

BCA

Business Council of Australia

# Unfair Trading Practices – Supplementary Consultation

Submission to Treasury

December 2024

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# 1. Key issues

The Business Council of Australia (BCA) welcomes the opportunity to make a submission to Treasury's supplementary consultation paper on Unfair Trading Practices. The BCA previously made a submission to Treasury's initial consultation Regulatory Impact Statement in 2023.<sup>1</sup>

## ***The wider economic context***

Businesses across the Australian economy are currently experiencing a significant increase in the regulatory burden which impacts business activities, dynamism and long-term investment decisions and performance. At a time when business is calling on governments to focus on measures which enhance Australia's productivity and performance, regulatory measures which are overly and unnecessarily costly and complex will act as a drag on investment and innovation. Progressing any legislative changes without undertaking a comprehensive policy development or assessment process that follows best practice principles is irresponsible, wrapping businesses up in considerable uncertainty without demonstrating the proportionate gains to consumers. The Office of Impact Analysis (OIA) outlines this process in detail for new policies.<sup>2</sup> The BCA acknowledges the consultation regulation impact statement process that Treasury has undertaken including the supplementary consultation. However, the BCA is concerned that absent undertaking a comprehensive and detailed "gap analysis" of existing laws that the consultation process is flawed and not in the interests of consumers or businesses.

## ***Comprehensive 'gap analysis' remains a critical and missing element in Treasury's consultation***

The BCA previously submitted to Treasury that further work be undertaken to clarify the nature of the conduct that is thought to give rise to a particular consumer harm and that potential harms should be mapped against the Australian Consumer Law (ACL) and other legislative protections to determine whether gaps exist and their materiality. The BCA is not aware that the Treasury have prepared such analysis which is crucial to assessing whether amendment to existing laws is warranted. In fact, we believe that the assertion that there are gaps in ACL is not supported by an analysis of the ACL. Specifically, Australia already has extensive consumer protections, including:

- misleading and deceptive conduct;
- unconscionable conduct;
- unfair contract terms;
- bait advertising;
- unsolicited consumer agreements;
- harassment and coercion; and
- offering rebates, gifts and prizes

Detailed analysis by BCA membership of the overlap between the issues identified in the Consultation Paper and the ACL is contained at **Appendix A**. That Appendix confirms that if there are gaps, they are minor. We recommend that the Government conducts a more detailed assessment of whether there are any gaps in the law and uses that review to consider which of the various reform proposals are appropriate.

## ***Unfairness based on the EU Unfair Commercial Practices Directive (UCPD)***

The BCA notes that Treasury proposes adapting the second limb of the UCPD. It is instructive that the UCPD was introduced to cover specific so called 'unfair practices'. When the UCPD practices are compared with the ACL

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<sup>1</sup> Business Council of Australia (2023), *Submission regarding Treasury's Unfair Trading Practices Consultation Regulation Impact Statement*, November 2023.

<sup>2</sup> Office of Impact Analysis, "The 7 Impact Analysis Questions", 10 July 2023, <https://oia.pmc.gov.au/resources/guidance-impact-analysis/7-impact-analysis-questions> accessed December 2024.

obligations, it is apparent that Australia’s consumer framework already covers the conduct the UCPD was designed to address.

**Table 1 Comparison of EU Unfair Commercial Practices Directive to Australian Consumer Law**

Unfair Commercial Practices Directive	Australian Consumer Law equivalent
Art 5(3) - referring to particularly vulnerable groups	Unconscionable conduct
Art 6 – misleading actions	Misleading or deceptive conduct
Art 7 – misleading omissions	False or misleading representations
Art 8 – aggressive commercial practice	<ul style="list-style-type: none"> <li>■ Unconscionable conduct</li> <li>■ Consumer guarantees</li> </ul>
Art 9 – harassment, coercion and undue influence	<ul style="list-style-type: none"> <li>■ Unsolicited consumer agreements</li> <li>■ Harassment and coercion</li> <li>■ Offering rebates, gifts, prizes</li> </ul>

### **Multiple-overlapping reforms**

Additionally, the BCA is concerned that there are a plethora of reform processes and consultations on foot which will cut across issues raised in this consultation including the recently announced consultation on a new Digital Competition Regime<sup>3</sup>. **Appendix 2** sets out the current and proposed reforms for the *Competition and Consumer Act* and Australian Consumer Law, since the first Treasury unfair trading practices consultation in November 2023.

## 2. Recommendations

**Recommendation 1** That the Government does not seek to legislate a general prohibition against unfair trading practices noting the extensive protections under existing laws including ACL and noting that there is scope to address any evidenced, systematic and material gaps through targeted measures. The table at Appendix A outlines how each of the proposed provisions of the general prohibition are already captured under the ACL.

**Recommendation 2** That Treasury review and revise proposed items to be included in the ‘grey list’ so that:

- items listed are objectively discernible and set out examples in the commercial context; and
- to the extent that the intent is to provide a ‘grey list’ that these items be incorporated in the explanatory memorandum rather than the legislation itself.

**Recommendation 3** Notwithstanding that the BCA does not support the introduction of a general prohibition of unfair trading practices, should the government introduce requirements for general and specific prohibitions, a staged approach (over a number of years e.g. five years) must be adopted to allow businesses the opportunity to improve their

<sup>3</sup> The Australian Government the Treasury, 2024, “A new digital competition regime: proposal paper”, December 2024, <https://treasury.gov.au/consultation/c2024-547447> accessed December 2024.

compliance and adapt to the new laws. This is especially warranted given the significant penalties that are attached to breaches of ACL.

- Recommendation 4** Without prejudicing BCA’s opposition to the introduction of a general prohibition, Treasury notes BCA’s suggestion to improve the drafting of the proposed general prohibition (see 4.1, Table 3 for detail).
- Recommendation 5** If the Government decides to proceed with specific regulation for subscriptions, that detailed consultation is undertaken on the precise drafting.
- Recommendation 6** That any regulation of subscriptions is confined to pre-sale disclosure and is limited to specified items – pricing, renewal period and the cancellation mechanism.
- Recommendation 7** That no further amendment to ACL is warranted to tackle drip pricing as it is already addressed in consumer law.
- Recommendation 8** Any regulation of dynamic pricing should be limited to requiring transparency around the approach to pricing rather than seek to prohibit its use. The ACCC could consider providing additional guidance to businesses about issues to consider if seeking to implement dynamic pricing.
- Recommendation 9** That no further regulation be imposed given existing and incoming laws (privacy, spam, cybersecurity and anti-scam framework) address the key concerns raised.
- Recommendation 10** If the Government decides to proceed with specific regulation, that detailed consultation is undertaken on the precise drafting.
- Recommendation 11** The Government should not introduce additional regulation concerning access to customer support without further analysis of the problem and its magnitude to be solved. Treasury should undertake additional work, including consideration of responses to the recent consultation on consumer guarantees. Additionally, the ACCC could look to provide guidance to businesses on their obligations under consumer guarantees and feature best practices.
- Recommendation 12** Before embarking on seeking amendments to financial services law, the Treasury:
- notes existing and extensive protections benefiting consumers under existing financial services law and related laws;
  - undertakes detailed and public consultation on the adequacy of financial services laws vis-à-vis ACL including a detailed and comprehensive gap analysis against existing and forthcoming law, and policy changes; and
  - considers the findings and recommendations of the ALRC’s recent review of corporations and financial services regulation and considers progressing reforms on the basis of the report in the first instance.

## 3. Overview of position

### 3.1 General prohibition

The BCA is firmly opposed to the introduction of a general prohibition against unfair trading practices, consistent with our earlier submission. The consultation paper notes the purpose of a general prohibition is “to provide sufficient certainty as to its application while avoiding regulatory overreach or unintended consequences”. However, this is unlikely to be achieved as a general prohibition creates:

- uncertainty for businesses and consumers as it is reliant on concepts and terms borrowed from the European Union and which are not present in Australian courts; and
- increases the cost and complexity for businesses in providing services and products to consumers without providing a material benefit to consumers.

We note that the EU’s approach to consumer protection appears particularly influential in Treasury’s approach to a general protection. First, the EU examples in the consultation paper focus on actions that are deceptive or deceive. Clearly, Australia already has well-established legal precedent concerning misleading and deceptive conduct. Second, the concept of “manipulates” is found in the EU Digital Services Act (DSA), which has no analogue in Australia.

Australia is already experiencing a considerable slowdown in productivity and economic growth following an extended period of rising prices. New laws which add to business uncertainty will only impact future business investment decisions and undermine Australia’s attractiveness as a jurisdiction for testing and deploying innovative products, which is essential for dynamism and productivity. The proposed general prohibition has the potential to create significant uncertainty, making it difficult for business to understand its obligations. For example, how should a business assess the point at which ‘manipulation’ or ‘distortion’ become ‘unreasonable’, in circumstances where the words ‘manipulate’ and ‘distort’ already connote something that is exploitative? Does an unreasonable distortion or manipulation connote malice, falsehood or deception? The uncertainty that arises is particularly concerning when the general prohibition is subject to significant penalties.

To the extent that there is uncertainty for business, there will also be uncertainty for consumers, and both will be dependent on Australian courts to provide clarity. Such an approach will not be timely and will be borne by both consumers and businesses.

**Recommendation 1:** That the Government does not seek to legislate a general prohibition against unfair trading practices noting the extensive protections under existing laws including ACL and noting that there is scope to address any evidenced, systematic and material gaps through targeted measures. The table at Appendix A outlines how each of the proposed provisions of the general prohibition is already captured under the ACL.

### 3.2 A ‘grey list’ does not overcome the uncertainties presented by a general prohibition

The BCA considers further work is needed on the items included in the proposed ‘grey list’ to ensure they would be informative and help to reduce uncertainty. Firstly, the items listed and descriptions should be based on objective standards or enable an objective assessment. To the extent the grey list items incorporate subjective elements or assessments, this does not provide different businesses with different business models the clarity needed to achieve compliance. Secondly, the examples lack the type of tangible, commercial examples that would create clarity.

Separately, a grey list should be just that – not a pathway for a de-facto blacklist of conduct. This could be achieved by the government including these items in an explanatory memorandum; or if they are included in the

proposed legislation, undertaking clearer drafting so that these grey list items are dependent on the facts and an assessment of the conduct overall.

**Recommendation 2:** That Treasury review and revise proposed items to be included in the 'grey list' so that:

- items listed are objectively discernible and set out examples in the commercial context; and
- to the extent that the intent is to provide a 'grey list' that these items be incorporated in the explanatory memorandum rather than the legislation itself.

### 3.3 Penalties

The BCA does not support the Treasury's proposal to implement penalties for breaches of the proposed new provisions at the provision(s) commencement.

Treasury's proposal to impose the maximum penalties available under ACL immediately is particularly concerning given the inevitable uncertainty associated with the proposed prohibitions. We also note the EU's penalty regime is significantly lower (see Table 2). The effect of these differences is amplified noting that private litigants can rely on ACL to seek adjudication of claims in addition to the ACCC.

**Table 2 Consumer Protection Penalties – Australia and Europe**

Australia	EU
Penalties are the greater of: <ol style="list-style-type: none"> <li>a. \$50 million; or</li> <li>b. 3 x the benefit obtained from the conduct; or</li> <li>c. 30 per cent of the adjusted turnover during the breach period if the benefit cannot be determined.</li> </ol>	<ul style="list-style-type: none"> <li>- At least 4 per cent of trader turnover; or</li> <li>- EUR 2 million if turnover cannot be determined.</li> </ul>

In contrast, the unfair contract term prohibition adopted penalties after an extensive period of operation and with the benefit of consideration by the courts. Though there remains uncertainty as to the application of that prohibition, the community is in a vastly superior position to assess and manage compliance risk.

Noting the concerns above, if a new general or specific prohibition are introduced, the BCA recommends that Treasury consider a staged approach, in which there is an initial period during which the prohibitions take effect without any penalty provisions. This approach allows time for the regulator, business and consumers to understand exactly what is required under the new prohibition and for a body of practice to be established so that businesses, and the regulator alike can calibrate their understanding of the scope of any new prohibition and how it applies in practice.

As noted above, a staged approach was taken to introducing the UCT prohibitions into the regime. The UCT regime came into effect in 2010 however, prior to 9 November 2023, it was not an offence to include a UCT in an agreement, and no penalties applied. The transition period enabled a body of case precedent to be developed. It also enabled the ACCC to undertake sectoral/industry reviews for particular conduct and to issue guidance, so

that business had a better understanding of ‘unfairness’ under the UCT. A similar approach could be taken to the introduction of any unfair trading practices provisions.

**Recommendation 3: Notwithstanding that the BCA does not support the introduction of a general prohibition of unfair trading practices, should the government introduce requirements for general and specific prohibitions, a staged approach (over a number of years e.g. five years) must be adopted to allow businesses the opportunity to improve their compliance and adapt to the new laws. This is especially warranted given the significant penalties that are attached to breaches of ACL.**

### **3.4 Specific prohibitions on certain practices**

The BCA is supportive of clear, specific and well-crafted prohibitions on conduct where there is evidenced systemic harm to consumers and where the introduction of a specific prohibition would effectively mitigate that harm. We are concerned about the lack of comprehensive and robust analysis to this end in the consultation materials to date and is why we have advocated for a comprehensive gap analysis to support any law reform.

A well-targeted and specific prohibition affords businesses clarity around the specific practices that are prohibited allowing businesses to ensure their service and product delivery accounts for these prohibitions and eliminating uncertainty. Consumers are more likely to benefit from a specific prohibition as businesses amend their systems quickly and consistently to ensure compliance. Clear and specific prohibitions can also be more easily understood and relied upon by consumers.

In the context of a general prohibition and a grey list, the specific prohibitions should be additive rather than duplicative. Indeed, the Consultation Paper does not attempt to reconcile how a business which complies with the general prohibition could nonetheless find itself subject to a specific prohibition. This stands in contrast to other parts of the Competition and Consumer Act 2010 (Cth) which have antioverlap arrangements.

Finally, we also consider that the specific provisions such as those proposed amount to an almost micro-level intervention in how businesses design their customer experience and organise their businesses. As raised above, this degree of over-regulation in businesses in Australia could have the outcome of Australia being seen as a highly regulated and highly interventionist regime, to the detriment of our ability to attract investment.

## **4. General prohibition**

### **4.1 Main prohibition**

Notwithstanding the BCA’s reasoned position to oppose the introduction of a general unfair trading prohibition, the BCA makes the following additional comments with respect to the proposed general prohibition.

As noted above, the BCA notes that the existing general prohibition text that Treasury has proposed is taken from the EU Directive, with some additional wording changes introduced by Treasury (although there is no explanation for the deviations from the EU Directive).

If Treasury ultimately recommends a general prohibition, noting the BCA comments above, the proposed text will likely result in confusion and legal uncertainty. This arises from the use of similar but different terms and the omission of ways a party could show that the conduct was not ‘unfair’. The BCA considers there is substantial merit in simplifying the proposed clause to mitigate the confusion that will arise and to promote legal certainty.

Further, noting the discussion in the Consultation Paper regarding an inclusion of a legitimate interest test, we agree this would be important to include in any future proposed general prohibition. However, our suggestion regarding its inclusion is limited to the extent it does not replicate section 24(4) (ACL) of the legitimate interest test under the UCT prohibition whereby businesses must positively satisfy that the contract term protects a “legitimate interest” whereby there is an express presumption that the contract term is otherwise unfair. If this

standard was to be duplicated for the general conduct of businesses, it would effectively make all behaviour of the business subject to a "protect legitimate interest" standard. That is an impossibly high standard to meet if it covers all customer interactions, advertising and other commercial activity, would create real and systemic uncertainty across commercial practices and is effectively a reversal of onus – something which the Government recently ruled out in the context of merger reform for good reason.

Accordingly, the BCA proposes the following revised proposed text for a general unfair practices prohibition set out in Table 3 below.

**Table 3 proposed drafting - general prohibition**

Proposed Legislation	Reasons supporting change
<p>(a) <del>unreasonably</del> <u>materially</u> distorts <del>or manipulates</del>, or is likely to <del>unreasonably</del> <u>materially</u> distort <del>or manipulate</del>, the economic decision-making <del>or behaviour</del> of a <u>reasonable</u> consumer, <del>and</del></p>	<ul style="list-style-type: none"> <li>■ 'Unreasonably' replaced with 'materially'. Firstly, this is consistent with the language in Limb (b) and therefore aids certainty. Secondly, it aligns with EU Directive.</li> <li>■ The removal of 'manipulates' aligns with EU Directive. Further, it is unclear what Treasury intended by 'manipulates' in addition to 'distorts'. The terms are similar but dis-similar, suggesting each term has a separate and distinct meaning. Given neither term is used in the ACL, minimising the introduction of new terms will increase certainty.</li> <li>■ We understand the concern is the impact on consumer economic decision-making and believe that is the relevant test. It is also objective, whereas behaviour is subjective and indeed a consumer may change their behaviour in response to numerous circumstances. We note the EU Directive uses a single term here, not two.</li> <li>■ There is uncertainty as to who is a 'a consumer' and the addition is designed to clarify the test is an average consumer. This appears to be implied on p.13 of the <a href="#">Consultation Paper</a>). Further, this change better aligns with the ACL's focus on the reasonable consumer, not any consumer.</li> </ul>
<p>(b) causes, or is likely to cause, material detriment (financial or otherwise) to the consumer; <u>and</u></p>	<ul style="list-style-type: none"> <li>■ This change aligns with the existing ACL and unfair contract terms regime, which aids legal certainty for businesses in Australia as it helps to make an informed decision regarding the application of the relevant regime.</li> <li>■ The material detriment element aims to ensure the proposed prohibition is directed at conduct that is sufficiently serious to warrant penalties.</li> </ul>
<p>(c) <u>is not reasonably necessary in order to protect the legitimate interests of the party engaging in the conduct.</u></p>	<p>This change implements the alternative proposal Treasury indicated in the Consultation Paper. It also aligns with unfair contract terms (s24(1)(c) of the ACL).</p> <p>We also consider (c), given it is drawn from the ACL in respect of the unfair contract terms prohibition, will lead to greater certainty than 'unreasonably'.</p> <p>Importantly, the BCA does not support a concept of legitimate interest that imports section 24(4) for UCT for the reasons set out in the introduction of section 4.1.</p>

The general prohibition would provide that conduct is unfair if it:

- a. *materially distorts, or is likely to materially distort, the economic decision-making of a reasonable consumer,*
- b. *causes, or is likely to cause, material detriment (financial or otherwise) to the consumer; and*
- c. *is not reasonably necessary in order to protect the legitimate interests of the party engaging in the conduct.*

**Recommendation 4:** Without prejudicing BCA's opposition to the introduction of a general prohibition, Treasury notes BCA's suggestion to improve the drafting of the proposed general prohibition as follows: (see 4.1, Table 3 for detail).

## 4.2 Additional comments on "grey list" proposal

The BCA is concerned that the inclusion of a "grey list" in practice becomes a blacklist. We recommend that Treasury considers including either directions in the legislation itself or in the explanatory memorandum that the 'grey list' is indicative, dependant on a review of the relevant conduct overall and not intended to indicate such conduct on its face will contravene the relevant prohibition.

The BCA further recommends that if a 'grey list' is ultimately retained that Treasury focus on objective descriptions of conduct. To the extent that the conduct described veers into subjective concepts and subjective assessments from the perspective of the consumer, that is simply too vague and uncertain to be meaningful to businesses (from a legal certainty perspective) or the courts (from an application perspective).

With respect to the 'grey list' the BCA notes the following. First, there are no real world, practical examples in the proposed grey list, so it is unclear what types of conduct these provisions would apply to. Second, the list includes concepts that are inherently vague and subjective. For example, at what point will a 'design element' be said to unduly pressure or obstruct a consumer in their decision-making? Finally, the list draws from the EU Directive and therefore covers conduct which arguably are already covered by the ACL (see **Appendix A**).

## 5. Specific prohibitions

At a threshold level the BCA observes the following in respect of the proposed specific prohibitions.

First, given the highly prescriptive and very detailed nature of the specific prohibitions, business will be subject to significant compliance costs plus significant associated costs. For example, given the focus of the specific provisions on online businesses, those business will incur cost to redesign their tech-stack, the customer experience, their check-out experience and a host of other aspects of their online business to implement the very specific requirements arising from the specific prohibitions. Those cost will inevitably be transferred to Australian consumers, who are already facing high prices.

Second, give the prescriptive nature of the specific prohibitions, it will mean those provisions may struggle to accommodate technological advancements in the business sector. For example, the specific prohibitions may require ongoing business spend on compliance and technological solutions in relation to practices that change or which are longer a concern give new and innovative services or business models.

Third, and building on work included in Appendix A, there is no clear 'gap' in the law in respect of the conduct referenced in the Consultation Paper that these specific prohibitions are said to address. Further, it is uncertain how these specific prohibitions interact with existing provisions ACL provisions.

Fourth, if despite this submission Treasury determines that a general prohibition is appropriate, it is not clear what gaps remain such that a specific prohibition is needed. Further, there will be a risk of double-jeopardy as

businesses which comply with the specific prohibition may nonetheless fall afoul of the general prohibition (or vice versa). As noted previously, there is no antioverlap proposal in the consultation which is used in other areas of the CCA.

## 5.1 Subscriptions

Considering that it is proposed that penalties accompany these proposed reforms, the BCA is concerned that certain specific prohibitions appear focussed on consumers being inconvenienced, as opposed to suffering financial harm or detriment, the latter being a requirement of the existing unfair contract terms regime.

For example, Treasury notes issues with subscription cancellation processes including navigation difficulties, and being ‘overly complex’ or time consuming. Further, these categories of criticism are not objective but are subjective. What is time consuming for one person may not be for another. It also doesn’t distinguish where the quality of a business model including customer service and ease of subscription are to a business’s commercial advantage. For example, the Consumer Protection Research Centre’s survey relating to subscriptions highlighted that 90 per cent of Australians would likely purchase from the same organisation if cancelling a subscription process was quick and simple.<sup>4</sup> While it is regrettable that there are businesses that seek to adopt such practices, this is not limited to the digital economy and consumers have long “shopped around” based on brand, quality, reputation and customer service.

Another threshold issue is that the breadth of the possible definition of a subscription appears to be so broad (a renewing contract) that it potentially could capture anything from rental agreements, recurrent child care fees, gym memberships through to online products and services. The practicality of requiring the plethora of recurrent contracts to meet many of these options is extremely complicated and doesn’t appear to be proportionate to the problem.

Of the options proposed, some may be workable but are not without challenges.

- **Option 1 (Pre-sale disclosure of material information):** There have been many lengthy debates about the effectiveness of consumer disclosure requirements which have been subject to detailed design, and redesign for specific goods and services including telephony contracts and financial products.<sup>5</sup> This has also been an issue more recently for franchisees as part of the Government’s recent review of the Franchising Code of Conduct.
- **Option 2 (Notification requirement):** For example, a business with a large volume of consumers on a month-to-month subscription plan. This requirement means that business must re-design their tech-stack to ensure existing, new, cancelling members, free-trial members, all receive a monthly communication regarding their account. This volume of email on a repetitive basis may not be informative to consumers, may present an inconvenience, and may not even be read. For customers on month-to-month contract who can then cancel at any time, it is not clear what “harm” other than convenience is being remedied by this proposal.
- **Option 3 (Active opt in requirements):** As with many of the options canvassed, this requires online business only to invest in the redesign of their internal tech-stack and processes, in circumstances where some businesses may already have effective mechanisms that achieve this outcome and/or such conduct would contravene a general prohibition (if that is Treasury’s recommendation).
- **Option 4 (Removing barriers to cancelling a subscription):** In circumstances where the Consultation Paper proposes both a general and specific prohibition, it is not clear why this conduct is not something caught by the general prohibition. If, as the BCA recommends, the general prohibition is removed there may be value

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<sup>4</sup> <https://cprc.org.au/report/let-me-out> accessed 28 November 2024.

<sup>5</sup> Pre-sale notification requirements are set out in the Telecommunications Consumer Protections (TCP) Code at cl 3.2, 4.1.1, cl 4.2, and 4.3. See [Communications Alliance - C628:2019 Telecommunications Consumer Protections \(TCP\) Code](#) A significant further uplift to the TCP Code was released for consultation on 17 December 2024, see: <https://www.acma.gov.au/articles/2024-12/acma-welcomes-tcp-code-consultation>.

in a cancellation obligation, but otherwise this proposal appears duplicative of the general and is a good example of over-regulation. If anything, the Government should avoid prescriptively instructing businesses on how to design their customer experience but rather focus on ensuring there is a clear mechanism to cancel.

The BCA suggests that it would be more constructive to require a simple pre-sale disclosure as to pricing and renewal period, and clear disclosure of the mechanism to cancel.

**Recommendation 5:** If the Government decides to proceed with specific regulation for subscriptions, that detailed consultation is undertaken on the precise drafting.

**Recommendation 6:** That any regulation of subscriptions is confined to pre-sale disclosure and is limited to specified items – pricing, renewal period and the cancellation mechanism.

## 5.2 Drip pricing

As noted by the consultation paper, the ACL already provides protection from engaging in misleading or deceptive conduct or making false or misleading representations as to price and captures drip pricing practices in various ways.<sup>6</sup> Further, we note that the ACCC has successfully undertaken action against businesses believed to be engaging in drip pricing. It is therefore unclear what a specific prohibition would add to existing law and the BCA is concerned that a new law risks adding unnecessary complexity and duplication to existing ACL.

**Recommendation 7:** That no further amendment to ACL is warranted to tackle drip pricing as it is already addressed in consumer law.

## 5.3 Dynamic pricing

The BCA notes that the Treasury paper indicates that dynamic pricing is distinct from surge pricing however the distinction is not well-articulated in the paper. The only distinction that is apparent in the paper is that the price may change during the purchase. However, it is unclear what the implications are, and the problem Treasury is trying to solve for. Is the problem that the final price is unknown until close, like an auction, or that a consumer has not been informed that the price is subject to dynamic pricing? Would dynamic pricing be more tolerable if online ticket queues displayed the 'real-time price' of tickets rather than at the point of purchase where a consumer has arrived at the front of the digital queue?

The paper suggests that dynamic pricing is paired with other tactics to pressure consumers, however some of these practices serve practically as a way of allocating scarce products and services. The alternative would be to have a customer hold a product or service in their 'cart' indefinitely before potentially deciding not to proceed with the product that is in scarce supply. This is not in the interest of other consumers who would like access to that scarce product or service.

Further, the BCA notes that existing parts of the ACL, specifically section 18 (misleading and deceptive conduct), section 29 (false and misleading representation) and section 35 (bait advertising) also cover dynamic pricing.

**Recommendation 8:** Any regulation of dynamic pricing should be limited to requiring transparency around the approach to pricing rather than seek to prohibit its use. The ACCC could consider providing additional guidance to businesses about issues to consider if seeking to implement dynamic pricing.

<sup>6</sup> Consultation paper, p7.

## 5.4 Online account requirements

The BCA notes that the Australian Government is progressing changes to the Privacy Act that will affect the way that businesses collect and use data. This will change the way that many businesses operate in addition to existing protections for the use of information through the *Spam Act 2003* (Cth) as highlighted by Treasury in the consultation paper. The BCA strongly believes that these regulations should be sufficient to address the key concerns of Treasury without adding a specific prohibition.

If the Government were to introduce specific limits on when businesses can mandate the creation of online accounts (which the BCA believes is not necessary), it would be very important to carefully consider the scope and wording of such regulation.

Further, businesses mandate the creation of online accounts for many legitimate reasons, even in relation to 'once off' transactions. For instance, the online account process is often used to collect and store detailed information to verify the identity and legitimacy of a user, which is critical to ensuring online safety (e.g. to prevent fraudulent or malicious activity). In the case of online marketplaces, the account creation process is often necessary to meet the requirements of multiple parties – including regulators.

In these cases, an individual consumer may view their activity as a 'once off' from their own perspective (and therefore feel like the creation of an account is unnecessary) but they may not appreciate that the account creation process is a necessary step in enabling the operator to properly, safely and compliantly provide services, including by establishing the bona fides of users. This example shows that this area can be more complex than straightforward commercial transactions. It is important to enable providers to require online accounts to ensure they can meet the required level of due diligence that existing legislation and regulation demands of them.

It is worth noting that regulation already exists – indeed is being enhanced – that prohibits inappropriate practices in this area (privacy and spam) or that requires businesses to have in place processes that protect users by collecting and verifying key pieces of information (cybersecurity and anti-scam framework).

In terms of subscription or account-based services more generally, it is reasonable to expect that users sign-up to an online account to obtain continued access to the service (or enable other users to properly use the service).

**Recommendation 9:** That no further regulation be imposed given existing and incoming laws (privacy, spam, cybersecurity and anti-scam framework) address the key concerns raised.

**Recommendation 10:** If the Government decides to proceed with specific regulation, that detailed consultation is undertaken on the precise drafting.

## 5.5 Barriers to accessing customer support

Customer support is often a differentiating element of businesses competing for customers on quality of service. Many businesses strive to provide their customers with a seamless service experience including contact points and information about the fulfilment of the customer's transaction.

The BCA notes that no examples have been provided to demonstrate the limitation of existing laws from addressing circumstances where customers are unable to access support from the businesses they transact with. There is also a lack of clarity in what constitutes a 'barrier': for example, a business deciding not to have in-person or call centre options for consumer support may be an entirely legitimate approach given their products, customers, and cost base. We also note that the issues raised with respect of access to customer support range from fairly objective concerns (i.e. whether there is a point of contact) to subjective concerns (including whether the support is adequate notwithstanding various options the consumer may have to engage with the business).

There is also a strong risk of overregulation depending on what Treasury intends to require of businesses concerning customer support – again, having a point of contact by way of an email address is relatively low cost, but requiring a customer call-centre to operate to respond to all consumer concerns is very costly and potentially unnecessary for at least some customer concerns (e.g. how to access their account, how to change their settings, how to effect a return).

Further it is relevant to note the success of various ACCC proceedings regarding businesses misleading consumers about their consumer guarantee rights such that it is unclear there is a ‘gap’ that supports a specific unfair practices prohibition.

Consumers derive considerable value from businesses which offer products and services at a lower price by dispensing with customer support mechanisms which have a high cost, for example by resolving first-line customer inquiries using searchable online FAQs, crowd-sourced support databases, online videos and virtual customer support agents. If the ACL was to mandate a particular model of customer support with the first-line access point having to be a voice call centre agent, then businesses offering these lower price options are likely to either exit the market or pass through the costs to the consumer. Similarly, if a business that runs a physical storefront chooses to only open on certain days or during certain hours because that is when there is sufficient foot traffic to make the costs of operating worthwhile, the ACL should not mandate opening hours on the premise that customer support is otherwise insufficiently accessible.

Finally, we note the ongoing review of consumer guarantee laws which, if there is a consumer guarantee issue, should be dealt with as part of that process. It is not good regulatory policy to have multiple overlapping reforms where there is an existing legislative requirement that is understood and more easily updated.

**Recommendation 11:** The Government should not introduce additional regulation concerning access to customer support without further analysis of the problem and its magnitude to be solved. Treasury should undertake additional work, including consideration of responses to the recent consultation on consumer guarantees. Additionally, the ACCC could look to provide guidance to businesses on their obligations under consumer guarantees and feature best practices.

## 5.6 Application to small businesses

Without prejudicing the BCA’s position to oppose a general prohibition against unfair trading practices, the BCA considers it prudent to replicate the staged approach to introduction of a new prohibition as per Unfair Contract Terms whereby it was first introduced to consumers (2010) then to business (2016) and finally including penalties (2023).

A staged approach does not in itself overcome the problems associated with a broad prohibition but would allow businesses time to improve their compliance activities to mitigate against the significant risks of non-compliance including reputational risks and significant penalties. A staged approach provides time for courts to consider the application of new law and allows businesses to be better informed concerning their practices.

See Recommendation 3.

## 5.7 Interaction with financial services

The consultation paper contemplates a process of achieving ‘alignment’ between ACL and financial services laws once a settled position on amendments to the ACL is reached. The BCA acknowledges Treasury’s recognition that there are key differences between ACL and financial services law which means adopting similar changes in financial services law requires careful consideration. Nonetheless, as we remain concerned about an absence of comprehensive gap analysis with respect of ACL, we similarly feel it is crucial that a detailed gap analysis is undertaken with respect of financial services laws before any changes are contemplated.

The BCA notes that there is an extensive regulatory framework for financial services consumer protections including:

- Corporations Act (2001) Cth;
- Australian Securities and Investments Act (2001) Cth;
- National Consumer Credit Protection Act (2009) Cth;
- Privacy Act (1988) Cth; and
- Banking Code of Practice

Accordingly, to avoid duplication and added complexity, amendments to financial services law should not automatically follow because of any amendments to ACL. An extensive public consultation process should be conducted concerning the adequacy of financial services laws including a detailed assessment from Treasury as to the extent to which there are any gaps, before any such amendments.

Regulatory complexity has already been identified as a barrier to consumer rights and protections as set out in the Australian Law Reform Committee's review "Confronting complexity: reforming corporations and financial services legislation".<sup>7</sup> The BCA also notes the recent speech by Joe Longo, Chair of the Australian Securities and Investments Commission highlighting challenges of the existing complex regulatory environment for businesses and the regulator.<sup>8</sup> The BCA suggests that consideration of the recommendations in the ALRC report would be a worthy focus of reform in the first instance rather than seeking to add a further layer of complexity to an already heavily regulated area.

**Recommendation 12: Before embarking on seeking amendments to financial services law, the Treasury:**

- note existing and extensive protections benefiting consumers under existing financial services law and related laws;
- undertake detailed and public consultation on the adequacy of financial services laws vis-à-vis ACL including a detailed and comprehensive gap analysis against existing and forthcoming law, and policy changes; and
- consider the findings and recommendations of the ALRC's recent review of corporations and financial services regulation and consider progressing reforms on the basis of the report in the first instance.

<sup>7</sup> Australian Law Reform Commission, *Confronting Complexity: Reforming Corporations and Financial Services Legislation*, Summary Report, ALRC Report 141, November 2023, p6.

<sup>8</sup> Longo, J. "ASIC Annual Forum 2024: Bridging generations – regulating for all Australians", Keynote address at the ASIC Annual Forum, 14 November 2024, <https://asic.gov.au/about-asic/news-centre/speeches/asic-annual-forum-2024-bridging-generations-regulating-for-all-australians/> accessed December 2024.

# Appendix A

Potentially unfair trading practices identified in the consultation paper	Existing protections capable of addressing harm	Example potential application of existing protections
<p>a. The omission of material information</p>	<ul style="list-style-type: none"> <li>■ ACL – section 18, 21 29, consumer guarantees</li> </ul>	<ul style="list-style-type: none"> <li>■ Section 18 – Misleading or deceptive conduct / Section 29 – False or misleading representations</li> </ul> <p>Omitting material information could be misleading or deceptive conduct or a false or misleading representation where, for example, the omission leads the consumer into error as to the nature of the product or service being offered. Remaining silent may constitute misleading or deceptive conduct if the circumstances give rise to a reasonable expectation that, if some relevant fact does exist, it will be disclosed.</p> <p>The ACCC provides examples on its website about silence being misleading if a business discloses some information but fails to disclose important details to the consumer relating to their purchasing decision.<sup>9</sup></p> <p>In relation to false or misleading representations, while there is uncertainty as to whether a representation can arise by silence, half-truths may amount to false representations.</p> <p><b>Case example:</b> <i>Miller &amp; Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd</i> [2010] HCA 31; (2010) 241 CLR 357; <i>ACCC v LG Electronics Australia Pty Ltd</i> [2017] FCA 1047 at [53]</p> <ul style="list-style-type: none"> <li>■ Section 21 – Unconscionable conduct</li> </ul> <p>Omitting material information could amount to unconscionable conduct. This may be the case where, for example, there is an element of trickery in the omission, if the business is dealing with vulnerable clients, is systematically dishonest, or in bad faith in undermining a bargain.</p> <p><b>Case example:</b> <i>ACCC v Quantum Housing Group Pty Ltd</i> [2021] FCAFC 40</p> <ul style="list-style-type: none"> <li>■ Consumer guarantees</li> </ul> <p>Consumer guarantees require products to be fit for purpose and match description. If the omission of material results in the product not being fit for purpose or matching their description, the omission would likely already result in a contravention of the ACL</p>

<sup>9</sup> ACCC, False or Misleading Claims (viewed 2 December 2024) (<https://www.accc.gov.au/business/advertising-and-promotions/false-or-misleading-claims#:~:text=Silence%20can%20be%20misleading,are%20relevant%20to%20their%20decision.>)

<p>b. 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;</p>	<ul style="list-style-type: none"> <li>■ ACL – section 18, 21, 29, consumer guarantees</li> </ul>	<ul style="list-style-type: none"> <li>■ Section 18 – Misleading or deceptive conduct / Section 29 – False or misleading representations</li> </ul> <p>The provision of material information in an unclear, unintelligible, ambiguous or untimely way could be misleading or deceptive conduct or a false or misleading representation where, for example, the customer is led into error because material information was not clearly and conspicuously disclosed to them.</p> <ul style="list-style-type: none"> <li>■ Section 21 – Unconscionable conduct</li> <li>■ <b>Consumer guarantees</b> (e.g. that products are fit for purpose and match description)</li> </ul> <p>Consumer guarantees require products to be fit for purpose and match description. If the material is unintelligible, ambiguous or untimely, which results in the product not being fit for purpose or matching their description, the conduct would likely already result in a contravention of the ACL</p>
<p>c. Impeding the ability of a consumer to exercise their contractual or other legal rights</p>	<ul style="list-style-type: none"> <li>■ ACL – section 18, 21, 23 &amp; 29</li> <li>■ Consumer guarantees cannot be contracted out</li> <li>■ Privacy Act</li> </ul>	<ul style="list-style-type: none"> <li>■ Section 18 – Misleading or deceptive conduct / Section 29 – False or misleading representations</li> </ul> <p>Impeding the ability of a consumer to exercise their contractual or other legal rights could be misleading or deceptive/false or misleading if, for example, there is a representation that the customer does not have a certain right, or that the customer has to do something in return for exercising their right.</p> <p><b>Case example:</b> <i>ACCC v Mazda Australia Pty Ltd</i> [2021] FCA 1493</p> <ul style="list-style-type: none"> <li>■ Section 21 – Unconscionable conduct</li> </ul> <p>Adopting business practices or designing a product or service in a way that impedes a consumer from exercising their contractual or other legal rights could amount to unconscionable conduct where it would be contrary to the norms of commercial behaviour to impede consumers from exercising rights they are entitled to.</p> <p><b>Case example:</b> <i>ACCC v Get Qualified Australia Pty Ltd (in liq) (No 2)</i> [2017] FCA 709</p> <ul style="list-style-type: none"> <li>■ Section 23 - Unfair contract terms</li> </ul> <p>A term that impedes the ability of a consumer to exercise their contractual rights is likely to be unfair. A term that permits one party to avoid or limit performance is an example of a UCT grey list term.</p> <p><b>Consumer guarantees</b> cannot be contracted out of.</p>

<p>d. Use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision.</p>	<ul style="list-style-type: none"> <li>■ ACL – section 18, 21, 23, 29, consumer guarantees</li> <li>■ CCA – s 46</li> <li>■ Privacy Act; Industry Codes</li> </ul>	<ul style="list-style-type: none"> <li>■ Section 21 – Unconscionable conduct</li> </ul> <p>One of the indicia of unconscionable conduct under section 21 of the ACL is whether any undue influence or pressure was exerted on, or unfair tactics were used against, the customer. The use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision may amount to such undue influence or unfair tactics so as to contribute to a finding of unconscionable conduct.</p> <ul style="list-style-type: none"> <li>■ Section 46 of the CCA – Misuse of market power</li> </ul> <p>A business with market power that uses design elements in online consumer interfaces so as to unduly pressure, obstruct or undermine a consumer in making an economic decision may be considered to have misused their market power in breach of section 46 of the CCA if these elements have been designed for the purpose, or have the effect of, substantially lessening competition.</p>
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# Appendix B

Recent Law Reform Proposal	REFORM proposed/enacted	EFFECTIVE DATE
<p>1 Artificial Intelligence ('AI') and the ACL</p>	<p>The Treasury released a Discussion Paper on 15 October 2024, seeking submissions on the following issues:</p> <ul style="list-style-type: none"> <li>■ how well adapted the ACL is to support Australian consumers and businesses to manage potential consumer law risks of AI-enabled goods and services;</li> <li>■ the application of well-established ACL principles to AI-enabled goods and services;</li> <li>■ the remedies available to consumers of AI-enabled goods and services under the ACL; and</li> <li>■ the mechanisms for allocating liability among manufacturers and suppliers of AI-enabled goods and services.</li> </ul> <p>The consultation was designed to complement other work by the Government on AI, including the proposals for introducing mandatory guardrails for AI in high-risk settings.</p>	<p><b>Legislation Enacted:</b> N/A</p> <p>Submissions on the Discussion Paper closed on 12 November 2024. Treasury is considering responses.</p>
<p>2 Consumer Guarantee Changes</p>	<p>Treasury released a Consultation Paper on 16 October 2024, which sought feedback on the design of proposed new civil prohibitions and penalties for consumer guarantees and supplier indemnification. The proposed prohibitions are:</p> <ul style="list-style-type: none"> <li>■ prohibition on suppliers failing to provide a consumer guarantee remedy to a consumer when required under the ACL;</li> <li>■ prohibition on manufacturers failing to indemnify suppliers where they are liable under the ACL; and</li> <li>■ prohibition on manufacturers retaliating against suppliers where suppliers seek indemnification under the ACL (e.g the manufacturer terminates a contract or increases prices).</li> </ul> <p>The Consultation Paper also sought views on the proposed enforcement powers and remedies which included:</p>	<p><b>Legislation Enacted:</b> N/A</p> <p>Submissions on the Discussion Paper closed on 14 November 2024. Treasury is considering responses.</p>

	<ul style="list-style-type: none"> <li>■ powers for the ACCC to issue infringement notices for contraventions of the proposed prohibitions; and</li> <li>■ civil penalties for contraventions of the proposed prohibitions.</li> </ul>	
3 Unfair Contract Terms	<p>The <i>Treasury Laws Amendment (More Competition, Better Prices) Act 2022</i> (Cth) introduced the following reforms to the Unfair Contract Terms regime in Part 2-3 of the Australian Consumer Law:</p> <ul style="list-style-type: none"> <li>■ expanded the definition of small business contract to mean a business with fewer than 100 employees or an annual turnover of less than \$10 million; and</li> <li>■ introduced substantial penalties for proposing, applying or relying on an unfair contract term in a standard form consumer or small business contract.</li> </ul>	<p><b>Legislation Enacted:</b> 9 November 2022</p> <p><b>Transitional Period to prepare for amendments:</b> 12 Months</p> <p><b>Date penalties took effect:</b> For contracts entered into or renewed from 9 November 2023</p>
4 Ex-Ante Digital Platform Codes	<p>Following the release of the ACCC’s report of the Digital Platform Services on 11 November 2022, Treasury published a Consultation Paper on the ACCC’s recommendations to address competition and consumer issues posed by digital platforms and their services. Some of the ACCC’s recommendations included:</p> <ul style="list-style-type: none"> <li>■ introducing a new competition framework, which would subject ‘designated’ digital platforms to mandatory codes applying to the services they provide, based on principles set out in the legislation; and</li> <li>■ introducing targeted competition obligations for designated digital platforms to be included in the proposed new framework and codes, to address harms such as anti-competitive self-preferencing.</li> </ul> <p>Following the consultation, the Government announced on 8 December 2023 that it supports in-principal the recommendations made by the ACCC. It is now undertaking further work to complement the recommendations, which will include consulting on the development of a new ex-ante digital competition regime.</p>	<p><b>Legislation Enacted:</b> N/A</p> <p>Submissions on the Consultation Paper closed on 15 February 2023.</p>
5 Grocery Code Reforms	<p>On 23 September 2024, Treasury released an Exposure Draft of the <i>Competition and Consumer (Industry Codes—Food and Grocery) Regulations</i></p>	<p><b>Commencement Date:</b> 1 April 2025</p>

	<p>2024. The proposed changes to the Grocery Code include:</p> <ul style="list-style-type: none"> <li>■ making the code mandatory;</li> <li>■ strengthening dispute resolution arrangements;</li> <li>■ addressing supplier fears of retribution; and</li> <li>■ introducing penalties for breaching the code.</li> </ul> <p>Treasury also released an Exposure Draft for <i>Treasury Laws Amendment (Fairer for Families and Farmers) Bill 2024: Industry Codes (Penalties and Other Amendments)</i>. The proposed legislation will amend the <i>Competition and Consumer Law Act</i> to allow higher infringement notice penalties and higher maximum penalties for breaches of the Grocery Code.</p> <p>The Government has since published the instrument on the Federal register to formally come into force from 1 April 2024.</p>	
<p>6 Merger Clearance Reforms</p>	<p>In November 2024, Parliament passed the <i>Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024</i>, overhauling Australia’s merger control regime.</p> <p>From 1 January 2026, ACCC clearance will become mandatory for certain transactions meeting monetary thresholds (or other specific industry thresholds), and transactions will be suspended from completing (and voided if completed) without ACCC clearance.</p> <p>This reform is the most significant change to regulation and merger and acquisition activity since the introduction of the <i>Trade Practices Act</i> in 1974.</p>	<p><b>Commencement date:</b> 1 July 2025, mandatory 1 January 2026</p>

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