Submission in response to Unfair Trading Practices consultation

20 December 2024

australia new zealand screen association

anzsa.film

ABOUT ANZSA

This submission is made on behalf of the Australia New Zealand Screen Association (ANZSA). ANZSA represents the film and television content and distribution industry in Australia and New Zealand, and includes Motion Picture Association; Amazon Studios LLC; Walt Disney Studios Motion Pictures; Netflix, Inc.; Paramount Pictures; Sony Pictures Releasing International Corporation; Universal International Films, Inc.; Warner Bros. Pictures International, a division of Warner Bros. Entertainment Inc.

ANZSA's core mission is to advance the business and art of filmmaking, increasing its enjoyment around the world and to support, protect and promote the safe and legal consumption of movie and TV content across all services.

INTRODUCTION

ANZSA appreciates the opportunity to comment on the Unfair Trading Practices Consultation Paper ("**the Paper**").

Subscription Video on Demand services ("**SVOD**") have introduced a new model for viewing screen content, offering consumers the ability to choose what they want to watch from a library of thousands of films and TV series, whenever they choose to watch it.

Our member companies devote significant resources to designing and continually improving the customer experience. This means designing user interfaces which are intuitive, easy to use and aesthetically appealing. When a potential subscriber visits one of our member company websites and/or apps, our members want to ensure that they are provided with the information needed to select the plan that is right for them and their families. When a subscriber navigates one of our member companies' services, it's important for it to be as easy as possible for them to find the right content—for the right moment—for them and their families. And if a subscriber decides to cancel their subscription, our members want this to be as straightforward and accessible as possible. A subscriber may decide to cancel and rejoin again in the future.

Consumers have embraced the SVOD model: Telsyte reports that Australian households have taken out 25.3 million SVOD subscriptions, growing 4% year on year.[1] At the same time, Australians are finding it easy to change the composition of services they choose to subscribe to, with a 2023 market survey showing 1.62 million new subscriptions taken out and 1.25 million subscriptions cancellations in a three month period,[2] with another survey showing churn rates up to 15% of the entire subscriber base for one SVODs.[3] This clearly demonstrates that the highly competitive SVOD market delivers for consumers today.

[1] Telsyte, 2 September 2024, https://www.telsyte.com.au/announcements/ad-supported-streaming-surges-as-australians-seek-budget-friendly-entertainment
[2] Kantar, 1 August 2023, https://www.kantar.com/inspiration/technology/both-new-sign-ups-and-cancellations-rise-in-the-australian-streaming-market
[3] Kantar, 31 July 2024, reporting that Stan suffered 15% churn rate, https://www.kantar.com/inspiration/technology/avod-gains-momentum-as-australian-streamers-seek-more-value

The Paper seeks feedback on the introduction of new general and specific prohibitions for the Australian Consumer Law ("**ACL**"). ANZSA's positions can be summarised as follows:

1. ANZSA supports a general prohibition for unfair trading practices that is principles-based, tech-neutral and works harmoniously with existing statutory protections. To that end, ANZSA suggests some amendedments to the general prohibition proposed by Treasury that addresses the concerns raised in the Paper whilst aligning with the above principles;

2. Treasury should continue to refine its understanding of, and approach to, the issue of dark patterns as international approaches to, and the evidence base of harm caused by, dark patterns are still emerging;

3. The proposed "grey list" includes matters that are likely to be covered by existing laws and including it may reduce the role of the general prohibition; and

4. If a general prohibition for unfair trading practices is introduced, ANZSA does not support the introduction of specific prohibitions as this risks over-regulation given that many unfair trading practices are capable of regulation under the existing provisions of the ACL.

Each of these matters are each outlined in more detail below.

1. GENERAL PROHIBITION

ANZSA supports the introduction of a general prohibition for unfair trading practices which is principles-based, tech-neutral and works harmoniously with existing statutory protections.

However, we are concerned that the general prohibition proposed in the Paper poses significant compliance risks for business. We believe an alternative approach would mitigate these risks while still meeting Treasury's objectives, as discussed below.

The general prohibition proposed in the Paper introduces legal concepts that are foreign to Australian jurisprudence and which are vague and subjective. In its proposed form, businesses and their advisors will struggle to design business and consumer processes and systems with confidence until a sufficient body of case law is developed. Further, if the general prohibition is not drafted thoughtfully, these reforms will shift commercial norms for Australian businesses, carrying unintended litigative and regulatory consequences and stifling innovation.

These risks are difficult to justify when the ACL already has a comprehensive array of consumer protections. Australia has the toughest prohibitions in the world on false, misleading and deceptive conduct, unique consumer guarantees protections, broad and emerging unfair contract terms protections and the fallback of unconscionable conduct prohibitions.

Much of this regulation is supported by very high penalties of $50M/30% of turnover, which already cause our members to take extra care and incur significant compliance costs with respect to their operations in Australia.

In that context, any new general prohibition should be carefully crafted to avoid an unreasonable compliance burden and should allow for a suitable introductory period before pecuniary penalties are enforced.

Recognising Treasury's commitment to a new general unfair trading practices provision, ANZSA submits that the general prohibition should be amended to establish a clearer legal framework for businesses,

consumers and courts, and minimise overlap with existing remedies available for unfair trading practices in the ACL.

This could be achieved by amending the clause to include language familiar to the ACL, so that the prohibition is better equipped to objectively assess the harm of unfair trading practices on a 'reasonable' consumer. In particular, we would suggest removing references to 'unreasonably' distorting consumer decision making and 'manipulates', as these terms are not established under the ACL and would likely increase uncertainty and complexity for industry.

We would also support the incorporation of the alternative proposal set out in Question 4 of the Paper – that is, of "only capturing conduct where it is not reasonably necessary to protect the business's legitimate interests." This would provide a clear threshold test for businesses that is consistent with the language for unfair contract terms in section 24(1)(b) of the ACL.

If the general prohibition as amended is accepted, ANZSA submits there is a higher chance that the risks of unfair trading practices not currently captured by the ACL, including emerging concerns about dark patterns, will be better managed. See further commentary on dark patterns below.

2. GREY LIST

ANZSA submits that the amended general prohibition put forward in this submission should not be accompanied by a "grey list". The proposed "grey list" includes matters that are likely to be covered by existing laws in the ACL (as illustrated by the following table) and may serve to reduce the role of the general prohibition.

Grey List	Existing ACL Protection
the omission of material information	Section 18 and 29. The omission of material information is clearly misleading and deceptive conduct.
the provision of material information to a consumer in an unclear, unintelligible, ambiguous or untimely manner, including the provision of information in a manner that overwhelms, or is likely to overwhelm, a consumer	Section 18 and 29. This is clearly misleading and deceptive conduct and, in some circumstances, may be unconscionable conduct.
impeding the ability of a consumer to exercise their contractual or other legal rights,	Sections 29(m) and (n) cover the same territory.
use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision	This may be covered by section 18 and 29 and adds little to the general prohibition.[4]

[4] This behaviour described in the proposed "grey list" specifically targets online businesses, even though the stated elements may also be present in physical consumer interfaces such as shopping centres, entertainment precincts and retail stores. This is not inline with the technology neutral framework of the ACL.

3. DARK PATTERNS

We believe the amended general prohibition sufficiently covers the concerns and practices identified as 'dark patterns' in the Paper. However, we would encourage Treasury to continue to refine its understanding of and approach to dark patterns alongside any reforms, particularly as it relates to the following:

a. An evidence-based, risk-tiered approach.

Policymakers in many jurisdictions are turning their attention to the question of 'dark patterns' in the context of digital user experience design. While approaches differ, the core of each jurisdiction's definition of dark patterns is the notion of deceptive or manipulative **'intent'** on the part of the service provider. The nature of 'intent' is broad and ambiguous. Further, it may be difficult for a regulator or a business to distinguish an ordinary commercial practice from a prohibited dark pattern.

In order to address this fundamental ambiguity, we recommend the focus of any regulatory approach shifts emphasis from attempting to deduce intent from a given feature of online choice architecture to understanding and evidencing whether consumer harm has taken place.

This is the approach pursued by the OECD,[5] which recognises that the evidence base around the impact of dark patterns is still lacking:

"while many commentators have pointed to the harmful impacts of dark patterns on consumers, the empirical evidence to support such claims is still emerging…an understanding of the effects on consumer decision-making of different dark patterns and the resulting harms is vital to guide consumer policy makers and enforcers in prioritising which dark patterns to address."[6]

In order to move towards an evidence-based, risk-tiered approach to dark patterns, we recommend further study of specific, problematic trade practices—with a focus on quantifiable, concrete consumer harms that may result. This will ensure limb (b) of the proposed general prohibition - which maintains the material detriment limb proposed by Treasury - can be met.

Without such an approach and a deeper understanding of relevant harms, the line between a dark pattern (e.g., *"interfaces that unduly pressure. . . a consumer in making an economic decision"*[7]) and an ordinary commercial or marketing effort intended to promote a given good or service or a design element intended to make it easier for a consumer to make a choice among available options is blurred. The lack of a consistently discernable or objective difference will place an unreasonable compliance burden on businesses that could result in confusion and uncertainty, a less consumer friendly user experience and the stifling of innovation.

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[5] The OECD categorises personal consumer detriment (harms) from dark patterns into three broad categories: **(1) financial loss, (2) privacy harms, and (3) psychological detriment and time loss**. The OECD recognises that harms can be cumulative when multiple dark patterns are employed and are often interrelated. [OECD. (2022). Dark commercial patterns. OECD Digital Economy Papers, No. 336. OECD Publishing. https://doi.org/10.1787/9d8d9e7e-en

[6] OECD, November 2022, *Dark Commercial Patterns*, p. 21, https://one.oecd.org/document/DSTI/CP(2021)12/FINAL/en/pdf

[7] Treasury, November 2024, *Unfair Trading Practices*, p. 15, https://treasury.gov.au/sites/default/files/2024-11/c2024-602157-cp.pdf

b. The definition of dark patterns

While we appreciate Treasury's discussion of the contours of a 'dark pattern', we suggest studying the OECD's proposed definition of dark patterns which emphasises that *"[t]he full definition appropriate in a particular setting may depend on its intended use and the broader policy, legal or technological context".*[8] In other words, what may be a dark pattern in one specific context or use case may in another context be deemed not to be a dark pattern, but instead an ordinary commercial practice.

This distinction is critical, as it may be difficult for a regulator or a business to distinguish an ordinary commercial practice from a prohibited dark pattern. For example, the Paper asserts that *"pre-selected checkboxes . . . can make it easy for consumers to confirm* ***business-favoured*** *choices."*[9] Pre-selection along with a presentation of options with context may also help consumers to easily navigate through the purchase flow.

It is a common and completely legitimate business practice to highlight certain services or products over others. This can help customers identify which plan is most commonly selected by other consumers, or may indicate the most affordable plan. The same approach is taken in supermarkets which place products at eye level or at the checkout in the supermarket. It therefore should not be assumed that pre-selection *per se* is in the best interest of business or a dark pattern, unless it can be demonstrated that pre-selection is designed to mislead or deceive consumers and or may result in material harm.

4. SPECIFIC PROHIBITIONS

In supporting an amended general prohibition, ANZSA does not support the introduction of specific prohibitions for unfair trading practices for similar reasons as to why it does not support the "grey list" (see above).

ANZSA foresees the introduction of specific prohibitions as risking the over-regulation of certain harms and deterring business innovation. This is particularly so given several unfair trading practices identified in the Paper cover conduct which is likely to be in breach of existing provisions of the ACL. For example, existing legal proceedings on subscription service-related harms have been instituted using sections 18 and 29 of the ACL (e.g., Hipages Group Pty Ltd, eHarmony Inc.).

If accepted, ANZSA's proposal of an amended general prohibition should reduce the risk and harms arising from unfair trading practices not currently captured by the ACL.

Should Treasury decide to pursue specific prohibitions, it is critical this are designed with the following principles in mind:

- **Avoid interference with the customer experience.** ANZSA's members are constantly designing user interfaces which are intuitive, easy to use and aesthetically appealing. This is

[8] "Dark commercial patterns are business practices employing elements of digital choice architecture, in particular in online user interfaces, that subvert or impair consumer autonomy, decision-making or choice. They often deceive, coerce or manipulate consumers and are likely to cause direct or indirect consumer detriment in various ways, though it may be difficult or impossible to measure such detriment in many instances. **The full definition appropriate in a particular setting may depend on its intended use and the broader policy, legal or technological context.**" https://www.oecd.org/en/publications/dark-commercial-patterns_44f5e846-en.html

[9] Treasury, November 2024, *Unfair Trading Practices*, p. 10, https://treasury.gov.au/sites/default/files/2024-11/c2024-602157-cp.pdf

informed by research about consumer needs and their expectations on how and what information is provided to them across the customer journey. For example, consumers generally want service providers to communicate with them only when it is strictly necessary. We would therefore recommend that reforms are informed by research and do not introduce overly prescriptive obligations that may degrade the customer experience.

- **Enables flexibility and innovation.** Reforms should allow sufficient flexibility to respond to changing market dynamics and protect consumer choice, competition and innovation. Reforms should also not be so prescriptive that they prevent new services from entering the market, creating the perverse outcome that competition is reduced.

- **Harmonisation with existing international regimes.** As global service providers, our members comply with regulations across multiple jurisdictions. When regulations differ materially from one country to another, it creates compliance challenges and significantly increases the cost and complexity of doing business. Additionally, consumers may be confused if regulatory requirements that differ from one jurisdiction to another results in the look and feel of our members' services being different from one country to another. We therefore encourage Treasury to harmonise Australia's approach with international precedent and best practice in order to enhance consistency across jurisdictions, thus minimising the compliance burden for global businesses and minimising consumer confusion.

Consequently, should Treasury decide to seek to introduce specific prohibitions, ANZSA would encourage Treasury to pursue the following approaches to subscription-related practices and online account requirements, which are of most relevance to our members:

- **Subscription-related practices.** ANZSA would support option 4 (removing barriers to cancelling a subscription) and option 1 (pre-sale disclosure of material), in principle. These options provide sufficient flexibility to provide easy cancellation in the manner that fits within their services. ANZSA submits that options 2 and 3 may have unintended consequences that are detrimental to the consumer; for instance SVOD services may increase the minimum subscription term.

- **Online account requirements.** While we understand that account creation for one-off purchases may be considered onerous, it is important to recognise that account creation for subscription services —even in instances of free trials— is a fundamental aspect of subscriber onboarding for personalised VOD services. Without the creation of accounts, it would be impossible to trace fraudulent use cases or to offer a personalised experience to the relevant consumer.

ANZSA appreciates the opportunity to provide you with these comments. We remain ready to provide further information should this be of assistance.

Paul Muller
Chief Executive Officer