims#:~:text=Silence can be misleading,are relevant to their decision.)) [↑](#footnote-ref-27)
27. https://www.accc.gov.au/media-release/accc-court-action-against-eharmony-for-alleged-misleading-online-dating-membership-statements [↑](#footnote-ref-28)
28. https://www.accc.gov.au/media-release/tradie-platform-hipages-rectifies-subscription-trap-issues [↑](#footnote-ref-29)
29. Australian Government Office of Impact Analysis, *Australian Government Guide to Policy Impact Analysis*, March 2023 (<https://oia.pmc.gov.au/sites/default/files/2023-02/oia-impact-analysis-guide-nov-22.pdf>), 9. [↑](#footnote-ref-30)