



# Unfair trading practices

## **Consultation Regulation Impact Statement – ACCC submission to Treasury**

November 2023

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The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission

Land of the Ngunnawal people

23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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# Executive Summary

Fair trading practices are critical to the proper functioning of competition in markets, and enhancing the wellbeing of consumers and small businesses in Australia. Australian governments have an opportunity to modernise Australia's consumer protection framework, bringing it in line with international best practice, and creating standards for business conduct that will help enhance productivity.

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide comment to the Treasury's Consultation Regulation Impact Statement (CRIS) on unfair trading practices.

A prohibition on unfair trading will be an important safety net to protect consumers and small businesses from harm. Further, the introduction of an unfair trading practices prohibition will set an improved standard for business behaviour and promote better conduct in the marketplace. An unfair trading practices prohibition will help establish a normative standard of conduct that, in line with the competition law, requires businesses to compete more on merit. This will drive economic efficiencies, innovation and productivity growth. It will give increased confidence to consumers and small businesses, which in turn will promote well-functioning markets and economic dynamism.

Informed market participants making well-founded choices underpin effective and competitive markets in Australia. However, the ACCC is concerned that several factors have led to consumers and small businesses being harmed by unfair business conduct that is under- or un-regulated in Australia. These factors include:

- increasing market concentration
- supply chains globalising
- new technologies and advancements in e-commerce, including those that create new business models that can leave consumers and small business at a significant disadvantage
- growth of manipulative practices, including exploitation of behavioural biases, and
- products, services and transactions increasing in complexity and more often involving intermediaries.

The Australian Consumer Law (ACL) requires amendment to ensure it remains fit for purpose.

Through the ACCC's work, we have identified conduct that is not adequately addressed by the existing provisions of the ACL. A key example is practices in digital platforms that confuse or distort the ability of consumers to make well-informed and effective choices, as noted in our Digital Platforms Inquiry and Digital Platforms Services Inquiry.<sup>1</sup>

The ACCC's Perishable Agricultural Goods Inquiry and Wine Grapes Market Study also identified practices where larger businesses use their superior bargaining position to pressure small businesses, including farmers, into accepting unfavourable contracts, or face retaliation if they fail to accept the terms.<sup>2</sup> This conduct causes harm to the smaller

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<sup>1</sup> ACCC, 2019, Digital platforms inquiry, <https://www.accc.gov.au/about-us/publications/digital-platforms-inquiry-final-report>  
ACCC, Digital platform services inquiry 2020-25, <https://www.accc.gov.au/inquiries-and-consultations/digital-platform-services-inquiry-2020-25>

<sup>2</sup> ACCC, 2020, Perishable agricultural goods inquiry report, <https://www.accc.gov.au/about-us/publications/perishable-agricultural-goods-inquiry-report>; and ACCC, Wine Gapes Market Study Final Report, 2019, <https://www.accc.gov.au/about-us/publications/wine-grape-market-study-final-report>

businesses and often results in an unfair shift of risk from the larger business to the small businesses, which are less able to bear it.

The current prohibitions in the ACL have been insufficient to protect consumers and small businesses from these, and other, harms. The ACCC has observed this deficiency in Australia's existing consumer protection framework across our regulatory work, including several broad-ranging inquiries and market studies, as well as through our compliance and enforcement activity. Unfair trading practices can also disproportionately affect people experiencing vulnerability or disadvantage, including First Nations peoples in remote communities and people who are culturally and linguistically diverse.

Sometimes the ACL is unable to address harmful conduct at all. In other instances, the ACCC has been able to use existing ACL prohibitions to pursue limited aspects of the harmful conduct. This narrow enforcement action often cannot address the heart of the harm involved, and sometimes only minor changes made to a business model will enable a business to continue operating legally while still causing detriment.

In the long term, unfair trading practices worsen competition and productivity in Australia. Unfair trading practices can give businesses a competitive advantage over those businesses that do not engage in unfair trading practices. This may incentivise other businesses to engage in similar conduct and can lead to a 'race to the bottom' in corporate conduct. It can also have the effect of discouraging or inhibiting new entrants to the market. Inefficient risk allocation through unfair trading practices also leads to economic inefficiencies.

Introducing a prohibition on unfair trading would also bring Australia more in line with comparable international jurisdictions, including the United States, United Kingdom and European Union.

**The ACCC strongly supports the implementation of a modified version of Option 4 as proposed by the CRIS.** The ACCC considers the introduction of an economy-wide, principles-based general prohibition, combined with a non-exhaustive indicative list with specific examples, will address many of the under- or un-regulated harms identified.

## Recommendations

The ACCC makes the following recommendations:

- A modified Option 4 in the Treasury's CRIS paper should be implemented, which would include:
  - an economy-wide, principles-based, general prohibition on unfair trading practices, and
  - a non-exhaustive list of indicative, guiding examples of specific practices that are likely to constitute unfair trading practices under the general prohibition.
- The full range of remedies, including civil pecuniary penalties, should be available for breaches of the unfair trading practices prohibition. The civil pecuniary penalties should be in line with the current highest maximum penalties for breaches of existing consumer protection provisions.
- The *Australian Securities and Investments Commission Act 2001* (ASIC Act) should also be amended to include a prohibition on unfair trading practices in the context of financial products and services.
- The ACCC considers that a prohibition on unfair trading practices should provide for a high standard of business behaviour. As such, the ACCC considers that the concept of

“unfair” should not be narrowly defined or limited by qualifications, as suggested in the CRIS.

- However, if governments consider that specification of the term “unfair” is required, the ACCC recommends the following elements be considered:
  - A requirement that the conduct causes or is likely to cause material harm (financial or otherwise) (**harm element**); and
  - A rebuttable presumption that the conduct is not reasonably necessary in order to protect the legitimate interests of the party who engaged in the conduct (**legitimate interest element**).

Both elements should be subject to an objective assessment.

## The problem

The ACL is intended to establish minimum baseline standards of business conduct through providing general consumer protections and fair trading provisions. This includes prohibitions on misleading or deceptive conduct, unfair contract terms, and unconscionable conduct, as well as the prohibition of some specific practices. However, there are key gaps within the ACL which makes consumers and small businesses vulnerable to harm from unfair trading practices:

Australian Consumer Law provisions	Gaps in the existing law
<p>Section 18 prohibits conduct that is misleading or deceptive.</p>	<p>This provision does not apply to conduct that distorts consumer and small businesses choice without being misleading. For example, because it causes confusion or involves obfuscating relevant information. This provision may also have limited application in circumstances where material information is omitted. This is discussed further below.</p>
<p>Section 20 prohibits conduct that is unconscionable, “within the meaning of the written law.” This applies where one party takes unconscientious advantage of a special disadvantage of another.</p> <p>Section 21 prohibits conduct that is unconscionable in “all the circumstances”. The Courts may have regard to a broader range of considerations (such as those listed in section 22) than those traditionally taken into account by courts in applying the equitable doctrine of unconscionability. Generally, conduct will be prohibited when it is against good conscience, as judged by the norms of society.</p>	<p>These provisions do not apply to conduct that is significantly harmful but does not meet the high threshold of being unconscionable. This is discussed further below.</p>

<p>Section 23 provides that terms in standard form consumer and small business contracts that are unfair are void.<sup>3</sup></p>	<p>Section 23 does not apply to:</p> <ul style="list-style-type: none"> <li>• non-standard form contracts.</li> <li>• conduct around the negotiation of contract terms and entry into a contract.</li> <li>• unfair conduct engaged in pursuant to a contract term that is, on the face of it, a reasonable contract term.</li> </ul>
<p>Chapter 3 of the ACL makes specific unfair practices unlawful, such as:</p> <ul style="list-style-type: none"> <li>• false or misleading representations about, for example, the price of goods, availability or repair facilities, or the existence of warranties</li> <li>• bait advertising</li> <li>• accepting payment without intending to supply goods or services</li> <li>• certain practices in the unsolicited supply of goods or services</li> <li>• participating in or persuading someone to participate in a pyramid scheme</li> <li>• coercion, undue harassment or physical force in connection with the supply or possible supply of good or services, of payment for them.</li> </ul>	<p>Chapter 3 only applies to specified practices, each with its own judicial interpretation and elements that must be proven. Where harmful conduct does not contravene one of these specified practices, the conduct will not be captured by the ACL.</p> <p>While these provisions create powerful norms against specific practices, they are not general in their application. They do not create broader commercial norms or standards of behaviour, or impose broader deterrence against other unfair practices.</p> <p>Some of the other provisions in Chapter 3 are historic and reflect outdated market practices that rarely occur anymore.</p>
<p>Part 3-3 of the ACL prohibits the supply of consumer goods that are banned or do not comply with a safety standard.</p>	<p>These provisions require a 'supply' so there is uncertainty around the application to online marketplaces. The provisions also do not cover the supply of unsafe goods more broadly by businesses to consumers.</p>

## The unconscionable conduct threshold

The ACCC considers that the unconscionable conduct provisions in the ACL have been insufficient to address many harmful business practices. There are business practices that cause significant harm but do not meet the threshold of being unconscionable and are not prohibited by other provisions in the ACL. For example, the CRIS paper identified the ACCC's unsuccessful legal proceedings against Medibank Private Limited (Medibank). The ACCC had alleged that Medibank reduced the scope of its policies without notifying members while continuing to charge the same fees, causing them unexpected out of pocket costs. Justice Beach concluded that:

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<sup>3</sup> For contracts entered into or renewed, or terms varied, from 9 November 2023 onwards, section 23 prohibits the use of unfair contract terms in standard form consumer and small business contracts.

*“Certainly, Medibank acted harshly. And I am also prepared to conclude that it acted unfairly. But this is not enough to establish statutory unconscionability.”<sup>4</sup>*

Conduct that is objectively harsh, unfair, unjust, or wrong<sup>5</sup> is generally not enough to be unconscionable conduct. While all unconscionable conduct is likely to be ‘unfair’, not all ‘unfair’ conduct is unconscionable, as ‘unfairness’ connotes a “lower moral or ethical standard than unconscionability”.<sup>6</sup>

The ACCC has discontinued investigations into businesses where we considered conduct caused significant harm to consumers or small businesses, but was unlikely to meet the threshold of being unconscionable, and otherwise was not misleading or deceptive.

## **The limitations of the prohibition on misleading or deceptive conduct**

There have been a number of cases where courts have considered circumstances where a business failed to disclose material information as not constituting misleading or deceptive conduct.<sup>7</sup> Mere silence without more is unlikely to constitute misleading or deceptive conduct unless the circumstances are such as to give rise to a reasonable expectation that a fact, if it exists, will be disclosed.<sup>8</sup>

The prohibition does not specifically require businesses to provide material information clearly and upfront, nor does it establish a normative standard of conduct that will drive good outcomes for consumers, fair trading and competition.

## **Industry codes of conduct**

The *Competition and Consumer Act 2010* (Cth) includes several prescribed industry codes of conduct. Industry codes set out standards for specific conduct within a particular industry and may be mandatory or voluntary. The standards can include commitments in relation to the treatment of customers or suppliers of businesses at a particular level in the industry’s supply chain, including limited dispute resolution mechanisms.

Such codes of conduct are intended to address specific problems within particular industries or sectors, and are specifically tailored to those industries or sectors. An economy-wide unfair trading prohibition would appropriately establish a whole of economy standard of behaviour that would better future-proof Australia’s consumer and fair trading laws. It would establish a norm of behaviour that applies across different sets of circumstances, and for all participants in markets. This norm of behaviour would be able to keep up with evolving commercial practices in a way that more rigid ex-post regulation, like an industry code, cannot.

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<sup>4</sup> *Australian Competition and Consumer Commission v Medibank Private Limited* [2018] FCAFC 235 [353] (Beach J)

<sup>5</sup> For example, *Director of Consumer Affairs Victoria v Scully & Anor* [2013] VSCA 292, *ACCC v Woolworths Ltd* [2016] ATPR 42-528, [130]; *ACCC v Medibank Private Limited* [2018] FCAFC 235 at [353]

<sup>6</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 at [363]-[364]

<sup>7</sup> For example, *ACCC v LG Electronics Australia Pty Ltd* [2019] FCA 1456; *Director of Consumer Affairs Victoria v Good Guys Discount Warehouses (Australia) Pty Ltd* [2016] FCA 22; *ACCC v Medibank Private Ltd* [2018] FCAFC 235

<sup>8</sup> *ACCC v AGL South Australia* (2014) FCA 1369; *Addenbrooke Pty Ltd v Duncan (No 2)* (2017) 348 ALR 1.



## Consumer harm from unfair trading practices

In an increasingly digital world, consumers are being harmed by new kinds of unfair practices. The ACCC's Digital Platforms Inquiry and Digital Platforms Services Inquiry have noted several harmful manipulative practices that illustrate the need for an unfair trading practices prohibition.

A key example is the design of user interfaces intended to confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions. The September 2022 interim report of the ACCC's Digital Platform Services Inquiry noted that consumers face direct harms where such manipulative practices impact on their ability to make free and informed decisions about which products and services best serve their needs.<sup>9</sup>

The use of manipulative and exploitative design practices can significantly undermine the effective and efficient operation of online marketplaces by undermining consumer choice and autonomy.

Consumers also generally face information asymmetries and bargaining power imbalances in most, if not all, transactions. Small businesses also routinely face these issues when dealing with large suppliers and customers with monopsony power. This leaves consumers and businesses vulnerable to unfair trading practices.

Throughout our work, the ACCC has observed consumers being harmed by a range of under- or un-regulated unfair trading practices occurring both online and offline. Many harmful practices also arise from the combination of what a business does online and offline in interactions with consumers.

- Subscription service providers making it difficult for consumers to cancel their subscriptions, particularly after free trials. These "subscription traps" might include manipulative user interface design to steer consumers away from cancelling, and/or imposing time-consuming or burdensome requirements on consumers in order to cancel. For example, requiring consumers to return a physical product associated with the subscription in person (despite the sign-up process being completely online), or consumers having to follow up their request multiple times because the business deliberately ignores their request. Businesses that use "subscription traps" may also employ strategies that go beyond customer retention methods and are designed as friction points to get consumers to give up on cancelling. As a result, many subscriptions automatically roll-over despite consumers wanting to and attempting to cease paying for those services.

### Example

The US Federal Trade Commission has taken action against Amazon for signing up consumers to its Prime subscription program without their consent and knowingly making it difficult for consumers to cancel their subscription.<sup>10</sup> Amongst other things, consumers looking to cancel their Prime subscription were required to complete multiple steps that did not clearly present the option to cancel. For example, consumers had to locate the cancellation flow, and then were redirected to multiple pages each presenting offers to continue the subscription, to turn off the auto-renew

<sup>9</sup> ACCC, 2022, Digital Platform Services Inquiry, Report No. 5 Regulatory reform, <https://www.accc.gov.au/about-us/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2022-interim-report-regulatory-reform>, pp. 67-68.

<sup>10</sup> US Federal Trade Commission, [FTC Takes Action Against Amazon for Enrolling Consumers in Amazon Prime without Consent and Sabotaging their Attempts to Cancel](#), 21 June 2023

feature, or to decide not to cancel.<sup>11</sup> Similar concerns were raised by the European Commission and, after negotiations, Amazon committed to bring its cancellation practices in line with EU consumer rules on all its EU websites in 2022.<sup>12</sup> We note that Amazon has recently made changes to simplify the Prime cancellation process in Australia. However, the ACL does not give the ACCC the same powers to pursue subscription cancellation issues in the ways the US and EU have in these examples.

- The use of choice architecture and other practices designed to get consumers to agree to unfair or unfavourable contract terms, with limited opportunity for consumers to be informed about their rights and obligations. This includes:
  - Using clickwrap agreements containing take-it-or-leave-it terms and bundling consents to policies that are long, complex, and unclear, to obtain unreasonable rights to use data.
  - Presenting terms, conditions and privacy policies in a way that consumers can not readily understand.
  - Strategically over-disclosing product details to hide key information consumers require to make an informed decision.
- Business practices that seek to dissuade consumers from exercising their contractual or other legal rights, including requiring the provision of unnecessary information in order to access benefits.
- Systemic actual or effective refusal to provide remedies to consumers that they are legally entitled to.

### Example

In *ACCC v Mazda Australia Pty Limited*<sup>13</sup> the majority judgment on appeal considered that the facts of the consumer cases placed Mazda's overall treatment of its customers in a very poor light. However, the Court considered that Mazda's conduct did not constitute a *sufficient* departure from the norms of acceptable commercial behaviour to be against conscience or to offend conscience, and so dismissed the ACCC's appeal from the first instance finding that Mazda had not engaged in unconscionable conduct (but upheld the trial judge's findings of false or misleading representations). The case involved instances of vehicles with serious and recurring faults, including requiring engine replacements. The faults affected the ability of the consumers to use their vehicles and, in some cases, included the vehicles unexpectedly losing power and decelerating while being driven. The consumers involved had requested a refund or replacement vehicle from Mazda on multiple occasions, but these requests were denied. In addition to finding that Mazda made false or misleading representations, the Court at first instance had found that Mazda gave consumers the "run-around" by engaging in evasion and subterfuges, provided appalling customer service and failed to make any genuine attempt to consider and apply the ACL consumer guarantee provisions.

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<sup>11</sup> H Towey and E Kim, Project Iliad: [Amazon used a sneaky tactic to make it harder to quit Prime and cancellations dropped 14%, according to leaked data](#), *Insider*, 22 June 2023

<sup>12</sup> Following a dialogue with the European Commission and national consumer protection authorities in Europe, Amazon committed in July 2022 to improving its cancellation practices in Europe in line with EU consumer rules. The platform will enable European consumers to unsubscribe from Amazon Prime with just 2 clicks, using a prominent and clear "cancel button". European Commission, [Consumer protection: Amazon Prime changes its cancellation practices to comply with EU consumer rules](#), Press release, 1 July 2022.

<sup>13</sup> [2023] FCAFC 45

- Businesses failing to disclose changes to a product or closely related product in circumstances that a consumer would reasonably expect that change to be disclosed (as in the Medibank case).
- Businesses who do not mislead consumers about pricing information but withhold critical details until consumers are committed to purchasing their product. For example, a wedding photographer advising their customers that individual photos can cost as little as \$5 each, without prominently disclosing until after the weddings that this price applied only to certain size photos and all other sized photos had to be purchased in packages.
- The use of negative choice architecture such as forced action and friction which significantly impedes consumer choice and autonomy, such as:
  - Changing click sequences on a website – where consumers are asked multiple questions during the ordering process, and halfway through the positions of ‘yes’ and ‘no’ buttons on screen are reversed.
  - Crosses that do not close the window and link to something else (e.g., ads for a product), or ‘next’ buttons which then become an ‘agree’ button.
  - Illogical colours for on-screen buttons, e.g., the ‘no’ button is green and the ‘yes’ button is red.
  - When Microsoft Edge users tried to enable the DuckDuckGo browser extension, Edge repeatedly disabled it despite a user confirming multiple times they wanted it to be installed.<sup>14</sup>
  - When Chrome users tried to enable the Ecosia browser extension, Chrome presented a pop up noting that the Ecosia extension can “read and change your data” and “read a list of your most frequently visited websites”. It also framed the “cancel” button more prominently than the “add extension” button.<sup>15</sup>
- Platforms failing to take reasonable steps to prevent the sale or promotion of unsafe goods by third party sellers on their marketplaces, where they are on notice that the goods are likely to be unsafe.
- Intermediaries and platforms failing to implement reasonable measures to protect their customers from fraudulent practices by third parties using their services.

With respect to the examples regarding data consents, the ACCC notes the *Privacy Act 1988* (Cth) and its proposed reforms provide important protections against unfair data collection. However, the ACL provides an additional layer of protection for consumers.<sup>16</sup> The ACCC considers that reforms to the Privacy Act and an unfair trading prohibition will play a complementary role in improving consumer protections in Australia around data practices.

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<sup>14</sup> ACCC, 2021, Digital Platform Services Inquiry, Report No. 3 Search Defaults and choice screens, [https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20September%202021%20-%20Full%20Report%20-%2030%20September%202021%20%283%29\\_1.pdf](https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20September%202021%20-%20Full%20Report%20-%2030%20September%202021%20%283%29_1.pdf), pg. 65

<sup>15</sup> ACCC, 2021, Digital Platform Services Inquiry, Report No. 3 Search Defaults and choice screens, [https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20September%202021%20-%20Full%20Report%20-%2030%20September%202021%20%283%29\\_1.pdf](https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20September%202021%20-%20Full%20Report%20-%2030%20September%202021%20%283%29_1.pdf), pg. 65

<sup>16</sup> The ACCC notes the regulatory objective of the Privacy Act is to promote the protection of privacy of individuals (*Privacy Act 1988* (Cth) - s 2A), whereas the objective of the ACL is to enhance the wellbeing of Australians by promoting fair trading and competition.

## Small business harm from unfair trading practices

Small businesses in Australia are similarly harmed by under- or un-regulated unfair business practices.

The ACCC's 2020 Perishable Agricultural Goods Inquiry found unfair practices from supermarkets and processors caused significant harm to primary producers, including dairy and chicken farmers.<sup>17</sup> It found that significant power imbalances led to conduct that caused substantial detriment to supply chain participants.

A key example was large businesses that dissuaded, or attempted to dissuade, smaller businesses with inferior bargaining power from exercising their legal rights by threatening them with commercial retaliation. Some businesses alleged that the retailers they supply to had threatened them with de-listing in retaliation for seeking price increases (to which they may have been contractually entitled), or for making complaints about a retailer's alleged non-compliance with the prescribed Food & Grocery Code of Conduct and other legal obligations.

Other examples of unfair practices which harm small businesses include:

- Car manufacturers recommending their dealers pay for expensive showroom upgrades to increase the likelihood their contracts will be renewed, while simultaneously considering moving to a new business model that will mean no more dealerships and instead manufacturers running their own showrooms.
- Larger businesses, particularly local monopsonists, using their superior bargaining power to pressure smaller suppliers to amend contract provisions in an ongoing contract in a way that results in worse outcomes (e.g., lower prices) for the smaller supplier.

### Example

A chicken meat processor withdrawing from the market in a particular geographic region leaves only one processor remaining in that area. The remaining processor tells its existing growers, mid-contract, that it wishes to decrease the prices paid to them for the rest of the contract period. The growers are not obliged by their contracts to accept any price decreases during their contract term, and the processor did not seek to unilaterally vary the existing contracts. However, the discussions took place in the context of the growers knowing that there is now excess growing capacity in the region because the chicken meat processor would be able to contract the growers previously contracted to the processor that left the market.<sup>18</sup>

### Example

Large businesses relying on contract terms – that are not unfair contract terms on their face – in an unreasonable manner or according to a self-serving interpretation. For example, a large business using a contract term allowing it to unilaterally impose a price increase for 'carry-through' prices beyond its control to cover costs it *can* influence or take steps to minimise but does not do so, such as labour disputes.

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<sup>17</sup> ACCC, 2020, Perishable agricultural goods inquiry report, <https://www.accc.gov.au/about-us/publications/perishable-agricultural-goods-inquiry-report>

<sup>18</sup> ACCC, 2020, Perishable agricultural goods inquiry report, <https://www.accc.gov.au/about-us/publications/perishable-agricultural-goods-inquiry-report>, pages 118-119

- Businesses using search engine manipulation tactics to redirect consumers away from the products and services of a competitor and to their product or service instead.
- Online marketplaces and other intermediary platforms using ranking algorithms, and other practices to unfairly influence the purchasing decisions of consumers, such as by prioritising the platform's own products over others selling on the platform; or requiring third-party sellers to take up related services such as the marketplace's own shipping fulfilment services to secure necessary visibility to consumers.
- Platforms failing to implement due process procedures for key decisions or actions such as decisions to suspend or terminate user accounts, or having unreasonably one-sided and arbitrary process for such decisions or actions, which have a significant impact on users, including business users. For example, inconsistently applying review policies to business's products or services which are sold or advertised on the platform.
- Platforms using choice architecture and other practices designed to get small businesses to agree to unfair or unfavourable contract terms, with limited opportunity for small businesses to be informed about their rights and obligations (e.g. as per the examples noted above for consumers). Given the importance of digital platform services as a means for Australian small businesses to connect with customers,<sup>19</sup> and as small businesses become more reliant on software providers for enterprise business solutions, the same risks identified for consumers in this regard would also increasingly apply to Australian small businesses.
- Supermarkets demanding suppliers offer promotions or trade spend as a precondition for product ranging decisions, either new product ranging or delisting, with the implied threat of negative consequences if they do not agree.

## Implementing an unfair trading practices prohibition

The small business and consumer examples set out above (along with the examples of unfair practices cases taken in the United States and the European Union in Appendix A, and the examples set out in Treasury's CRIS), demonstrate there is a need for an unfair trading practices prohibition in Australia.

The ACCC considers that civil pecuniary penalties should be available for breaches of an unfair trading practices prohibition, along with the full range of other remedies available for breaches of the ACL. We consider that such penalties should align with the highest maximum civil pecuniary penalties currently available under the ACL.<sup>20</sup>

Substantial civil pecuniary penalties will incentivise compliance and ensure that penalties are not seen as a cost of doing business.

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<sup>19</sup> For example, in a 2021 survey of 1,000 SMEs in Australia, Meta identified that 82% used Facebook apps to help start their business; 71% reported that personalised advertising is important for business success; and 64% reported Facebook apps are important for obtaining feedback (Meta, Dynamic Markets Report: Australia, October 2021, p 5).

<sup>20</sup> This is the greater of:

- \$50,000,000;
- Three times the value of the "reasonably attributable" benefit obtained from the conduct, if the court can determine this; or
- If a court cannot determine the "reasonably attributable" benefit, 30 per cent of adjusted turnover during the breach period.

## Scope of the prohibition

The ACCC considers an unfair trading practices prohibition should apply to conduct “in trade or commerce” without any further thresholds beyond establishing that the conduct is an unfair trading practice. This would align the prohibition with the existing misleading or deceptive conduct and unconscionable conduct provisions in the ACL.

The CRIS suggests there could be a specific small business threshold in an unfair trading prohibition, such as the small business threshold in the unfair contract terms regime. However, the ACCC considers that limiting the prohibited conduct to only as against consumers and a specifically defined cohort of businesses may make the provision more complex for businesses to comply with. It will also result in a gap where unfair trading practices can continue to harm competition and fair trading as:

- Particular conduct that harms a business with 99 employees may be just as harmful when directed at a business with one extra employee.
- There can still be significant disparity in bargaining power between two businesses neither of which would be considered ‘small businesses’, and such disparity in bargaining power can lead to unfair practices. In this regard, we note that suppliers in the ACCC’s 2014 proceedings against Coles Supermarkets Australia Pty Ltd for unconscionable conduct would not be considered “small businesses” in most contexts.<sup>21</sup>

The ACCC considers the policy objective of an unfair trading practices prohibition should not be about protecting a specific cohort of businesses alongside consumers. Rather, its policy objective should be about establishing a normative standard of fair conduct across the economy.

**The ACCC supports a modified Option 4 in the CRIS.** The ACCC considers a general, principles-based prohibition on unfair trading practices is necessary, and that it should be accompanied by a non-exhaustive list of indicative, guiding examples of specific practices that are likely to constitute unfair trading practices under the general prohibition.

This option has the benefits of the flexibility of a broad, principles-based general prohibition, while providing some certainty for stakeholders about specific types of conduct which are likely to constitute prohibited unfair trading practices.

## General prohibition

The ACCC supports the introduction of a broad, principles-based, economy-wide prohibition on unfair trading practices. One of the strengths of Australia’s consumer protection framework is that it contains principles-based, economy-wide prohibitions on conduct which is contrary to fair trading. A principles-based unfair trading practices prohibition will allow the law to have sufficient flexibility to address unfair trading practices both now and into the future.

As marketplaces and technologies evolve, new forms of harmful business conduct will emerge, and a principles-based legislation will mean the law can continue to adequately address these emerging harms.

Attempting to deal exhaustively and in detail with every possible issue or case that could arise will result in long and complex legislation, and is likely to create loopholes. A general

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<sup>21</sup> See *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405

prohibition will instead guide and promote better behaviour by businesses on a principles basis.

## Possible elements of an unfair trading prohibition

The ACCC considers that a prohibition on unfair trading practices should provide for a high standard of business behaviour. The ACCC considers that the concept of “unfair” should not be narrowly defined or limited by qualifications, as suggested in the CRIS. A broad conception of unfairness will help to set a high standard of business behaviour that focuses on competition on the merits. Existing general prohibitions on misleading or deceptive conduct and statutory unconscionable conduct in the ACL do not include elements going to detriment or considering the legitimate interest of the business engaging in the conduct.

However, if governments consider that specification of the term “unfair” is required, the ACCC recommends that the following elements should be considered:

- A requirement that the conduct causes or is likely to cause material harm (financial or otherwise) (**harm element**); and
- A rebuttable presumption that the conduct is not reasonably necessary in order to protect the legitimate interests of the party who engaged in the conduct (**legitimate interest element**).

Both elements should be subject to an objective assessment.

### Possible harm element

As stated above, the ACCC considers that a harm element is not a necessary element of a general prohibition on unfair trading practices. However, the ACCC acknowledges that a harm element (appropriately framed) can balance concerns about ensuring the provision is appropriately targeted and will not prohibit practices which do not, or are unlikely to, cause material harm.

The ACCC considers that harm should not be confined to economic harm. This is especially relevant in a digital economy, as there are circumstances where harm may be more difficult to quantify on an economic basis, and may include emotional harm, inconvenience, loss of autonomy, or harm arising from disclosure of sensitive or confidential information that is not reasonably necessary for the supply or acquisition of a product or service.

The harm element should not require proving material harm across all possible classes of affected consumers. It should also ensure it captures harms that may have a small impact on individual consumers or small businesses, but a significant impact when the affected consumers or small businesses are considered as a whole. When assessing harm, the conduct’s impact on people experiencing vulnerability or disadvantage should be considered an aggravating factor. However, harm to vulnerable or disadvantaged consumers should not be a necessary element.

The ACCC also considers it necessary for the harm element to include a prospective aspect rather than the element only being met after harm has already been caused. Broadly speaking, the courts have interpreted the prospective limb in section 18 “likely to mislead or deceive” if there is a “real or not remote” chance that the target audience have been misled or deceived.

The unfair trading practices regimes of the United States, European Union, and the United Kingdom all contain a prospective harm element in their definition of unfair trading.

A prospective element would mean it is not necessary to establish specific harm that has occurred to individual people. This is particularly relevant in the digital world, where cohorts of people have been affected but it can be hard to identify specific people who have been harmed. Consumer advocates have noted a prospective element lessens the need for regulators to rely on witnesses who may be experiencing vulnerability in order to take enforcement action. Evidence of harm could instead be drawn from survey evidence or evidence from experts about consumer decision-making.<sup>22</sup>

### Possible legitimate interest element

The ACCC considers that a legitimate interest “defence” is not a necessary element of a general prohibition on unfair trading practices. This is because conduct that is otherwise unfair to consumers and small business should not be permitted because it is in the interests of the business engaging in the conduct. However, the ACCC acknowledges that such an element (appropriately framed) can balance concerns about ensuring the unfair trading practices provision does not capture objectively reasonable business conduct, and can help provide greater certainty around the provision.

The ACCC considers that such a legitimate interest element should follow that used in the test for ‘unfair’ in the unfair contract terms provision in the ACL.<sup>23</sup> It should require an objective assessment as to whether the conduct is *reasonably necessary* to protect the business’s *legitimate* interests, which would include assessing the legitimacy of the interests claimed, the proportionality of the conduct against the harm caused or likely to be caused, and other options available to the business to protect any legitimate interests.<sup>24</sup>

Like the unfair contract terms regime, if this element forms part of the unfair trading practices prohibition, it is critical that it should be framed as a rebuttable presumption that conduct is not reasonably necessary to protect legitimate interests, unless the party engaging in the conduct proves otherwise. A legitimate interest element that is not framed as a rebuttable presumption would unfairly place the burden of proof on consumers, small businesses, and regulators to disprove bare assertions by businesses that conduct is reasonably necessary to protect their legitimate interests. Businesses asserting that their conduct was reasonably necessary to protect their legitimate interests should be required to prove it.

Any legitimate interest element should also make it clear that just because a practice is industry-wide this does not mean that it is reasonably necessary to protect a business’s legitimate interests. The business should still be required to rebut the presumption that the practice is not reasonably necessary to protect its legitimate interests, and this would be assessed objectively.

A legitimate interest element like this is a familiar concept for businesses operating in Australia, as it has been used in the unfair contract terms regime since 2010.

However, the ACCC also notes there is a risk that such an element could shift the focus of the unfair trading practices prohibition away from the harm or potential harm on affected consumers and small businesses, and instead focus on the needs of the businesses in question. This could mean that certain harmful practices may be allowed to continue if they have been proven necessary for the particular business model in question in a case, rather

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<sup>22</sup> G. Brody and K. Temple, 2016, “Unfair but not Illegal. Are Australia’s consumer protection laws allowing predatory businesses to flourish?” *Alternative Law Journal*, vol. 41:3

<sup>23</sup> Section 24 ACL

<sup>24</sup> See for example, *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd* (Case No WAD 606 of 2017); *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA 184



than a broader focus of whether the business model itself is appropriate given it requires harmful practices.

## Specific examples

The ACCC considers the general unfair trading practices prohibition should be accompanied by a non-exhaustive indicative list of examples. The unfair contract terms provisions in the ACL provides such a list in section 25 of the ACL, which outlines, “examples of the kinds of terms of a consumer or small business contract that may be unfair.”

This approach will provide greater clarity and guidance to businesses and consumers about certain types of conduct which will be likely to be considered an unfair trading practice falling within the general prohibition. While a general, principles-based prohibition is necessary (as discussed above), on its own there will be less clarity around the prohibition until after many years of judicial interpretation.

This approach will also allow the Federal Parliament to add or refine practices to reflect changing business conduct and emerging issues in the future.

An indicative list of examples would also provide an opportunity to see the provision operate in practice and could guide the creation of a “black-list” of specific prohibited unfair practices in the future, if experience with the prohibition ultimately proves that this approach is preferable.

Drawing from the examples of conduct discussed earlier in this submission, the ACCC considers a non-exhaustive list of specific examples of conduct that would be likely to be unfair could include businesses:

- failing to disclose changes to a product or service provided under an agreement.
- omitting material information, or providing material information in an unclear, unintelligible, ambiguous or untimely manner.
- unreasonably inhibiting access to, or enjoyment of, a product or service already purchased.
- failing to take reasonable steps to prevent the sale or promotion of unsafe goods on a platform or website owned, operated or controlled by the business.
- preventing persons from exercising their contractual or other legal rights or significantly impairing their freedom of choice or conduct.
- using influence to cause a consumer or other business to agree to:
  - vary a contract that would cause the consumer or business material detriment (whether financial or otherwise) or
  - pay a sum of money that the person is not contractually entitled to.
- causing a customer to disclose sensitive or confidential information that is not reasonably necessary for the purposes of any relevant supply or acquisitions of goods or services to the customer, and that the business uses or intends to use for their commercial advantage.
- denying consumers their consumer guarantee rights on a systemic level.

## Financial products and services

Consumer protection in Australia is jointly administered between the ACCC, state and territory fair trading agencies, and the Australian Securities and Investments Commission (ASIC). A key principle of the regulatory framework is that general consumer protection provisions in the ASIC Act and the ACL mirror each other, and only diverge where there is a sound policy basis to do so. This ensures that the same general consumer protections apply to all goods and services across the economy and reduces confusion about the application of the consumer law, including to products or services that may involve both financial and other elements.

The ACCC notes the Treasury will consider a possible unfair trading prohibition in the ASIC Act in a separate consultation regulatory impact assessment process in 2024.

The ACCC strongly supports an unfair trading practices prohibition being extended to the ASIC Act. The ACCC also considers such an amendment should be considered as part of the current policy process, rather than in the proposed staggered approach.

It is not always clear at face value whether a particular product or service is a financial product or service. Further, some products and services are a mixture of financial and non-financial. An inconsistent policy approach to unfair trading practices, depending on whether or not something is a financial product or service, will increase the regulatory and compliance burden, and may inhibit effective action against existing unfair practices.

Inconsistent protections across the ACL and ASIC Act will lead to regulatory gaps, which unscrupulous providers can take advantage of, or which businesses may simply fall within by happenstance and escape regulation. This also leads to inconsistent outcomes for consumers and small businesses, and will mean many harmful practices can continue.

## Appendix A

### Examples of some unfair practices cases taken by regulators in the US and the EU

In Australia, ACL regulators would be likely to be able to take action with respect to the deceptive acts or practices aspects of these cases, but unlikely to with respect to the aspects relating to other practices.

#### European Union 'blacklist' example cases

[Purely Creative Ltd](#) – Alleged aggressive commercial practice by informing consumers they had won a prize, but were required to pay money to be told the nature of the prize, or to acquire it. The European Court of Justice upheld a prior UK High Court decision that conduct amounted to a blacklisted aggressive practice in Annex 1 to the UCPD by requiring a consumer to pay money or incur a cost on taking any action to claim what is presented as a prize or other equivalent benefit.

[Wind Telecomunicazione and Vodafone Omnitel](#) – Alleged breach of the Italian Consumer Code through:

- aggressive commercial practice by pre-installing cost-incurring services on SIM cards
- refusing to stop charging consumers unless they expressly asked that the service be deactivated, and
- aggressive commercial practice in restricting consumers' freedom of choice.

The Italian Competition Authority penalty was upheld by the European Court of Justice. The conduct was found to amount to 'inertia selling', one of the 31 blacklisted unfair practices in the UCPD. *'...when a consumer has been neither informed of the cost of the services in question nor even of the fact that they were pre-loaded and pre-activated on the SIM card that he bought, it cannot be considered that he freely chose the provision of those services'*.

#### Addressing harmful business models in a holistic way

[Match Group Inc](#) - The FTC took action against dating service Match.com, which also owns Tinder, OKCupid, PlentyOfFish, alleging it engaged in unfair practices in addition to making various misleading representations. These unfair practices include unfairly exposing consumers to the risk of fraud through communications from other accounts (when the company had internally flagged these accounts as likely to be fraudulent); banning consumers from services they had paid for when they unsuccessfully disputed charges; and making it difficult for users to cancel their subscriptions.

[Sixthcontinent Europe S.r.l.](#) – operates in online advertising and e-commerce and, in particular, in offering and selling shopping cards. Among other conduct, it blocked the accounts of many customers in an unjustified manner; hindered the issue of shopping cards by various merchants and delayed their activation several times; considerably reduced the number and importance of shopping cards that could be purchased with credits on the platform; and considerably reduced other payment services that could previously be used with the customer's balance and accumulated credits. These, and other misleading and aggressive practices by the business, resulted in a €4 million fine imposed by the Italian Competition Authority.

[Western Union](#) – The FTC took action against Western Union alleging, amongst other things, that despite what Western Union knew, it failed to take prompt action against agents with high levels of consumer fraud, didn't conduct adequate background checks of prospective new agents or those up for contract renewal, didn't adequately train and monitor its agents, and failed to adequately record consumer fraud complaints. In addition to violations of the US Telemarketing Sales Rule, the FTC alleged that Western Union's failure to take timely, appropriate, and effective action in the face of fraud-induced money transfers was an unfair trade practice.<sup>25</sup> The action concluded with an overall settlement of \$US 586 million in relation to the FTC's action and separate criminal prosecutions.

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<sup>25</sup> <https://www.ftc.gov/business-guidance/blog/2017/01/586-million-western-union-settlement-be-careful-about-company-your-company-keeps>