Tech Council of Australia

Unfair trading practices – Supplementary Consultation Paper

Tech Council of Australia Submission

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1. Introduction

Thank you for the opportunity to make a submission regarding the options to address unfair trading practices. We recognise and have a deep appreciation for the need for strong consumer protections as a foundation for the Australian economy across all industries. Maintaining consumer trust in the goods and services that they purchase, and the entities that they purchase from, underpins business viability and promotes competition and economic growth.

The TCA is Australia's peak industry body for the tech sector. The tech sector is a key pillar of the Australian economy, with the tech sector Australia's third largest industry behind mining and banking, and Australia's seventh largest employing sector. The TCA represents a diverse cross-section of Australia's tech sector, including startups, scale-ups, venture capital funds and global tech companies, many of whom provide services directly to consumers and small businesses.

Australia has world-leading consumer protections, with an established and comprehensive consumer protection regime that deals with a range of unfair practices by containing prohibitions on unconscionable conduct, unfair contract terms, misleading and deceptive conduct, robust statutory warranties for goods and services, and a national product safety law. There are also a range of other laws and regulations that operate to protect consumers and small businesses from unfair practices, including the Privacy Act, Telecommunications Act, Online Safety Act and instruments such as industry-specific codes.

Given Australia's existing framework of laws, we continue to consider that it is not clear that any additional prohibition on unfair trading practices is required or would offer consumers and small businesses any additional protections. Introducing an unfair trading practices prohibition where it is not required risks:

- Increasing legal and business uncertainty, ultimately reducing dynamism and deterring innovation for new products and services, and
- Increasing costs of compliance, which are ultimately borne by consumers.

There have also been recent changes to the Australian Consumer Law (**ACL**), for which insufficient time has passed to properly consider the effect of these changes. Last year, the penalties for breaches of Australia's consumer law were increased significantly, which have a significant deterrent effect. From 9 November 2023, businesses were also prohibited from proposing, using or relying on unfair contract terms in standard form contracts with consumers and small businesses. Together, these reforms have a significant impact on businesses considering their compliance with consumer laws in Australia.

In this context, the TCA continues to consider that option 1, as presented in the Consultation RIS, is the best option. Notwithstanding this, if a general and specific prohibition on unfair trading practices is introduced, we consider that it is critical that these reforms are appropriately targeted and dliver clarity and certainty to businesses and the broader public.

2. Alternatives to Treasury proposal

While the consultation paper notes that there are 'gaps' or 'grey areas' in Australia's existing consumer laws which may expose consumers to harms, the TCA is concerned that the limits of Australia's existing consumer laws have not been sufficiently tested in relation to the

conduct that is potentially of concern. Testing to identify where there are gaps in Australia's existing consumer laws should be a priority concern before the introduction of new laws.

We also note, as outlined in our earlier submission, that the ACCC has already taken successful enforcement action against many of the concerns in the consultation paper, for example:

- hipages entered into a court-enforceable undertaking with the ACCC regarding misleading or deceptive conduct by failing to adequately disclose contract terms that allowed it to automatically renew subscriptions and charge an early termination fee.[1]
- The ACCC successfully ran a misleading and deceptive conduct case against Trivago, which found that it had made misleading representations about hotel room rates to consumers and resulted in a fine to Trivago of $44.7 million.[2]
- The ACCC has taken action in respect of potentially misleading special offers.[3]

Overlap with other laws and industry codes

Australia's consumer law regime sits alongside many other laws and instruments that also govern the interactions between businesses, consumers and small businesses. These prevent unfair practices in relation to particular issues across the economy and in relation to particular sectors for which specific harms have been identified.

This includes the Privacy Act, Telecommunications Act, Online Safety Act, and Spam Act. Other instruments that may protect consumers and small businesses from unfair trading practices include the:

- Telecommunications Consumer Protections Code
- Food and Grocery Code of Conduct
- Franchising Code
- Dairy Code
- Unit Pricing Code, and
- Consumer Data Right Rules.

For example, the Telecommunications Consumer Protections Code contains rules for telecommunications providers to protect consumers. Providers must follow rules including how they communicate with or deal with customers, and what they can say in advertising and sales information.

Where new regulation overlaps with sector-specific industry codes and other regulatory instruments, there are different regulators responsible for enforcement, and different penalty regimes that apply. Ultimately, this harms both consumers and businesses by creating confusion and regulatory uncertainty, disincentivising innovation, causing delays in the resolution of issues and a patchwork of unevenly applied, inconsistent legislation.

Recommendation 1: Any changes to the ACL must avoid unnecessary layering of regulation over existing provisions in the ACL and other regulatory instruments, and particularly over existing sector-specific mandatory industry codes and regulation enforced by other regulators (e.g. the ACMA).

[1] Tradie platform hipages rectifies subscription trap issues | ACCC
[2] Trivago to pay $44.7 million in penalties for misleading consumers over hotel room rates | ACCC
[3] ACCC concerns about Mitsubishi discount offer resolved following consumer refunds | ACCC

Best practice for consumer protection obligations and their enforcement path is that they are clear and single-track. Compliance by a business with its own sector's mandatory regulation where there is no gap in consumer protection that the new ACL provisions would achieve, should confer a safe harbour in respect of the proposed general prohibition, the grey list and the specific prohibitions, in respect of the same conduct by the business.

3. Commentary on proposed general prohibition and grey list

Consistent with the aims outlined in the Consultation Paper, we agree that a general prohibition should provide certainty as to its application to consumers and businesses, while avoiding regulatory overreach or unintended consequences.

However, we are concerned that some of the proposals for the proposed general prohibition and grey list introduce significant uncertainty into the application of Australia's consumer laws, especially given that technology and its use can change quickly.

Conduct element

As a starting point, we consider that business conduct should not be presumed unfair. Instead, conduct should only be considered unfair if it is unreasonable.

We are concerned about introducing a 'legitimate interest' element as the third limb of the proposed general prohibition, that would presume that particular conduct is not in a business' legitimate interest unless the business can prove the alternative.

There are significant differences between the sorts of conduct that the unfair contract terms prohibition seeks to address, and those to be addressed through this general prohibition. For example, the business conduct which might be tested against the general prohibition will not have the defined form that is typical of a written contractual term.

There is a significant risk that a reversal of onus as proposed would chill legitimate business conduct in marketing and supplying products and services to consumers: the consequence would be that consumers lose out. If there is express consideration of the legitimate interest of the business in the new general prohibition, this should be a factor in whether the business' conduct was 'unreasonable' rather than a separate limb with a reversal of onus.

Recommendation 2: do not adopt a 'legitimate interest' element as the third limb of the proposed general prohibition. Instead, the focus should be on the conduct that results in harms suffered by consumers and not on the justification for the business for engaging or not in particular conduct.

If Government is minded to introduce this concept, this should be a factor in whether the business' conduct was unreasonable, rather than a separate limb.

Detriment element

We are concerned that the detriment element of the general prohibition, as currently set out in the Consultation Paper, is broad and creates uncertainty.

We do not consider that digital markets merit a detriment element that goes beyond financial detriment, to include extremely subjective elements such as emotional detriment, inconvenience or loss of autonomy, as suggested by the ACCC, which are extremely subjective. The reforms should not be targeted to protect against mere 'inconvenience' and should focus on specific harms. We consider that a broad definition of detriment is likely to introduce uncertainty to the proposed legislation, with a detrimental impact on both consumers and businesses. Given the potential for the penalties that may be imposed for non-compliance, it is appropriate for the detriment to be material to ensure proportionality, reduce the burden on the courts and regulators for enforcement, and to reduce litigation and financial risk for businesses where harm is minimal or negligible. Limiting the detriment element to financial detriment will capture the harms to consumers that the Consultation Paper seeks to address.

Further, we strongly agree with the Consultation Paper that any detriment should be a material detriment. Where the practices sought to be addressed by the general prohibition exist on a spectrum, and in many instances there may be little or no consumer harm, an unfair trading practices prohibition should focus on material detriment to consumers rather than on cases where it is unclear if there has been detriment at all. This would also help focus the prohibition on cases where there is broader consumer detriment and ensure that detriment is not measured on a consumer-by-consumer basis.

Recommendation 3: the detriment element should be limited to financial detriment only, rather than extremely subjective concepts of detriment including emotional detriment, mere inconvenience or a loss of autonomy.

Recommendation 4: we strongly support that the detriment element should be a material financial detriment.

The introduction of a grey list

We understand that the inclusion of a grey list in the general prohibition is intended to provide examples of conduct that are likely to breach a general prohibition, and that this may assist businesses in assessing their compliance obligations under the scope of other parts of the ACL. However, we do not consider that the grey list should form part of the legislation.

The inclusion of the grey list in the ACL itself will result in uncertainty for consumers and businesses and increase the risk of the proposal not evolving with developments in technology. Per the proposal, the wording of the grey list is vague and subjective. There are also no practical examples in the grey list, which makes it very unclear what types of conduct these examples would extend to.

We consider that the examples are better placed in ACCC guidance, where they can illustrated by more specific scenarios that would provide meaningful assistance to consumers and businesses interpreting the obligations.

Additionally, the benefit of the examples being set out in ACCC guidance is that they can be updated to reflect concerns by consumers or by the ACCC, without having to undergo the lengthy process and timeframe required for amending the Australian Consumer Law. We consider that the inclusion of the grey list in the legislation itself increases uncertainty as well as the risk that the legislation will become out of date.

Concerns with examples in grey list

One of the examples provided in the Consultation Paper justifying why the grey list is necessary is '…a business not providing consumers with a reasonably accessible contact point for customer service or complaint resolution– (for example, only offering a communication channel that is inadequate or difficult to access)". While the TCA understands the intent behind this example in principle, we encourage Government to consider the variety of online businesses and service providers in Australia, and the different nature of services offered by these businesses. It would be inappropriate, and in some cases commercially unfeasible, to mandate certain service providers to provide a particular type of dedicated, tailored support to consumers, especially when their services are complex, predominantly used by businesses or individuals with the relevant technical expertise and the nature of the enterprise customer relationship is different to a traditional business-to-consumer interaction.

For example, chatbots, which the Consultation Paper also refers to when providing examples of barriers to accessing customer support, are beneficial for consumers and businesses of all sizes to quickly troubleshoot common issues, triage questions, and ensure consumers access the right contact points in an efficient and cost effective way. Not permitting businesses to use certain services to offer customer support, such as by prohibiting or discouraging the use of chat bots, will very likely increase the cost of services to consumers (or render some services entirely unavailable to Australian consumers) and/or require businesses to invest disproportionate resources into alternative customer service options that may be less efficient or helpful for consumers, and lead to longer delays in consumer support.

Recommendation 5: the grey list should be in ACCC guidance, rather than included in the legislation as part of the general prohibition and any guidance should not prohibit the use of technology, such as chat bots, that offers an efficient and effective way to access customer support.

Should the grey list remain part of the legislation, it should be redefined and clarified to ensure better certainty around key elements, such as what would be meant by a 'reasonably accessible contact point'.

Dark patterns

The TCA is concerned that the proposals regarding dark patterns will potentially prohibit an unforeseen array of business practices. In practice, dark patterns:

- are extremely difficult to define;
- exist on a spectrum where many instances of these practices cause no or minimal consumer harm.

For example, conduct that would potentially fall within the description of being a "dark pattern" as Treasury defines it, may be a simple and innocuous behavioural cue. They can be used in physical or online transactions, that occur consumers to buy or otherwise engage with a business and their products and services. Behavioural cues are commonly used in a wide variety of contexts, including warning lights and alarms to encourage seatbelt use, in retail stores (for example, the design of aisles in a supermarket, or through signs asking consumers if they forgot to purchase common staples such as eggs, cereal and milk). These cues are also used by government in the design of government websites and communications, to encourage or persuade consumers to make particular choices. Equally,

behavioural cues can also be used to help improve consumers' cyber security, by nudging users to install security updates on their computer, or using a pop-up to make users consider whether a link or attachment is from a trusted source before clicking on it.

The Consultation Paper refers to the 'cumulative effect' of dark patterns that may manipulate or distort consumer choices and behaviours. Attempting to regulate for the 'cumulative effect' of practices which exist on a spectrum, risks moving away from defining clear harms and defining exactly what conduct could be in breach of a prohibition, which significantly increases uncertainty in the application of such a prohibition.

Consistent with our commentary above, we consider that there should be clear, material, financial harm that arises to consumers from dark patterns for these practices to be captured by an unfair trading practices prohibition. Merely steering consumers towards or away from action or towards decisions that they would not normally take is not sufficient. Further, Australian law already regulates the behavior this proposal is seeking to address – existing Australian Privacy Principles, for example, already regulate the collection, use and disclosure of personal information, and recent amendments to the Privacy Act now reflect enhanced transparency in automated decision-making.

Recommendation 6: a prohibition on dark patterns in the general prohibition should only focus on dark patterns where there is clear, material, financial harm arising to consumers.

4. Commentary on proposed specific prohibition

Subscription-related practices

We consider that a tailored combination of options 1, 2 and 4, as set out in the Consultation Paper, would balance the needs of consumers by protecting them against harms, with those of businesses. Any proposals should enable flexibility across different types of products and services, as well as sales on different platforms (e.g., mobile phones, laptops, gaming consoles). Consistent with this, general standards, rather than prescriptive approaches, should be adopted so the rules are future-proof.

We do not consider that option 3 should be adopted. This would be out of step with international best practice, with the US FTC recently declining to require this. The adoption of option 3 would also have the potential to encourage abuse of trial periods in which consumers sign up and use a subscription, cancel it, and sign up again. This would ultimately harm consumers, through businesses limiting offering free trials, or increasing costs to consumers that are signing up for a subscription service.

Commentary on option 1

The TCA is supportive of a requirement for businesses to clearly disclose material information relating to subscriptions prior to customers signing up.

However, we do not support the inclusion of prescriptive lists of specific information that must be disclosed to consumers signing up to a subscription. Such an approach risks being both over and under-inclusive, and can lead to large blocks of text that are less likely to be read and understood by consumers. This approach would likely result in consumers superficially providing 'informed consent'. Instead, we recommend a flexible standard, such as that the 'material subscription terms' must be disclosed prior to purchase.

If a list of required disclosures is included, it should be as short as possible and enable sufficient flexibility to be applicable across all types of subscription services. In particular:

- With regard to the proposal to include "…the date by which, and how, the consumer can end the contract to avoid being charged…," we would recommend replacing "the date by which" with "the timeframe in which." It is not always possible to calculate the exact date a consumer will be charged prior to sign-up and/or to include dynamic fields in disclosure text. With this change, businesses would still be required to disclose when the consumer will be charged, but a disclosure could read "one week from today" rather than a specific date. This more flexible standard meets consumers' need to know when they will be charged, while taking into account that it may not be possible for businesses to communicate the exact date.
- Secondly, we recommend against requiring businesses to include "the indicative cost per annum" as proposed. Many subscriptions offer renewal on a monthly basis and enable consumers to cancel at any time. In other words, there is no obligation on consumers to remain subscribed for a full year. In that context, the price for a full year is not relevant and could confuse consumers into thinking that a one-year commitment is required when it is not. Businesses must already comply with price display requirements in Australia, such that they must display the minimum total cost of a product or service as a single figure.

A requirement for material information to be provided in a specific form would be difficult to implement across different platforms and services. Instead, the same flexible standard that generally applies to disclosures in advertising should be applied to subscription disclosures, i.e., they should be clear (easy to understand) and prominent (difficult to overlook).

This would enable consumers to make informed, effective choices about entering into a subscription, while also giving businesses certainty about the information that needs to be provided to consumers.

Commentary on option 2

We generally support notification requirements, but they should be tailored appropriately so as not to inundate consumers with an excessive number of notices.

Too many notices reduces the likelihood of the consumer reading and understanding the notices. In that regard, we recommend requiring pre-billing notices for subscriptions that renew annually, as consumers are more likely to be caught off guard for annual renewals than monthly renewals. Requiring notices for month-to-month subscriptions would not only have a likely negative impact on consumers (by giving them so many notices that they are unlikely to pay attention to significant ones), but would also be out of step with other jurisdictions.

If pre-billing notification is required, it is not also necessary to require billing receipts that include information regarding how to cancel, as proposed. Information regarding how to cancel can and should be included in pre-billing notifications when it is most relevant – i.e., when a consumer can cancel and avoid being charged.

It is unclear how a requirement imposed on businesses to provide an option to cancel or modify a subscription easily and quickly whenever a receipt is issued would work in practice.

Some consumers sign up to annual subscriptions that are billed monthly, breaking down the annual cost into 12 installments. For these subscriptions, imposing such a requirement could lead to significant uncertainty for both consumers and businesses, whereas consumers are better served by the provision of this information when their subscription renews (rather than when it is billed).

Finally, with respect to the content of the proposed notifications, "how much the consumer has spent on the subscription to date" should not be required. Consumers often subscribe to products and services continuously for long periods of time. Including this requirement would mean businesses must retain transaction records for a very long time, creating privacy concerns for consumers and costs for businesses with no clear benefit. It is important for consumers to know when, how much and how often they will be charged in the future, and how they can cancel if they wish to.

Commentary on option 4

We agree that a requirement for the cancellation of subscriptions to be straightforward is reasonable and fair.

However, cancellation is a very different process than signing up, so the ease of sign up (which can involve many steps, e.g., entering contact information, creating an account, entering payment information) should not be the measuring stick for cancellation, as it is not a like-for-like comparison and could have the opposite of the intended effect – for example, a business that has a very complicated sign-up process could be empowered to also have a complicated cancellation process.

We also note that there are considerable differences between businesses and consumers in how they cancel subscriptions – for example, while consumers tend to use relatively straightforward single accounts to access subscriptions online, businesses are much more likely to have enterprise subscriptions with many users, which may also be linked or bundled with other services that they acquire. In this context, we consider that while consumers should have access to straightforward cancellation of subscriptions, that businesses should be excluded from this requirement given that there may be valid business reasons that cancellation of a subscription for a business is not straightforward.

We also consider that the current language suggested in option 4 could lead to uncertainty regarding what is meant by 'as straightforward and easy as the process for subscribing to it', and would benefit from clear guidance by the ACCC.

A clear but flexible standard, such as that cancellation must be easy to locate, understand and complete supports the policy goal that it should be straightforward to cancel subscriptions, while enabling flexibility for businesses to implement cancellation mechanisms that are appropriate to their services and platforms.

Recommendation 7: if Government decides to introduce specific prohibitions that address subscription issues, we recommend the tailored introduction of a combination of options 1, 2 and 4. This would balance the needs of consumers by protecting them against harms, with those of businesses. Any proposals should enable flexibility across different types of products and services, as well as sales on different platforms (e.g., mobile phones, laptops, gaming consoles). Consistent with this, general standards, rather than prescriptive approaches, should be adopted so the rules are future-proof.

Online account requirements

We have some concerns about the proposals to restrict the collection of information from consumers when they purchase goods and services online. For example, some personal information is necessary (and will become increasingly important if some of the other proposals in the Consultation Paper are adopted, such as requirements for sending consumers information and notices).

Most sales of goods and services online require, at a minimum, email addresses to provide consumers with key information about their purchases and to provide them with receipts and necessary documentation. We consider that any regulation introduced that relate to online account requirements should be carefully tailored so that they only target areas of actual consumer harm and should not overlap with privacy law obligations (or proposed privacy changes).

Further, there are many legitimate reasons why businesses need to collect information about their customers, even in relation to 'once-off' transactions. Online accounts are often used to collect and store detailed information to verify the identity and legitimacy of a user, which is critical to ensuring online safety (for example, to prevent fraudulent or malicious activity). For online services, the information collected through online accounts is often necessary to meet the requirements of multiple parties, including regulators. This includes requirements by regulators for platforms to verify the identity or qualifications of their users, and important measures taken by platforms to reduce the risks of scams and fraud being perpetrated on or through their platform.

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 straight forward 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 (such as in relation to cybersecurity, anti-money laundering and anti-scam framework).

Recommendation 8: no further regulation relating to online account requirements should be imposed given existing and incoming laws that would be at odds with these requirements. If Government proceeds with any restrictions on online account, there should be carve outs for the operation of other laws, and for measures which enhance consumer safety on the platform.

Drip and dynamic pricing

Any requirements that are introduced in relation to drip and dynamic pricing should be carefully targeted to consumer harms that are not already addressed by consumer laws.

We agree that consumers should be informed about the actual cost of goods and services that they are proposing to purchase. However, consumers also value being provided with

options regarding their purchase, and their choice of options (for example, regarding shipping costs) will change the total cost of their purchase.

We also note that the Consultation Paper acknowledges that drip pricing has already been addressed through the use of prohibitions against misleading and deceptive conduct. Dynamic pricing has not been tested by Australia's consumer laws yet, which we consider should be done as a first step before regulation.

Any consideration of interventions in relation to dynamic pricing should focus on harm, and not the mere existence of dynamic pricing, especially given that there can be strong economic arguments for the use of dynamic pricing to ensure that goods and services are effectively matched between buyers and sellers. Further, we note that the Consultation Paper focuses on harms from drip/dynamic pricing in relation to the online sale of tickers, rather than from e-commerce generally. In these circumstances, we consider that any requirements introduced should be carefully targeted to areas of concern, and ensure that they do not capture non-harmful, accepted business practice.

Recommendation 9: Any requirements that are introduced in relation to drip and dynamic pricing should be carefully targeted to consumer harms that are not already addressed by consumer laws.

5. Introduction of regime and penalties

We are supportive of a staged approach for the introduction of a general prohibition on unfair trading practices, as set out in the Consultation Paper, with its initial application to business-to-consumer dealings, before applying to business-to-business dealings. We consider that introducing a 3-5 year period before the regime is expanded to business-to-business dealings would be appropriate. We consider that this would enable the law to be developed (supported by guidance and case law) and ensure that issues are addressed. We also consider that there should be an assessment, prior to rolling out the regime to business-to-business dealings, whether the regime is necessary and fit-for-purpose, or whether adjustments may be needed (based on learnings from the business-to-consumer rollout).

We also consider that the penalties regime should be staged as well, similar to the unfair contract terms regime. Companies should be given a grace period to comply with new requirements, as they may involve updates to purchase and cancellation flows that take time to plan, implement and test. We recommend a 2-year transition period to enable businesses to plan in a way that lessens disruption while also requiring compliance within a reasonable period.

Having a delayed period before penalties apply is important for businesses in engaging with the regulator and ensuring that their business practices are consistent with new requirements. This would lead to improved engagement and certainty for businesses, and ultimately, better consumer outcomes. This would also enable the ACCC to conduct ad hoc reviews to monitor application and interpretation of the regime, and to provide additional guidance during the transitional period where necessary.

There are a significant number of regulatory changes over the coming few years for businesses, with reforms relating to scams, privacy, anti-money laundering and counterterrorism financing, regulation of the buy now pay later sector, and the rollout of the

Consumer Data Right to the non-bank sector. In this context, a staged approach to further reforms is essential.

Recommendation 10: introduce an unfair trading practices prohibition through a staged approach: first to business-to-consumer dealings, and after 3-5 years, to business-to-business dealings to enable learnings from the business-to-consumer rollout to be applied to the business-to-business rollout.

Recommendation 11: include a staged approach to the penalties regime, allowing businesses to proactively engage with the regulator to ensure compliance before penalties apply. We recommend a 2-year transition period.

6. Recommendations

Recommendation 1: Any changes to the ACL must avoid unnecessary layering of regulation over existing provisions, and particularly over existing sector-specific mandatory industry codes and regulation enforced by other regulators (e.g. the ACMA).

Recommendation 2: do not adopt a 'legitimate interest' element as the third limb of the proposed general prohibition, if this was accompanied by an onus on business to prove its conduct is to "protect its legitimate interest". The 'legitimate interest' of the business should instead be a factor in determining whether the business' conduct was reasonable in the circumstances.

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Government proceeds with any restrictions on online account, there should be carve outs for the operation of other laws, and for measures which enhance consumer safety on the platform.

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