

Submission to the Treasury on Digital Platforms: Government consultation on ACCC's regulatory reform recommendations

15 February 2023

Digital Competition Unit
Market Conduct Division
The Treasury

By email: digitalcompetition@treasury.gov.au

The Federal Government must fast-track the introduction of measures that will adequately protect Australians engaging in the digital economy from current and future harms.

The following reforms should be prioritised to deliver a holistic consumer protection framework that effectively holds digital platforms accountable across all their business sectors:

- Introduction of an unfair trading prohibition to protect consumers from data extraction and digital misuse.
- Reform of the Privacy Act to bring Australia's protection framework into the digital age through a coherent, economy-wide consumer protection.
- Introduction of a general safety provision to clearly make companies responsible for delivering safe, secure data-driven products and services.
- Increased enforcement resources for regulators to proactively operate within a complex digital environment.
- Clear pathways for consumers to access support when experiencing digital harms.

CPRC is a not-for-profit consumer policy think tank. Our role is to investigate the impacts that markets and policies have on Australian consumers and advise on best practice solutions. Consumer protections in the digital world is a current research focus for CPRC.

Our submission uses insights from our research and considers the questions raised in the issues paper using three key principles – fairness, safety and inclusivity for consumers engaging in the digital economy.

We would welcome the opportunity to work with Treasury and share further insights from our consumer research projects. For further discussion regarding our research and the contents of this submission, please contact chandni.gupta@cprc.org.au.

Yours sincerely



Chandni Gupta
Digital Policy Director
Consumer Policy Research Centre

Question 1: Do you agree with the ACCC's conclusion that relying only on existing regulatory frameworks would lead to adverse outcomes for Australian consumers and businesses? What are the likely benefits and risks of relying primarily on existing regulatory frameworks?

Question 2: Can existing regulatory frameworks be improved or better utilised?

The existing regulatory framework in its current form is not fit-for-purpose. Australians are navigating a digital economy which has not been designed with their best interests in mind. Failure to strengthen Australia's consumer protections will mean Australians will continue to navigate a digital economy that:

- collects, shares, and uses data to make predictions about consumers in ways that can leave them worse off
- uses and aggregates data to unfairly exclude consumers from accessing certain products and services
- targets consumers to expose their vulnerabilities for commercially beneficial outcomes
- fosters little transparency on what consumers are presented, what they consume and at what price
- lacks adequate support for consumers seeking redress from data-related harms.

Lack of clarity creates regulatory loopholes

There is also a lack of clarity on how the Australian Consumer Law (ACL) applies to digital platforms, given that the law was established well-before the introduction of large digital platforms.

For example, the term supply in the Competition and Consumer Act (CCA) is narrowly defined as, "...in relation to goods—supply (including resupply) by way of sale, exchange, lease, hire or hire-purchase".¹ As digital platforms often consider themselves as a 'facilitator of the supply' but not the actual supplier, it creates loopholes in accountability which would be difficult to close via traditional compliance and enforcement measures. This is particularly the case where digital platforms operate an online retail marketplace, creating a scenario where consumers are often left with the burden to resolve issues with the third-party seller on their own. This is further exacerbated when the third-party seller is based overseas – in these cases an Australian consumer technically has rights under the ACL but enforcing them is likely impossible.²

CPRC recommends that a review of Australia's current consumer protection frameworks needs to be undertaken without further delay to address these gaps.

Question 6: What is the best way to ensure coherence between Government policies relating to digital platforms? Are any of the recommendations better addressed through other Government reforms or processes?

CPRC supports the adoption of a broader framework to ensure potential harms across digital platforms can be adequately addressed. A broader framework should require platforms to show evidence of how they mitigate and/or reduce the risk of harms to consumers. The approach should place the onus back on digital platforms instead of where it is currently – with consumers via reporting mechanisms and regulators via investigations of identified breaches.

¹ See: *Competition and Consumer Act 2010*, Retrieved from <https://www.legislation.gov.au/Details/C2011C00003>.

² CPRC, "The Digital Checkout", (December 2021), <https://cprc.org.au/the-digital-checkout/>.

In addition to the ACL and the CCA being reviewed and revised so they are fit-for-purpose, wider whole-of-economy reforms are needed to adequately protect consumers, such as:

- introducing an unfair trading prohibition – expanded on further below
- Introducing a general safety provision
- reforming the Privacy Act to give consumers more control and agency over their data
- Introducing an obligation for businesses to use data in consumers' best-interests – expanded on further below.

Australia needs to stop unfair business practices

Unlike other countries that have prohibitions on unfair practices, several business practices that lead to unfair consumer outcomes are currently not illegal in Australia. Examples include business models that thrive on high-pressure sales of low value products, that fail to provide accessible and meaningful support to their customers and are predicated on opaque business processes that undermine consumer autonomy. Often these unfair business practices target those consumers specifically experiencing vulnerability or disadvantage.³

CPRC recommends that the Federal Government prioritise its work on introducing a prohibition on unfair business practices that protects Australians today and in the future. CPRC has conducted a comparative analysis of laws that ban or restrict unfair practices across Europe, the United States, the United Kingdom and Singapore and has outlined key lessons that Australia can learn when implementing its own unfair trading prohibition.⁴

Based on what works well in these jurisdictions, we believe an unfair trading law in Australia should:

- be drafted as a principles-based law but with specific guidance or an evolving a blacklist of unfair practices to give clarity to both regulators and businesses
- allow regulators to investigate and proactively enforce the law before widespread harm takes place
- have provisions in place for the law to evolve over time to address new and emerging unfair practices
- hold businesses accountable through penalties and enforcement action that effectively deter unfair business practices
- offer meaningful redress to consumers impacted by unfair practices
- quickly stop practices found to be unfair overseas from making their way to Australia
- expand the scope of consumer harm to include the impact on mental health in addition to financial and reputational loss.

Incorporating a best interests duty or a duty of care

Introducing economy-wide measures also brings the opportunity to incorporate elements that may not have yet been considered in competition and consumer protection frameworks for digital settings. Incorporating a duty of care or best-interests duty (similar to a fiduciary duty), especially for how consumer data is treated and how choice architecture is presented and implemented on digital platforms, can help add a level of accountability on digital platforms that could significantly reduce the likelihood of consumer harm. It could also lead to pro-business benefits by increasing consumer trust in those platforms that actively build this into their business model.

³ CPRC, "Imagining an unfair trading prohibition – CPRC Spark Series Webinar", (September 2022), <https://cprc.org.au/event/utpwebinar/>.

⁴ CPRC, "How Australia can stop unfair business practices", (September 2022), <https://cprc.org.au/stopping-unfair-practices>.

The idea of a best interests duty for consumer data is relatively new and unexplored in the Australian context. As a next step, CPRC recommends an inquiry to explore how to construct and implement positive obligations on businesses to use data in consumers' interests.

Question 7: Do you agree with the evidence presented by the ACCC regarding the prevalence and nature of harms to consumers resulting from the conduct of digital platforms?

Question 8: Do you agree with the ACCC recommendation to introduce targeted measures on digital platforms to prevent and remove scams, harmful apps and fake reviews? Are there any other harms that should be covered by targeted consumer measures, for example, consumer harms related to the online ticket reselling market for live events?

CPRC agrees with the evidence presented by the ACCC about the prevalence and nature of harms to consumers caused by digital platforms.

Treasury should consider harms at a holistic level instead of focussing on harm per sector, product or service type. Previous CPRC research⁵ has revealed numerous examples of practices from digital platform services⁶ that can lead to consumer harm, many of which are unfair but currently not illegal in Australia. These practices, summarised below, represent externalities that have a negative effect on consumers.

Due to the opacity of digital supply chains, consumers may have little to no direct relations with specific actors within the digital platform services where these risks stem from.

Below are harms that consumers typically experience from digital platforms:

- **Manipulation:** sophisticated companies can have the power to design online user interfaces in very manipulative ways, for example, by using dark patterns.⁷ Companies can use the information they hold about customers to shape what products are shown and what information is presented, effectively exacerbating the information asymmetries between companies and consumers. Manipulation can also lead to unfair outcomes, misuse of data, compromise the dignity of consumers and hinder or distort competition.⁸ CPRC's research into dark patterns revealed that manipulative online design is costing Australians money, is leading to a loss of control over their personal information and impacting their wellbeing – 83% of Australians have experienced negative consequences as a result of dark patterns.⁹
- **Discrimination and exclusion:** information about consumers can be and is used to benefit commercial entities in discriminatory ways at direct odds with the needs and interests of consumers.¹⁰ For example, data can be used to build an "online profile" of a consumer and effectively "score" their value – with a view to identifying and retaining profitable customers through advertisements (and avoiding those who are not

⁵ See: Brigid Richmond, *A Day in the life of data*, 2019, CPRC, pp. 34-40. CPRC also funded a research project that provided a literature review on data tracking. See: University of Melbourne, *State of the Art in Data Tracking Technology*, 2019

⁶ The *Issues Paper* (p. 13) sets out the "data services providers" who design services for analysing and/or have access to information about consumers, including Data Management Platforms, Data Analytics Services and Data Brokers.

⁷ "Dark Patterns" that make it difficult for users to express their actual preferences or that manipulate users into taking actions that do not comport with their preferences or expectations. For more information see the Stigler Centre's 2019 *Committee on Digital Platforms – Final Report* (p. 12).

⁸ Kayleen Manwaring, "Will emerging technologies outpace consumer protection law? The case of digital consumer manipulation", (2017), *Competition & Consumer Law Journal*, 26, 149, <https://www.accc.gov.au/system/files/Kayleen%20Manwaring%20%28December%202018%29.PDF>.

⁹ CPRC, "Duped by design - Manipulative online design: Dark patterns in Australia", (June 2022), <https://cprc.org.au/dupedbydesign/>.

¹⁰ University of Melbourne, *State of the Art in Data Tracking Technology*, 2019, p. 14.

profitable).¹¹ A lack of transparency and accountability within such processes means it is difficult for consumers to see how their profile is produced; understand the impact it will have on them; or influence, appeal or correct assumptions based on wrong information.¹² Profiles can also be used to set prices, leading to some groups of consumers paying more for the same service.¹³

- **Lack of control:** CPRC consumer research indicates consumers are uncomfortable with the amount of information collected about them and would prefer to have greater control over that data collection.¹⁴ Control is particularly lacking given that personal data can often be traded between firms deeply embedded in supply chains without a direct link to consumers or even the basic service they'd signed up for. In addition, it can be difficult for consumers to know where and how to remove their associated data from brokers' holdings.¹⁵ This issue is compounded by terms and conditions and privacy policies that are often ineffective at enabling consumers to make informed choices.¹⁶

Question 10: Is a new independent external ombuds scheme to resolve consumer disputes with platforms warranted? Can any or all of the functions proposed for the new body be performed by an existing body and, if so, which one would be most appropriate?

Consumers don't currently have an accessible and independent way of resolving disputes with digital platforms. When consumers are unable to resolve issues directly with a utility like an energy provider or telecommunications company, they have access to independent support for redress through an ombudsman. However, in the case of redress relating to an online experience, this support is out of reach. Consumers are frequently left to navigate any form of recourse themselves or simply give-up.¹⁷ For some complaints, consumers may be able to raise issues through state-level tribunals, but these processes tend to be difficult to navigate and take long periods.

Several participants in CPRC's qualitative research conducted between June and August 2021, specifically noted not pursuing redress options for products or services purchased online, including via digital platforms, as they felt the likelihood of being compensated was low. In absence of support, consumers are left powerless, with products and services that are either faulty or no longer fit for purpose.

There is currently a lack of good public data about consumer issues. The last national Australian Consumer Law survey was conducted in 2015. While regulators at a state and federal level likely have data about the nature of consumer complaints, this is rarely published in a consistent and comparable format.

CPRC strongly recommends that the Federal Government finalise and release a scoping study as a matter of priority to identify the types of online disputes consumers are raising

¹¹ Wolfie Christl, "Corporate Surveillance in Everyday Life", (June 2017), Cracked Labs, p. 13, https://crackedlabs.org/dl/CrackedLabs_Christl_CorporateSurveillance.pdf.

¹² Cathy O'Neil, "Weapons of Math Destruction", (2016), Crown Books, p. 143.

¹³ For an example of personalised pricing, see 2020 investigation by Choice where it found that people over the age of 30 were offered prices more than double the prices of those aged under 30: <https://www.choice.com.au/about-us/media-releases/2020/august/tinders-secret-pricing-practices>.

¹⁴ CPRC, "CPRC 2020 Data and Technology Consumer Survey", (December 2020), <https://cprc.org.au/cprc-2020-data-and-technology-consumer-survey/>.

¹⁵ Federal Trade Commission, Data Brokers, "A Call for Transparency and Accountability" (2014), <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.

¹⁶ Brigid Richmond, "A day in the life of data", (2019), pp. 25-33, <https://cprc.org.au/research-report-a-day-in-the-life-of-data/>.

¹⁷ *Ibid.*

along with options for establishing more effective external dispute resolution pathways. This work should consider digital issues today and complex matters that are likely to arise in the future. As mentioned in previous CPRC submissions, we believe there may be merit in a more holistic approach to dispute resolution, such as via the establishment of a Digital Ombudsman that can provide support on all facets of a digital experience, beyond digital platforms.

There must be effective dispute resolution pathways to enable consumers to seek redress for when things go wrong in the online space. As consumers increase their engagement online, a Digital Ombudsman needs to be adequately resourced to meet benchmarks for industry-based customer dispute resolution to ensure consumers can effectively resolve any disagreements that will arise.¹⁸

Question 11: The ACCC recommends these requirements to apply to all digital platforms, do you support this? If not, which requirements should apply to all platforms, and which should be targeted to certain entities?

Any new consumer protection measures should apply to all digital platforms. Creating a tiered approach or excluding specific types of businesses will continue to create loopholes for poor online practices to thrive. It also places the onus on consumers to navigate a complex market to determine which digital platforms provide specific consumer protections and which ones do not, adding further burden on consumers who already feel overwhelmed when it comes to engaging online.¹⁹

The following quote from CPRC's 2020 Data and Technology Survey²⁰ encapsulates the feedback that comes via consumers when it comes to digital policy making:

"I'd like to think the government (regulates it). Because with private competition, you just have so many different platforms, you can't just make rules for each platform, it has to be on a broader level."

Question 12: If the above processes are introduced, is the Australian Consumer Law the appropriate legislation to be used and what should the penalty for non-compliance be?

See response to Question 6 regarding other whole-of-economy reforms that need to take place in conjunction with the review and revision of the ACL and the CCA.

In terms of penalties, given that most of the measures relate to protecting Australian consumers, any new legislation should be supported by the current penalty framework that exists under the ACL. Businesses must be held accountable and penalties need to be commensurate with the harm caused to consumers via poor business practices.

However, for legislation and its respective penalties to be effective, they need to be supported by regular surveillance and enforcement by the regulator to educate and shift the market towards a more consumer-centric approach to the digital economy.

Australia needs a well-resourced regulator with the capacity and capability to monitor and enforce breaches in the complex digital environment. Traditional compliance and

¹⁸ See: [Benchmarks for Industry-based Customer Dispute Resolution | Treasury.gov.au](https://www.treasury.gov.au/industry/customer-dispute-resolution)

¹⁹ CPRC, "The Digital Checkout", (December 2021), <https://cprc.org.au/the-digital-checkout/>.

²⁰ CPRC, "2020 Data and Technology Consumer Survey", (December 2020), <https://cprc.org.au/publications/cprc-2020-data-and-technology-consumer-survey/>.

enforcement models often take place post harm. This needs to be reimagined if protection is to be adequately delivered to consumers in the digital economy.

Regulators also need more sophisticated approaches to identify harm. Currently regulators largely rely on reports from consumers, identifying harm after it takes place. The majority of the onus cannot continue to remain on consumers to identify and report breaches. This is not feasible in a digital environment where there is little to no transparency about how consumer data is collected, used, and passed on to other businesses. Instead, regulators need to proactively uncover harm that is currently obfuscated. Regulators should be pushing businesses to be radically more transparent about how they use consumer data – this is a first step to then removing unfair practices.

Monitoring and surveillance by regulators in this complex environment needs a diverse workforce that not only understands the implications of the law but also the technical architecture on which these business models are built upon. Experts such as data scientists, artificial intelligence engineers, information security analysts and other technical professionals need to be in the mix to support upstream regulation and mitigate the risk to consumers, potentially before widespread harm has occurred.

Question 18: Should codes be mandatory or voluntary?

Digital platforms and their business models are no longer developing or new. Initiatives such as voluntary codes of practice that are self-assessed are no longer adequate in addressing the risks posed to consumers by large and powerful digital platforms.

Consumers expect and deserve legislation that holds businesses accountable for their practices. We need to evolve our laws beyond voluntary commitments to broader principles that capture unfair practices and require businesses like digital platforms to think broadly about how they help rather than hurt consumers.

Question 25: Should Australia seek to largely align with an existing or proposed international regime? If so, which is the most appropriate.

Question 26: What are the benefits and downsides of Australia acting in advance of other countries or waiting and seeking to align with other jurisdictions?

Australia is far behind other jurisdictions around the world when it comes to consumer protection within the digital economy.²¹

Alignment could be considered across a variety of reforms, such as:

- introducing a prohibition on unfair practices that currently exist in comparative jurisdictions such as the United Kingdom, Europe and the United States
- introducing measures similar to the ones brought in via the Digital Markets Act in the European Union (EU)²²
- by strengthening Australia's privacy protections.

²¹ Nitesh Patel, "Government to Enhance Data Privacy and Protection to 'Regulate the Digital Age'", (17 February 2020), <https://www.mondaq.com/australia/data-protection/894470/government-to-enhance-data-privacy-and-protection-to-regulate-the-digital-age>.

²² BEUC, "Digital Markets Act: landmark Big Tech regulation agreed in boost to consumer choice", (25 March 2022), <https://www.beuc.eu/publications/digital-markets-act-landmark-big-tech-regulation-agreed-boost-consumer-choice/html>.

In doing so, the Federal Government must consider what the net effects are in terms of new laws being introduced in other jurisdictions that apply to global businesses that also operate in Australia. For example, the recent introduction of both the Digital Markets Act and the Digital Services Act in Europe, combined with Europe's current directive on unfair commercial practices are likely to have a significant shift in how businesses operate and adjust their business models. However, it is naive to assume that a global business will naturally course correct across all jurisdictions. Often this is not the case, especially when they are benefitting from current business models.

As an example, in July 2022, Amazon changed its cancellation process for its Prime membership subscription to a simple two-clicks with a clear cancellation button after it was found to have breached EU's unfair trading laws.²³ This change has not been implemented in Australia. Currently, Australians are navigating through multiple screens, multiple steps and multiple options. In this last screen the customer is offered four options, and three of the four involve keeping Prime in some form. Only one is about immediate termination but unlike the EU where the option stands out (Figure 1), here in Australia it blends in with all the others (Figure 2).²⁴

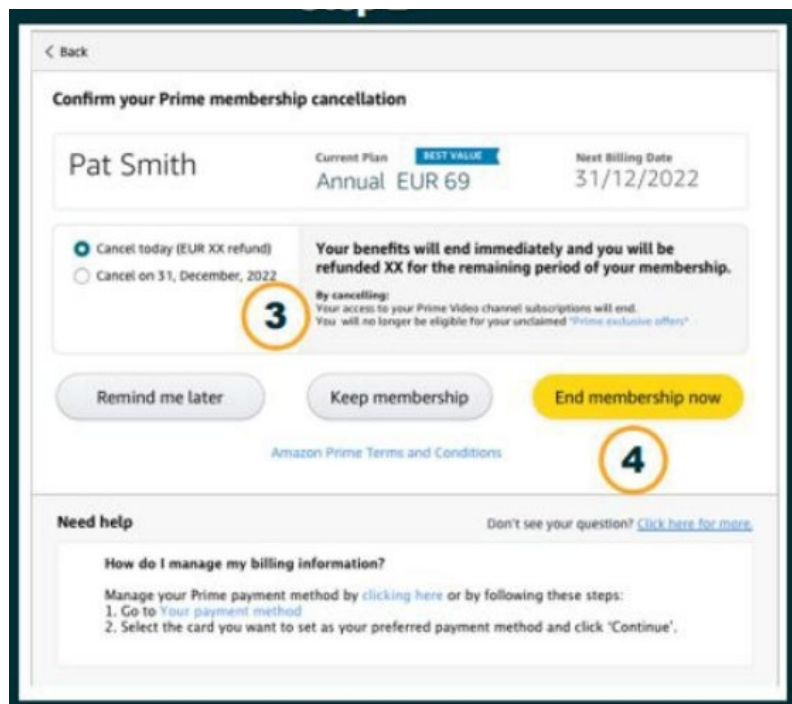


Figure 1: Updated final screen for cancelling Amazon Prime subscription in Europe
Source: European Commission: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4186

²³ European Commission, "Consumer protection: Amazon Prime changes its cancellation practices to comply with EU consumer rules", (1 July 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4186.

²⁴ CPRC, "How Australia can stop unfair business practices", (September 2022), <https://cprc.org.au/stopping-unfair-practices/>.

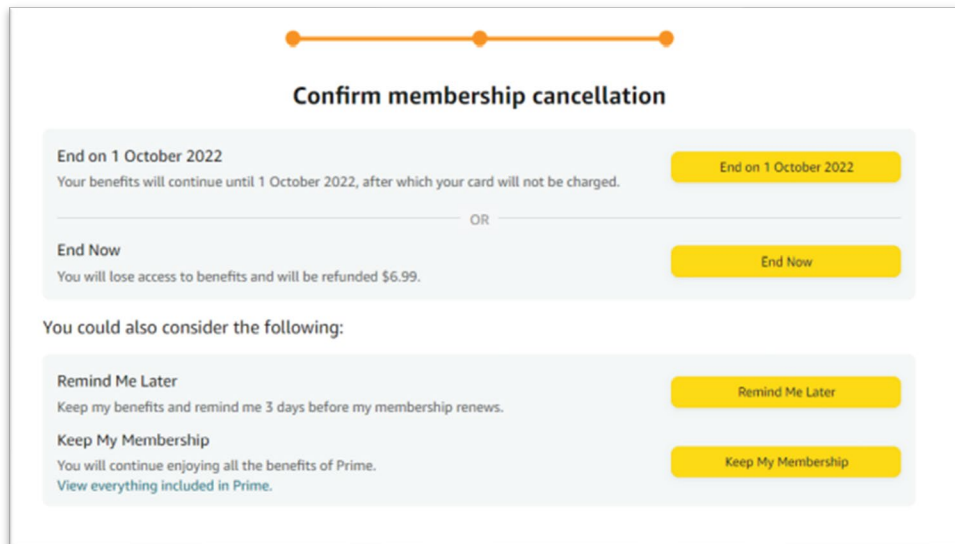


Figure 2: Final screen for cancelling Amazon Prime subscription in Australia where the process involves a range of dark patterns (deceptive designs) that aim to influence and manipulate consumer behaviour.

As mentioned previously in this submission, CPRC recommends that the Federal Government implement an unfair trading prohibition that includes measures to swiftly stop practices found to be unfair overseas from making their way to Australia. This would ensure that Australian consumers are not left behind in being protected and businesses are held accountable to implement safer measures in Australia as they are implementing them overseas.

The Federal Government also has an opportunity to be a role-model on the world stage on what effective consumer protection online can look like. The Federal Government should not shy away from opportunities to enhance what is already in place internationally. As an example, there is value in defining consent in line with GDPR and considering standardised consents to assist with consumer comprehension but simply copying the GDPR consent framework will not address the over-reliance on consent and choice as consumer protections. Australia needs to evolve its approach so that consumer protections proactively stop harm and go beyond disclosure. Safety and fairness should not be left to consumer choice – these are things which consumers expect the law to ensure regardless of choice.²⁵

The time to act is now

CPRC urges the Federal Government to implement the range of measures outlined in this submission without further delay to ensure the digital economy delivers equitable outcomes to all Australians. Many of the measures, such as restricting unfair business practices and establishing strong privacy protections have been in place in other jurisdictions for decades. Failure to protect consumers will mean that Australians will continue to be exposed to business models that manipulate consumer consent, use opaque business processes that undermine consumer autonomy or exploit consumer vulnerabilities. Australian consumers deserve better.

²⁵ CPRC, "Submission to The Attorney-General's Department – Privacy Act Review – Discussion Paper" (10 January 2022), <https://cprc.org.au/submission-to-the-attorney-generals-department-privacy-act-review-discussion-paper/>.