



# Unfair trading practices

## **Consultation on the design of proposed general and specific prohibitions**

December 2024

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## **Acknowledgement of country**

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

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# Contents

Executive Summary .....	3
A general unfair trading practices prohibition .....	3
The general prohibition should also apply to business-to-business conduct .....	3
The general prohibition should also apply to financial products and services .....	4
Other potential ACL amendments to address specific practices .....	5
The problem.....	5
Key gaps in the consumer protection framework .....	5
Consumer harm from unfair trading practices .....	6
Small business harm from unfair trading practices .....	8
General prohibition on unfair trading .....	10
Scope of the general prohibition.....	10
Dark patterns.....	13
Enforcement tools and penalties.....	14
Other potential ACL amendments to address specific practices .....	15
Subscription-related practices .....	15
Drip pricing practices.....	18
Dynamic pricing .....	20
Online account requirements.....	22
Barriers to accessing customer support.....	22
Appendix A.....	25
Key gaps in existing provisions in the CCA/ACL .....	25

# Executive Summary

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to comment on the Treasury's consultation paper on the design of proposed general and specific prohibitions intended to address harms arising from unfair trading practices.

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The ACCC's primary responsibilities are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (CCA), regulate national infrastructure and undertake market studies. The CCA also contains the Australian Consumer Law (ACL) which is enforced by state and territory ACL regulators alongside the ACCC under a one law, multiple regulator model.

Efficient and 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.

## **A general unfair trading practices prohibition**

The ACCC strongly supports the government's commitment to amend the ACL to introduce a principles-based general prohibition against unfair trading practices. Through the ACCC's work over many years, we have observed under- or un-regulated unfair trading practices that cause significant detriment to both consumers and small business in both online and offline environments. Markets and products have become increasingly more complex for consumers and small business to engage with. The current prohibitions in the ACL have been insufficient to protect consumers and small businesses from these harms. Unfair trading practices can also disproportionately affect people experiencing vulnerability or disadvantage, including First Nations peoples in remote communities, people who are culturally and linguistically diverse, and those experiencing situational vulnerability, such as those experiencing homelessness and those in strained financial circumstances.

A prohibition on unfair trading will be an important safety net to protect consumers and small businesses from harm.

The ACCC considers an unfair trading prohibition is an important microeconomic reform that 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.

## **The general prohibition should also apply to business-to-business conduct**

Noting the government's proposal to consider a potential business-to-business unfair trading practices prohibition via a "staged approach", the ACCC strongly recommends the proposed general unfair trading practices prohibition should also apply to business-to-

business conduct. Small business, including self-employed people and micro businesses, experience many of the same harms from unfair trading practices as consumers. Small business generally face information asymmetries and bargaining power imbalances, including in dealing with large suppliers and customers with monopsony power, which can leave them vulnerable to unfair trading practices. Examples of unfair trading practices that small business face are set out below.

We note that an attempt to exclude small business from these protections would suffer from a great deal of uncertainty and impracticality. For example many of the unfair practices that are likely to be proscribed by the proposed prohibition are practices that businesses direct to both consumers and small business without distinction. It would be a perverse regulatory outcome to be able to sanction a business for engaging in unfair practices against a consumer, but not being able to sanction the same business for the same conduct if the victim happened to be a small business.

As the consultation paper notes, the unconscionable conduct and unfair contract terms laws in the ACL were initially introduced to only address business-to-consumer conduct, and some years later in each case, the laws were extended to also cover business-to-business conduct. However, in each case later reforms to cover business-to-business conduct were implemented for the same reasons which various stakeholders had raised when the business-to-consumer reforms were first being considered. It was the detriment that small businesses continued to suffer from the continued harmful practices that led to the later reforms to cover business-to-business unconscionable conduct and business-to-business unfair contract terms. It was not the case that issues arising from the operation of the business-to-consumers laws provided more clarity around how the laws should apply to business-to-business conduct.

The ACCC remains concerned that small businesses will continue to suffer from harms arising from under- or un-regulated unfair trading practices for a significant period of time if a staged approach is taken to implementing the unfair trading practices prohibition.

## **The general prohibition should also apply to financial products and services**

Given the ACCC's remit, this submission largely focuses on harmful conduct with respect to non-financial products and services. However, we reiterate our strong support that an unfair trading practices prohibition should also be implemented in the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to ensure effective protections from harm, and an improved standard of business conduct, across the economy. The ACCC considers that an unfair trading practices prohibition in the ASIC Act should be implemented within a similar timeframe as one is introduced into the ACL, to ensure there is consistency across the economy in the norms that guide business behaviour.

We share the view expressed by ASIC in its submission to the 2023 Consultation Regulation Impact Statement on unfair trading practices that a lack of harmonisation between the ACL and the ASIC Act on this can pose significant risks that can leave consumers and small businesses exposed to harm and markets functioning sub-optimally.<sup>1</sup> As set out in our submission to the 2023 Consultation Regulation Impact Statement on unfair trading practices, it is not always clear at face value whether a particular product or service is a

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<sup>1</sup> [Submission by the Australian Securities and Investments Commission to the consultation regulation impact statement on unfair trading practices](#), November 2023. ASIC Commissioner Alan Kirkland also set out these issues in his keynote address at the Australasian Consumer Law Roundtable in Melbourne on 6 December 2024: <https://asic.gov.au/about-asic/news-centre/speeches/fair-s-fair-the-case-for-prohibiting-unfair-trading-practices-in-financial-services/>

financial product or service. Further, some products and services are a mixture of financial and nonfinancial. 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.

## Other potential ACL amendments to address specific practices

The ACCC also welcomes the government consulting on a range of other proposed specific amendments to the ACL to help target specific areas of harmful conduct that have been raised in the government's unfair trading practices consultation to date.

The ACCC considers that a well-designed, economy-wide prohibition on unfair trading practices has the flexibility and longevity to capture a broad range of specific harms, from those identified in the consultation paper to those that may only emerge in the future.

However, in addition to the proposed economy-wide prohibition, the ACCC also supports specific reforms to the ACL to introduce positive obligations on businesses that would be a targeted way to address the detriment caused by subscription-related practices.

The ACCC also considers that while existing provisions of the ACL can address a lot of drip pricing conduct, there are amendments that could be made to the ACL to strengthen these provisions.

The introduction of a general prohibition against unfair trading practices, in conjunction with related reforms to target specific unfair trading practices related to subscriptions and drip pricing, will ensure Australia's consumer protection framework is fit-for-purpose, and able to address new and emerging harmful business practices, now and into the future.

## The problem

### Key gaps in the consumer protection framework

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.

As set out in the [ACCC's submission](#) to Treasury's 2023 [Consultation Regulation Impact Statement on unfair trading practices](#), we consider there are key gaps within the ACL which make consumers and small businesses vulnerable to harm from under- or un-regulated unfair trading practices.<sup>2</sup> The key gaps in the ACL are set out in more detail in **Appendix A**.

As a result of these gaps, the ACCC has discontinued investigations into businesses where we considered conduct caused significant detriment to consumers or small businesses but was unlikely to meet the threshold of being unconscionable, was otherwise not misleading or deceptive, and also did not meet the elements of any other specific provisions.

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<sup>2</sup> <https://www.accc.gov.au/system/files/accc-submission-treasury-cris-unfair-trading-practices.pdf>

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.

## Consumer harm from unfair trading practices

For many years the ACCC has observed consumers being harmed by a range of under- or unregulated 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.

Below are a range of unfair practices that cause detriment to consumers, including those previously set out in our submission to government's 2023 Consultation Regulation Impact Statement on unfair trading practices:

- The use of choice architecture and other practices in both offline and online environments 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 in 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.<sup>3</sup>
- Systemic actual or effective refusal to provide remedies to consumers that they are legally entitled to. For example, in *ACCC v Mazda Australia Pty Limited*<sup>4</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

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<sup>3</sup> For example, as noted in the ACCC's Digital Platforms Inquiry: ACCC, 2019, [Digital Platforms Inquiry, Final Report](#), p.26

<sup>4</sup> 2023] FCAFC 45

service and failed to make any genuine attempt to consider and apply the ACL consumer guarantee provisions.

- Businesses failing to disclose key information, or key changes to a product or closely related product, in circumstances where a consumer would reasonably expect that information to be disclosed. There have been a number of cases where, despite a failure to disclose such material information causing consumer harm, courts have considered the conduct as not constituting misleading or deceptive conduct.<sup>5</sup>
- Supermarket's use of promotional labels that resemble labels commonly used for price discount offers, including through the use of particular colours and design elements, in circumstances where a price discount is not being offered.
- 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.
  - 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>6</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>7</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.

Our submission to the government's 2023 Consultation Regulation Impact Statement on unfair trading practices also noted that there are aspects of subscription-related practices that are harmful and not adequately addressed by existing laws. This includes subscription service providers making it difficult for consumers to cancel their subscriptions, particularly after free trials. This 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 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.

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<sup>5</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>6</sup> ACCC, 2021, [Digital Platform Services Inquiry, Report No. 3 Search Defaults and choice screens](#), pg. 65

<sup>7</sup> ACCC, 2021, [Digital Platform Services Inquiry, Report No. 3 Search Defaults and choice screens](#), pg. 65



As discussed further below, the ACCC supports the government's proposal to introduce specific protections in the ACL to address unfair subscription-related practices. A general principles-based unfair trading practices prohibition would then play a complementary role, as a safety net should any harmful conduct relating to subscriptions arise in the future that is not addressed by the specific subscription-related provisions proposed.

On 1 February 2024 the Treasurer directed the ACCC to inquire into markets for the supply of groceries (the Supermarkets Inquiry). On 27 September 2024, we released our interim report for the Supermarkets Inquiry, outlining what the ACCC has heard from consumers, suppliers and other interested parties at the halfway point of the 12-month inquiry. Our interim report noted that through the remainder of the Supermarkets Inquiry, we will consider the ability of an unfair trading practices provision to address consumer issues identified in the inquiry. The Supermarkets Inquiry Terms of Reference direct the ACCC to provide a final report to the Treasurer by 28 February 2025. In the Final Report, the ACCC will outline findings and recommendations with respect to the Terms of Reference.

## **Small business harm from unfair trading practices**

Small businesses in Australia are similarly harmed by online and offline unfair business practices. There are many harmful practices that businesses direct to both consumers and small business without distinction. Small businesses, including those self-employed, also experience many of the same bargaining power imbalances as consumers. As a result, some of the examples noted above relating to consumer harm from unfair trading practices also arise in the context of small business, including:

- Business practices that seek to dissuade small businesses from exercising their contractual or other legal rights.
- Harmful subscription-related practices.
- Systemic actual or effective refusal to provide remedies to small businesses that they are legally entitled to.
- Businesses failing to disclose changes to a product or closely related product in circumstances where a small business customer would reasonably expect that change to be disclosed.
- Intermediaries and platforms failing to implement reasonable measures to protect their customers from fraudulent practices by third parties using their services.

Below are a range of other under- or un-regulated unfair practices that cause detriment to small business, including those previously set out in our submission to government's 2023 Consultation Regulation Impact Statement on unfair trading practices:

- Large businesses that dissuade, or attempted to dissuade, smaller businesses with inferior bargaining power from exercising their legal rights by threatening them with commercial retaliation.<sup>8</sup> This includes retailers threatening small businesses 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.
- Car manufacturers recommending their dealers pay for expensive showroom upgrades to increase the likelihood their contracts will be renewed, while simultaneously

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<sup>8</sup> ACCC, 2020, [Perishable agricultural goods inquiry report](#),

considering moving to a new business model that will mean that those dealerships will not be used.

- 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>9</sup>

- 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.
- 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>10</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.

Our Supermarkets Inquiry interim report noted that through the remainder of the Supermarkets Inquiry, we will further consider issues around potential harm arising from supplier vulnerability to supermarket buyer power.

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<sup>9</sup> ACCC, 2020, [Perishable agricultural goods inquiry report](#), pages 118-119

<sup>10</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).

## General prohibition on unfair trading

The ACCC considers it is necessary for the prohibition on unfair trading practices to be a broad, principles-based, economy-wide prohibition.

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.

### Scope of the general prohibition

The ACCC considers an unfair trading practices prohibition should be limited in application to conduct "in trade or commerce". This would align the prohibition with the existing misleading or deceptive conduct and unconscionable conduct provisions in the ACL.

The consultation paper proposes the following elements for the general prohibition on unfair trading practices:

- unreasonably distorts or manipulates, or is likely to unreasonably 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**).

As noted earlier, we consider the general unfair trading practices prohibition should cover both business-to-consumer and business-to-business conduct. Consequently, we consider the elements should not include specific references to "a consumer" or "the consumer".

The ACCC also considers that the proposed elements do not require both the "unreasonableness" aspect to the conduct element, as well as the detriment element.

We agree with the policy intent of ensuring that the prohibition does not capture legitimate marketing tactics, noting that all marketing is intended to manipulate purchasers' decision making in some way. However, we consider that the detriment element provides a sufficient threshold to ensure that only conduct that goes beyond legitimate marketing tactics is captured by the prohibition, such that the use of "unreasonably" in the conduct element is unnecessary. Further, the combination of the "unreasonableness" requirement in the conduct element and material detriment requirement in the detriment element will result in many harmful business practices not reaching the statutory threshold, and continuing to go unregulated.

Alternatively, the detriment element could be removed altogether and the "unreasonableness" requirement in the conduct element retained.

### Conduct element

Subject to the above changes, the ACCC generally supports the conduct element proposed in the consultation paper.

The ACCC notes the proposed conduct element draws on aspects of the unfair commercial practices definition the European Union's Unfair Commercial Practices Directive (UCPD).<sup>11</sup> The European Union's guidance on the interpretation and application of UCPD states that what determines whether something materially distorts or is likely to materially distort the economic behaviour of a consumer is whether they "take a transactional decision that they would not have taken otherwise".<sup>12</sup> The guidance also states that the notion of a transactional decision also encompasses pre-purchase and post-purchase decisions, and so can include, amongst other things, a decision to click through a website as a result of an offer, or a decision to switch to another service provider or product or not.<sup>13</sup> The ACCC considers that likewise, the proposed ACL unfair trading practices conduct element should also be broadly construed and include an interpretation that clarifies that the decision-making or behaviour can encompass pre-purchase and post-purchase acts and decisions, not just the transaction to purchase.

Given the proposed conduct element would introduce new concepts into the ACL, interpretative principles will need to be included in accompanying materials, such as the explanatory memorandum. This will assist in providing clarity to businesses and the broader community about the policy objective and operation of the provision and diminish the possibility of a narrow interpretation of the conduct element.

The ACCC also considers it is critical to include the proposed prospective aspect, i.e. conduct that is "likely to distort or manipulative", as the prohibition should not operate to cover harmful conduct only after harm has already been caused to consumers or small businesses. We also consider that it should not be necessary to prove that the economic decision making or behaviour of a consumer or small business was distorted or manipulated. It will greatly diminish the efficacy of the provision to address harmful conduct if the conduct element does not have this prospective aspect.

## Detriment element

The ACCC generally supports the proposed detriment element outlined in the consultation paper, subject to the removal of the "unreasonableness" requirement from the conduct element, and the removal of the specific reference to "the consumer".

Detriment is a familiar concept for ACL regulators, businesses, and the courts, as it has been used in the unfair contract terms regime since 2010.<sup>14</sup> The ACCC considers that it is necessary for any detriment element to specify that the detriment involved may be financial or otherwise to reflect that consumers and small businesses may experience harms outside of economic detriment from unfair trading practices. As noted in our submission to the 2023 Consultation Regulation Impact Statement on unfair trading practices, there are circumstances where detriment may be more difficult to quantify on an economic basis, and may include emotional harm, inconvenience, or loss of autonomy.

The ACCC also considers it is critical to include the proposed prospective aspect, i.e. conduct that is "likely to cause" material detriment. This aligns with the misleading or deceptive provision in the ACL. Broadly speaking, the courts have interpreted the prospective

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<sup>11</sup> European Commission, [Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market](#).

<sup>12</sup> European Union, 2021, [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](#), section 2.4

<sup>13</sup> European Union, 2021, [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](#), section 2.4

<sup>14</sup> See section 24(1)(c) of the ACL.

limb “likely to mislead or deceive” in section 18 of the ACL as referring to a “real or not remote” chance that the target audience have been misled or deceived. As noted in our submission to the 2023 Consultation Regulation Impact Statement on unfair trading practices, a prospective element would mean it is not necessary to establish specific detriment that has occurred to individual people. This is particularly relevant for unfair practices where cohorts of people have been affected but it can be hard to identify specific people who have been harmed. It will greatly diminish the efficacy of the provision if the detriment element does not have this prospective aspect. We also note 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.

The ACCC also considers the detriment element should not require proof of material detriment 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.

## Grey list examples

The ACCC supports the consultation paper’s proposal for the general unfair trading practices prohibition to be accompanied by a non-exhaustive indicative list of examples, or “grey list”, of conduct which may, depending on the circumstances, constitute unfair trading practices.

The ACCC considers this approach will help 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. We note a similar non-exhaustive indicative list of examples is used in the unfair contract terms provisions.<sup>15</sup>

It is essential that it is made clear in the legislation that the list is non-exhaustive. The ACCC supports the 4 examples of conduct that the consultation paper has suggested being included on the initial grey list, with the caveat that they should not be limited to business-to-consumer dealings. The ACCC considers the 4 examples should be:

- the omission of material information.
- the provision of material information to a customer, or prospective customer, in an unclear, unintelligible, ambiguous or untimely manner, including the provision of information in a manner that overwhelms, or is likely to overwhelm, the customer, or prospective customer.
- impeding the ability of a consumer, or small business customer or supplier, to exercise their contractual or other legal rights.
- use of design elements in online interfaces that unduly pressure, obstruct or undermine a consumer, or small business customer or supplier, in making an economic decision.

The ACCC also considers the following examples of conduct should also be included on the grey list:

- failing to disclose changes to a product or service provided under an agreement.

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<sup>15</sup> See section 25 of the ACL.

- 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.
- 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.
- systemic actual or effective refusal to provide remedies to consumers and small businesses that they are legally entitled to.
- failing to provide an accessible and effective contact point for customer service support.

## Dark patterns

The consultation paper is seeking feedback on whether the proposed general prohibition on unfair trading practices would adequately address the use of “dark patterns”, or whether “dark patterns” need to be addressed by other means.

The ACCC notes that “dark patterns” is a broad term used to denote a diverse range of conduct. We note that quite often academics, advocates and international regulators use examples of conduct that is already covered by existing provisions of the ACL under the broad “dark patterns” label, principally misleading or deceptive conduct and false or misleading representations.<sup>16</sup> The following ACCC actions are examples of enforcement actions that the ACCC has taken against businesses for conduct that is commonly categorised as “dark patterns”:

- In December 2023, the ACCC instituted proceedings in the Federal Court against bedroom furniture supplier [Emma Sleep](#) and two of its subsidiaries for (amongst other things) allegedly making false and misleading representations in its advertising materials, including representations that its advertised prices were part of a limited sales campaign by placing countdown timers on its website or stating that the campaign was ending soon, when this was not the case and the countdown timers reset themselves, or the products continued to be on sale for the same or similar discount.
- In October 2020, the Federal Court ordered [Viagogo](#) to pay \$7 million in civil pecuniary penalties for making several different false or misleading representations when reselling tickets for live music and sports events. These representations included (amongst other things) false scarcity claims where Viagogo represented that tickets to certain events were scarce (for example, “less than 1% of tickets remaining”), when the scarcity only referred to the tickets available on its resale platform and didn’t include tickets available elsewhere.
- Several actions with respect to subscription-related practices, as mentioned in that section below.

The ACCC considers that other “dark pattern” conduct that falls outside existing ACL protections should be captured by a general prohibition on unfair trading. In addition, other conduct commonly categorised as “dark patterns” would be addressed by the specific reforms proposed in the consultation paper around subscription-related practices, and the

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<sup>16</sup> OECD, 2022, [Dark commercial patterns](#), OECD Digital Economy Papers, No. 336, page 8, OECD Publishing, Paris,

specific reforms we have recommended to better address drip pricing practices (discussed below).

We also note that recommended reforms to the *Privacy Act 1988* (Cth) (the Privacy Act) to require that the collection, use and disclosure of personal information be fair and reasonable in the circumstances would also address data collection practices that some stakeholders include under the general “dark patterns” heading.<sup>17</sup>

## Enforcement tools and penalties

The ACCC considers ACL regulators should be empowered to employ the full range of their existing enforcement powers and compliance actions to address contraventions of the proposed unfair trading prohibition. These include court action, infringement notices, court-enforceable undertakings, administrative resolutions, guidance and education, cautions to businesses to change their conduct and public warnings or other public statements.

The maximum available penalty for breaching the proposed prohibition must be set at a level that is sufficient to ensure that it acts as a genuine deterrent for non-compliance and is not perceived as an acceptable cost of doing business for all businesses ranging from sole traders to large multi-national corporations.

The ACCC supports maximum penalties for contraventions of the proposed prohibitions aligning with the current pecuniary penalty regime for existing key general protections under the ACL.<sup>18</sup> The maximum civil pecuniary penalties under the ACL are:

- For a corporation, the maximum civil pecuniary penalty for a contravention is the greater of:
  - \$50 million
  - if the court can determine the value of the benefits reasonably attributable to the contravention, 3 times that value, or
  - if the court cannot determine the value of the benefits, 30 per cent of the company’s adjusted turnover during the breach turnover period for the relevant contravention.
- For an individual, the maximum pecuniary penalty for a contravention is \$2.5 million.

The courts are well-practised at determining the appropriate penalty amount in any given case, up to the per contravention maximum set in the ACL. Under s 224(2), the Court must have regard to all relevant matters including:

- the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission
- the circumstances in which the act or omission took place, and
- whether the person has previously been found by a court to have engaged in any similar conduct.

There are a range of other well-established factors that the courts will consider when determining the appropriate quantum of a penalty. These factors include:

- the corporate culture of compliance
- the deliberateness of the contravention

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<sup>17</sup> Attorney-General’s Department, 2023, [Privacy Act Review](#), p.8., accessed 29 November 2024

<sup>18</sup> See section 224(3A)



- the profit or benefit obtained from the contravening conduct
- the financial position of the respondent, and
- the level of cooperation throughout the investigation and litigation.

## Other potential ACL amendments to address specific practices

### Subscription-related practices

The ACCC supports the government's proposal to introduce specific prohibitions in the ACL to address unfair subscription-related practices. While we consider that harmful subscription-related practices should also be captured by a general unfair trading prohibition, we also consider specific reforms to the ACL to introduce positive obligations on businesses would be a targeted way to help address the detriment caused by subscription-related practices, given how common subscription business models are across the economy.

Unfair subscription-related practices impact both consumers and small businesses. As such, the ACCC supports the government's commitment that any subscription-related reforms should apply to business-to-business transactions, as well as consumer-to-business transactions.

The purchase of products or services using a recurring payment model through subscriptions or memberships, has been commonly used in the Australian economy for many decades. In recent years, subscriptions have increased as the supply of digital services has also increased. For example, changes in technology to embed more software in cars which can be controlled and updated remotely, has allowed some car manufacturers to convert features of their vehicles that would ordinarily be included as a set included feature in the car when it is sold, into a service that consumers can choose to pay extra for, via a subscription.<sup>19</sup>

While subscriptions can offer genuine benefits, many consumers and small business have reported to the ACCC issues, including:

- poor or insufficient disclosure about the nature and terms of the subscription or membership.
- difficulties cancelling subscriptions and ending memberships. This includes businesses having onerous requirements to cancel a subscription or membership, having prohibitively high fees to cancel an ongoing arrangement, and not facilitating or engaging with cancellation requests at all.
- concerns that subscriptions and memberships auto-renew or 'rollover' without reasonable disclosure or warning, particularly after a free trial period has ended.

Consequently, consumers and small business can end up being locked into paying for goods and services supplied by this model, and therefore paying for subscriptions and memberships they do not need or want. Unfair subscription-related practices can curtail people's ability to switch to other goods or services, and so can also act as a restriction on competition between businesses.

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<sup>19</sup> For example, BMW introducing a subscription model for some of its cars' features, including heated seats: <https://carbuzz.com/why-bmw-was-right-to-make-you-pay-a-subscription-for-heated-seats/>, accessed 2 December 2024



The harms from unfair subscription-related practices can also disproportionately affect consumers experiencing vulnerability, including older people, people from a culturally or linguistically diverse background, people with disabilities, or people experiencing situational vulnerability.<sup>20</sup>

The ACCC has observed that some businesses embed unnecessary friction into the cancellation process, which increases switching costs and often leads to consumers abandoning the cancellation process due to frustration and being time poor. Where there are a large number of steps, and/or unnecessary steps, required for a consumer to cancel a free trial, this may manipulate users into not cancelling their subscription in time, or at all. For example, many businesses do not allow consumers to cancel online and require consumers to call a service centre number. This can cause problems if the company does not answer the phone or if there are prohibitively long wait times. It can also be problematic where the consumer and retailer operate in different time zones.

Aspects of some harmful subscription practices may already breach the ACL. For example, where a business makes a false or misleading representation in either the sign up or cancellation stage. Depending on the circumstances, insufficient disclosure (for example, where consumers are not made aware that they are signing up for a monthly subscription payment), may also be misleading or deceptive conduct under the ACL. The ACCC has taken a number of enforcement actions addressing certain aspects of subscription-related practices including:

- In January 2024, [Dreamscape Networks International Pte Ltd](#) (Crazydomains.com.au) paid \$56,340 in infringement notice penalties for allegedly making false or misleading representations about two 'free' products automatically added at checkout, and about the benefits of its Domain Privacy product. Crazydomains.com.au offers a range of services including domain name registration, web hosting and web design. Between October 2019 and July 2023, the website advertised that its '3-month website builder' product and an 'additional domain name registration' were free. These products were automatically added to a customer's shopping cart as 'free', '3 months free gift' or '1 year free gift' but had an auto-renewal feature that meant customers would be charged fees after the free period ended. The alleged conduct affected small business customers.
- In September 2023, the ACCC commenced proceedings against dating service [eHarmony Inc](#) in the Federal Court for allegedly making misleading statements about the pricing, renewal and duration of its memberships, including automatically renewing memberships at a price significantly higher than the initial membership, failing to adequately disclose the minimum total membership prices, and misleading consumers about their ability to cancel their memberships.
- In May 2023, [hipages Group Pty Ltd](#) provided a court-enforceable undertaking that admitted it likely engaged in misleading or deceptive conduct in breach of the ACL from October 2018 to January 2022 by failing to adequately disclose contract terms that allowed it to automatically renew subscriptions and charge an early termination fee to subscribers. hipages is a platform that operates by requiring small businesses and self-employed tradespeople in the home improvement sector to enter into a membership with hipages. Its platform then connects them with consumers who need trades work completed.
- In November 2021, online education institute [Shaw Academy Ltd](#) agreed to refund hundreds of former students after admitting it had offered consumers a free trial to its

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<sup>20</sup> For example, in a March 2024 article, the family of a missing woman reported having to pay 2 years of a gym membership that she never used because the gym had insisted that they needed to speak directly to the woman to be able to close her membership: <https://www.abc.net.au/news/2024-03-14/missing-lorin-whiteheads-family-want-answers-samantha-murphy/103550188>, accessed 2 December 2024

online education courses but then charged some of them a subscription fee even when they had cancelled or tried to cancel before the end of the trial.

However, the ACL can only currently address a limited scope of subscription-related harms. Accordingly, the ACCC supports the four options proposed in the consultation paper obligations on businesses that offer subscriptions to consumers and small businesses:

- Pre-sale disclosure of material information such as the fact the customer is entering into a subscription, how much the customer will be liable to pay, and how long the subscription will last. Positive obligations on businesses to disclose such key information prior to customers entering subscriptions will help to consumers to make better informed purchasing decisions. However, disclosure alone is an insufficient protection, including because disclosure needs to compete with other strategies used by businesses for customer attention, and it has an immaterial impact where customers feel they have no choice but to purchase the relevant product or service offered.<sup>21</sup> The ACCC considers this option needs to be implemented in conjunction with those below.
- Notification requirement. Such a positive obligation would better assist consumers and small businesses to make informed decisions about cancelling or continuing a subscription. However, it would need to be framed in a way that ensured that the notification is provided within a sufficient time period to allow consumers to make a considered decision. Further, given that consumers and small businesses are time poor and could miss email notifications, or such notifications may get diverted to junk mail, the ACCC considers that this option would need to be implemented in conjunction with the others.
- Opt-in requirement. The ACCC supports this option to ensure that consumers and small businesses have genuine choice as to whether they wish to enter into a paid subscription or membership after a free trial or introductory offer period.
- Removing barriers to cancelling a subscription by introducing a requirement that businesses make the process for terminating a subscription as straightforward and easy as the process for subscribing to it. As noted earlier in this submission, consumers and small businesses are experiencing harm when businesses employ manipulative user interface design to steer consumers away from cancelling, and/or impose time-consuming or burdensome requirements on consumers in order to cancel. This harmful conduct would remain if only the disclosure and notification options were implemented, and the opt in option would have limited utility to subscriptions that don't involve a free trial or introductory offer period.

The ACCC supports the proposed four options being implemented in combination. In particular, we consider the reform option that would require businesses to make the process for terminating a subscription as straightforward and easy as the process for subscribing is a critical reform in addressing harm from subscription-related conduct. This reform should be holistically framed to prevent the full range of difficulties consumers and small businesses experience in cancelling subscriptions, as noted above. In this regard we note that even if businesses implement easy processes for cancelling, the existence of prohibitively high cancellation fees will act as constructive barrier to cancelling. A failure to address this issue may frustrate the policy objectives of the reform.

The ACCC considers the policy objective for this reform should be about establishing a normative standard of fair conduct across the economy for subscriptions and memberships. For this reason, the ACCC considers reforms should apply to all businesses that offer

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<sup>21</sup> October 2019, [Disclosure: Why it shouldn't be the default](#), a joint report from ASIC and the Dutch Authority for the Financial Markets

products or services using a recurring payment model. Exemptions for certain sectors would risk creating gaps in the law and would likely create confusion for consumers and small business about the protections they have with any specific subscription.

The four options, in combination with a general unfair trading prohibition, would strengthen protections for consumers and small business from unfair subscription-related practices. In addition, we note the proposed option to address barriers to accessing customer support (discussed below), would also complement the subscription-related proposed reforms.

The ACCC supports the full range of remedies, including seeking civil pecuniary penalties through court proceedings, being available to ACL regulators to take action for potential breaches of these proposed subscription-related requirements.

## Drip pricing practices

As the consultation paper notes, drip pricing is currently regulated by several provisions in the ACL. Section 48 of the ACL prohibits businesses from disclosing part of the price for a good or service without also disclosing the minimum quantifiable price (as a single figure), at least as prominently as the part price representation.<sup>22</sup> The minimum quantifiable single price must include any additional charges that a consumer can't avoid paying in order to make the purchase. If businesses pre-select any optional fees or charges for customers during the purchasing process, they also need to include those fees or charges in the representation of the minimum quantifiable single price, unless and until the pre-selected fees or charges are de-selected by the customer.<sup>23</sup>

If a transaction includes mandatory charges that can't be quantified on a per item basis at the time the business represents the price of the product or service, this amount does not need to be included in the minimum quantifiable single price in order for a business to comply with section 48. For example:

- delivery costs may be unable to be quantified until a customer enters delivery details later in the transaction.
- a handling or booking fee might apply to transactions regardless of the amount of items purchased in the transaction. In this situation, the business is unable to quantify the whole of transaction fee as part of the price represented for each item, as the per item amount will vary depending on how many items are purchased.

In addition, drip pricing practices are often captured by general provisions in the ACL which prohibit businesses from:

- engaging in conduct that is misleading or deceptive conduct, or likely to mislead or deceive (section 18)
- making a false or misleading representation with respect to the price of goods or services (section 29(1)(i)).

The ACCC has taken a range of compliance and enforcement action to address harmful drip pricing practices, including:

- In November 2024, the ACCC commenced proceedings against [Webjet](#) in the Federal Court alleging that Webjet made false and misleading representations to consumers about flight prices and bookings by failing to adequately disclose Webjet's compulsory

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<sup>22</sup> This requirement has existed since section 53C was introduced into the *Trade Practices Act* in 2009.

<sup>23</sup> Section 48(7) of the ACL.

'Webjet servicing fee' and 'booking price guarantee' fee in the advertised minimum price of airfares.

- In October 2020, the Federal Court ordered online ticket reseller [Viagogo](#) to pay \$7 million in penalties for multiple breaches of the ACL, including failing to adequately disclose additional compulsory fees, including a 27.6% booking fee which applied to most tickets.
- In March 2019, the Federal Court ordered internet provider [Activ8me](#) to pay \$250,000 in penalties for multiple breaches of the ACL, including not adequately disclosing that a set up fee of \$99.95 applied if consumers didn't sign up to a 12-month plan.
- In March 2017, the Federal Court ordered [Jetstar](#) to pay \$545,000 and [Virgin](#) to pay \$200,000 in penalties after finding that the airlines made false or misleading representations about some advertised airfares, by failing to adequately disclose their additional booking and service fees until after consumers had moved through a number of stages of the booking process.
- In October 2015, the ACCC accepted court enforceable undertakings from [Airbnb and online travel agency eDreams](#) for the businesses allegedly failing to adequately disclose mandatory fees to consumers on their online booking platforms. The ACCC considered there were occasions where Airbnb failed to adequately disclose a mandatory service fee and also a cleaning fee (where applied by an accommodation host) on search results pages and accommodation listing pages on its website, mobile site and apps. The ACCC also considered that eDreams failed to adequately disclose its mandatory service fee and payment fee on certain booking pages of the eDreams mobile site and app, and on particular pages of its website, didn't specify single total prices inclusive of the mandatory service fee and payment fee, in circumstances where those fees were quantifiable at the time of the price representations.
- In November 2014, [Ticketek and Ticketmaster](#) agreed to improve their online pricing practices in response to concerns raised by the ACCC. Both companies changed practices to include their minimum payment processing fees into the per ticket prices they displayed on their websites. Both companies also changed their practices to incorporate the service/delivery fee (in the case of Ticketek) and the handling fee (in the case of Ticketmaster) earlier in the online booking process as soon as the fees are calculable. In the case of Ticketek, this was when the customer has selected the number of tickets and delivery method. In the case of Ticketmaster, this was when the customer has selected the number of tickets.

Although the ACCC continues to take active compliance and enforcement action against drip pricing practices, we consider that amendments to the ACL could help improve business practices to deliver benefits to both consumers and competition.

## Mandatory whole of transaction fees should be disclosed prominently and upfront

The ACCC considers that the ACL could contain a specific positive obligation on businesses to disclose upfront and prominently any whole of transaction fees, i.e. fees charged on a per-transaction rather than per-item basis. This positive disclosure obligation should require businesses to:

- disclose the fact that any whole of transaction fees will be charged, and the amount that will be charged
- make this disclosure upfront – i.e. as early in the transaction as the business becomes aware that the whole of transaction fee will apply to the transaction, and

- make this disclosure prominently (i.e. not in fine print, and not via means that require consumers to take an additional step such as clicking through to another webpage or pop up).

While whole of transaction fees do not form part of the minimum quantifiable amount for the purposes of compliance with section 48 of the ACL, these are costs that consumers need to be aware of to make informed purchasing decisions. The same policy reasons that underlie section 48 also apply to needing businesses to disclose any whole of transaction fees upfront and prominently. Once a consumer selects an advertised product or service and begins the payment process, the behavioural economic theory of “loss aversion” suggests that consumers form an expectation and attachment to the idea that the purchase will be completed.<sup>24</sup> By the point that non-optional prices are “dripped”, and the consumer realises the product or service is more expensive than advertised, terminating the transaction can feel like a “loss”.<sup>25</sup> This makes the disclosure of all non-optional fees – including whole of transaction fees – an important safeguard to protect consumers from paying more than they initially intended or expected to in a transaction.

The quality of disclosure is particularly important given the increasing use of mobile devices to make transactions. Consumers risk missing a disclosure if it is not prominently displayed, especially people with low vision, or who struggle to navigate online booking systems for other reasons.

## Amending section 48 of the ACL to require the minimum quantifiable amount to be the most prominent price display

Currently, section 48 prohibits businesses from disclosing part of the price for a good or service without also disclosing the minimum quantifiable price (as a single figure), at least as prominently as the part price representation. This essentially permits a business to make a part price representation that is equal in prominence as the representation the business also makes about the total minimum quantifiable price.<sup>26</sup> The ACCC considers that section 48 should be amended to require the total minimum quantifiable price to be the most prominent representation of the price for a good or service that a business makes in its advertising and during a transaction process.

These two amendments would deliver benefits to consumers and small business customers, who will be in a better position to meaningfully compare the total amount they will need to pay for any product or service. This would set an improved standard for business behaviour and promote better conduct where businesses cannot obfuscate their pricing, thereby better enabling competition on the merits.

## Dynamic pricing

Dynamic or in-demand pricing refers to the use of a flexible revenue management pricing strategy based on real-time, or close to real-time, supply and demand factors to price products and services according to those factors. It is commonly used in some markets with highly perishable services, such as for ridesharing, accommodation, and airfare tickets, and has been used in these markets for years. While it results in higher prices during periods of

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<sup>24</sup> Daniel Kahneman and Amos Tversky, *Econometrica* (1979) *Prospect theory: analysis of decision under risk*; Brendan Markey-Towler, *The Conversation* (21 August 2018) *Explainer: what is loss aversion and is it real?* (accessed 26 November 2024).

<sup>25</sup> Ralf Steinhauser (2023) *Junk fees and drip pricing: underhanded tactics we hate yet still fall for*, *The Conversation* (accessed 25 November 2024).

<sup>26</sup> Subsections 48(1) and 48(5) of the ACL.

peak demand, dynamic pricing can also provide benefits to consumers in circumstances where prices decrease for purchases made during “out-of-season” or “non-peak” periods.

As the consultation paper notes, the practice of dynamic pricing is not, in and of itself, illegal under the ACL. However, businesses must not engage in misleading or deceptive conduct, or make false or misleading representations about the prices that customers will have to pay, including when they use dynamic pricing.

The consultation paper proposes to address harm from dynamic pricing by introducing a specific prohibition in the ACL on businesses increasing the price of a product during a purchasing process. While the markets referred to earlier use dynamic pricing, their prices don’t change during the transaction, but rather separate customers seeking to purchase within hours or even minutes of each other may receive different prices.

Internationally, there has been increased attention on the issue with examples of dynamic pricing in the events sector. For example, consumers in the UK have alleged that prices for a recent Oasis tour had increased significantly higher than they were expecting by the time they worked their way through the online queue.<sup>27</sup> The UK Competition and Markets Authority is now investigating whether the ticket sale may have breached the UK’s consumer laws.<sup>28</sup> There has been limited use of dynamic pricing in the events sector in Australia to date.

The conduct of increasing prices during a transaction is likely to already be covered by the ACL prohibitions on engaging in misleading or deceptive conduct and on making false or misleading representations as to price:

- Where a business represents in its advertising, or at the start of a transaction, that the price of a product or service is \$X but the customer is charged \$Y, this would mean the representation that the product or service was \$X is misleading.
- Similarly, where a business represents in its advertising, or at the start of a transaction, that the price of a product or service is “from \$X”, but due to the use of dynamic pricing, no customer is able to obtain the product or service for \$X, the representation that the product or service was “from \$X” is misleading.

Accordingly, the ACCC does not consider it necessary to introduce a specific prohibition in the ACL to address this conduct. The ACCC continues to monitor the use of dynamic pricing closely to check for conduct that may breach the ACL.

To the extent there may be harm caused by the use of dynamic pricing practices, which is not captured by existing provisions of the ACL, the ACCC considers that the proposed general unfair trading practices prohibition would also provide an additional protection against such harm. A general unfair trading practices prohibition would have the additional benefit of allowing the harm arising from a particular business model or practice to be considered holistically, where dynamic pricing practices may be involved.

In addition, the ACCC considers there may be practical challenges in determining the boundaries of when the purchasing process commences and finishes in particular settings. As an example, it may be difficult to ascertain when a purchasing process commences when a transaction occurs in a physical store.

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<sup>27</sup> <https://www.abc.net.au/news/2024-09-06/dynamic-pricing-is-coming-to-australia/104305176>

<sup>28</sup> UK CMA 5 September 2024 media release, <https://www.gov.uk/government/news/cma-launches-investigation-into-ticketmaster-over-oasis-concert-sales>



## Online account requirements

The ACCC acknowledges that businesses requiring consumers to provide unnecessary personal information for an online transaction can increase risks for consumers if personal information is inappropriately managed, and can expose consumers to data breaches and an increased risk of exposure to scams. Consumer concern with the unnecessary collection of personal data for online transactions has been raised consistently in the ACCC's Digital Platforms Inquiry and Digital Platforms Services Inquiry.<sup>29</sup>

Introducing a requirement in the ACL to require retailers to provide a 'guest' check out option may be an effective measure to address these concerns.

The ACCC supports the introduction of a fair and reasonable test in the Privacy Act for the collection, use and disclosure of personal information. The ACCC considers that the framing of such a test must have reference to what is fair and reasonable in relation to the average consumer, noting that most consumers do not read long and complex privacy policies, and generally have a limited understanding of how their data is used within businesses or shared with other businesses. Consumers' privacy interests must be prioritised, rather than undue weight given to the commercial needs of companies that earn revenue by commercialising consumer information and data.<sup>30</sup>

The ACCC also notes that the proposed general prohibition on unfair trading practices could play a complementary role to the Privacy Act and any reforms to it. As noted above, the proposed principles-based general unfair trading practices prohibition would allow the harm arising from a particular business model or practice to be considered holistically, including where harmful data management practices may be involved.

## Barriers to accessing customer support

The ACCC supports reform to the ACL that would help address detriment arising from businesses failing to provide adequate access to customer service support.

We regularly see consumers and small businesses experiencing issues with accessing customer service support, including:

- poor or limited communication (for example, not responding to emails, taking a significant time to respond to emails, or providing automated responses that don't actually answer the question or address the issue)
- long call-centre wait times, sometimes with no call-back option
- generally not having an accessible method to contact a business.

While harm caused by barriers to accessing customer support service occurs across most sectors, it is exacerbated in sectors where there are low levels of competition. Limited competition reduces incentives for a business to invest in overall service provision.

Consumers and small businesses can spend a considerable amount of time and cost in resolving a dispute with a business. In the 2023 Australian Consumer Survey, consumers spent on average 13 hours resolving their most recent problem with a good or service they

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<sup>29</sup>See ACCC, 2024, Digital platforms services inquiry, [Interim report 8: data products and services – how information is collected and used by data firms in Australia](#), and ACCC, 2019, [Digital Platforms Inquiry, Final Report](#), p.382

<sup>30</sup> [ACCC submission to the Privacy Act Review](#), 2023, accessed 3 December 2024.

purchased.<sup>31</sup> As noted earlier, the ACCC considers the following to be examples of unfair practices currently not adequately addressed by existing provisions of the ACL:

- Business practices that seek to dissuade consumers and small businesses from exercising their contractual or other legal rights.
- Systemic actual or effective refusal to provide remedies to consumers and small businesses that they are legally entitled to.

Barriers to accessing customer support services limits the ability of consumers and small businesses to exercise their statutory rights under the ACL, in particular their consumer guarantee rights, and in the case of businesses, their supplier indemnification rights. The ACCC has observed practices where businesses draw out handling of a consumer guarantees or supplier indemnification claim, resulting in the affected consumer or small business losing the will to pursue their claim further, and dissuading them from pursuing future attempts to exercise their rights. The ACCC considers that the current consumer guarantees and supplier indemnification framework in the ACL lacks sufficient incentives for businesses to comply with the law, and we have been advocating for reforms to make it a prohibition for:

- the failure of businesses (whether manufacturers or suppliers) to provide a consumer guarantee remedy when required to under the law, and
- the failure of manufacturers to indemnify suppliers where a consumer guarantee failure falls within the manufacturer's responsibility.<sup>32</sup>

We consider these reforms will generally incentivise better business compliance with the consumer guarantees and supplier indemnification provisions in the ACL, which in turn will assist consumers and small businesses to exercise their rights under these provisions. However, such reforms won't entirely eliminate the practical challenges consumers and small businesses face in exercising their rights. We also note that consumers and small businesses can face challenges in exercising other rights beyond the consumer guarantees and supplier indemnification rights.

The ACCC considers that issues around barriers to accessing customer service support will always need to be assessed in the context of the specific circumstances involved. Consequently, we consider a principles-based general unfair trading prohibition would be an appropriate means to address consumer and small business harm that arises from this conduct. We also consider that examples of conduct in the grey list of conduct which may, depending on the circumstances, satisfy the general prohibition, can also be used to help provide guidance on what standard of conduct could be expected around helping to ensure businesses do not impose barriers to accessing customer support service.

We note that the proposed non-exhaustive grey list is intended to include "impeding the ability of a consumer to exercise their contractual or other legal rights". As noted earlier, the ACCC supports this conduct being included on the proposed grey list, noting that it should also include a reference to 'small business' alongside 'consumer'.

As set out above, the ACCC also considers that the grey list should also include:

- systemic actual or effective refusal to provide remedies to consumers and small businesses that they are legally entitled to

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<sup>31</sup> [Australian Consumer Survey 2023](#), p.73, accessed 29 November 2024

<sup>32</sup> See [ACCC submission](#) to Treasury's 2021 consultation regulation impact statement on improving consumer guarantees and supplier indemnification provisions under the ACL, and the ACCC submission to the Treasury's 2024 consultation on the design of proposed new civil prohibitions and penalties for consumer guarantees and supplier indemnification under the ACL.



- failing to provide an accessible and effective contact point for customer service support.

As also noted earlier, the ACCC strongly supports the general unfair trading prohibition being extended to also cover small business dealings. With respect to this issue, small businesses experience similar harms to consumers arising out of barriers to accessing customer service supports.

# Appendix A

## Key gaps in existing provisions in the CCA/ACL

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.</p> <p>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>33</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>34</sup></p> <p>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.</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.</p>	<p>These provisions do not apply to conduct that is significantly harmful but does not meet the high threshold of being unconscionable.</p> <p>Conduct that is objectively harsh, unfair, unjust, or wrong<sup>35</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</p>

<sup>33</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>34</sup> ACCC v AGL South Australia (2014) FCA 1369; Addenbrooke Pty Ltd v Duncan (No 2) (2017) 348 ALR 1.

<sup>35</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]

<p>Generally, conduct will be prohibited when it is against good conscience, as judged by the norms of society.</p>	<p>"lower moral or ethical standard than unconscionability".<sup>36</sup></p> <p>In 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 <i>"Certainly, Medibank acted harshly. And I am also prepared to conclude that it acted unfairly. But this is not enough to establish statutory unconscionability."</i><sup>37</sup></p> <p>Additionally, in the recent High Court judgment of <i>Productivity Partners</i><sup>38</sup> Steward J, stated that the concept of moral obloquy, or a form of moral turpitude, endures as an essential attribute of unconscionable conduct. His Honour went on to state that the term "moral obloquy" is useful in making it clear that the doctrine of unconscionable conduct is not merely about characterising commercial behaviour as "unfair" or "unjust".<sup>39</sup></p> <p>The ACCC has also 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.</p>
<p>Section 23 prohibits the use of unfair contract terms in standard form consumer and small business contracts. The prohibition applies to contracts entered into or renewed, or terms varied, from 9 November 2023 onwards.</p> <p>Section 23 also provides that terms in standard form consumer and small business contracts that are unfair are void.</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>

<sup>36</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 at [363]-[364]

<sup>37</sup> *Australian Competition and Consumer Commission v Medibank Private Limited* [2018] FCAFC 235 [353] (Beach J)

<sup>38</sup> *Productivity Partners Pty Ltd (t/as Captain Cook College) v ACCC; Wills v ACCC* [2024] HCA 27.

<sup>39</sup> *Productivity Partners Pty Ltd (t/as Captain Cook College) v ACCC; Wills v ACCC* [2024] HCA 27 [286]

<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>
<p>The Competition and Consumer Act 2010 (Cth) includes several prescribed industry codes of conduct.</p>	<p>Industry codes set out standards for specific conduct within a particular industry and may be mandatory or voluntary.</p> <p>Such codes of conduct are intended to address specific problems within particular industries or sectors, and are specifically tailored to those industries or sectors. As such, they do not establish a broad norm of behaviour that applies across different sets of circumstances, and for all participants in all sectors across the economy. They are less adaptable to evolving commercial practices than a principles-based unfair trading practices prohibition would be.</p>