Law Council
OF AUSTRALIA

Unfair trading practices – Consultation on the design of proposed general and specific prohibitions

The Treasury

20 December 2024

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About the Law Council of Australia

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The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council acknowledges the contributions of the following Constituent Bodies and Section Committees in the preparation of this submission:

- the Law Institute of Victoria;
- the Queensland Law Society;
- Australian Consumer Law Committee, Legal Practice Section; and
- Competition and Consumer Committee, Business Law Section.

Introduction

1. The Law Council of Australia welcomes the opportunity to respond to the Treasury's November 2024 **Consultation Paper**, titled *Unfair trading practices: Consultation on the design of proposed general and specific prohibitions*.

2. We note that the Consultation Paper identifies examples of potentially unfair trading practices that cause harm to consumers and small businesses that, it is suggested, may not be captured by, or clearly captured by, the current prohibitions in the Australian Consumer Law (**ACL**).[1]

3. The Consultation Paper sets out several proposals previously consulted on in the August 2023 Consultation Regulation Impact Statement (**Consultation RIS**) to address such practices, and further stakeholder views on Option 4 are being sought. The full list of options previously consulted on are as follows:

   Option 1: status quo (no change);

   Option 2: amend the statutory prohibition on unconscionable conduct in section 21 of the ACL, extending it to capture a broader range of conduct;

   Option 3: introduce into the ACL a general prohibition on unfair trading practices; or

   Option 4: introduce both a general prohibition on unfair trading practices (as in Option Three) with the addition of a list of specific prohibited practices.

The policy proposal

Amend the Australian Consumer Law to introduce general and specific prohibitions on unfair trading practices.

4. The ACL plays a critical role in safeguarding consumer interests and maintaining fair market practices. However, evolving business models, particularly with the rise of digital platforms and new marketing tactics, mean that updates to the ACL are considered to be required to ensure that unfair trading practices, including manipulative and deceptive behaviour, are adequately addressed.

5. On 12 December 2023, the Law Council provided a submission to the Treasury on the Consultation RIS.[2] The submission summarised the diverse views put to the Law Council through consultation with its Constituent Bodies and Sections. Feedback at that time ranged from a desire to maintain the status quo with respect to unfair trading practices, through to support for the introduction of general and specific prohibitions in the ACL. There remains a range of views across the legal profession, however this submission has been prepared to constructively engage with the proposals put forward in the Consultation Paper, rather than revisiting the policy rationale for reform.

[1] *Competition and Consumer Act 2010* (Cth) Sch 2 ('*Australian Consumer Law*').
[2] Law Council of Australia, *Unfair Trading Practices – Consultation Regulation Impact Statement* (12 December 2023), available at <https://lawcouncil.au/resources/submissions/unfair-trading-practices-consultation-regulation-impact-statement>.

6. The Law Council acknowledges that the specific issues identified in the Consultation Paper pose significant challenges for consumers, and we commend Treasury for seeking to identify and address key issues facing consumers today.

7. If the Government intends to pursue general and specific prohibitions on unfair trading practices, we emphasise the need for careful refinement of the proposed prohibitions, ensuring that they strike an appropriate balance between safeguarding consumers and allowing businesses to operate efficiently and effectively within the marketplace. By addressing these areas of ambiguity and providing more detailed guidance, the prohibition can achieve its intended purpose of promoting fair business conduct while minimising unintended consequences for both businesses and consumers.

General prohibition

Question 1:

- **Is the proposed general prohibition sufficiently clear to provide certainty regarding its application? If not, how could it be clarified?**

8. The Law Council acknowledges that the proposed general prohibition on unfair trading practices, as currently outlined in the Consultation Paper, is intended to address business conduct that unreasonably distorts or manipulates consumer decision making, ultimately causing material detriment. This prohibition is part of a broader effort to enhance consumer protection, ensuring that businesses engage in fair and transparent practices that allow consumers to make informed choices without undue influence or deceptive tactics.

9. Courts have been able to reasonably interpret general, principles-based standards in the ACL. A general prohibition provides the flexibility to evolve to address new forms of consumer harm as they emerge. However, concerns have been expressed to the Law Council that the drafting of the proposed general prohibition imports some foreign concepts that are not currently well understood in Australian consumer protection law. In its current form, the proposed general prohibition, therefore, has the potential to capture a wide range of business conduct, including some standard business practices that are unlikely to cause consumer harm.

10. The general prohibition, as currently drafted, may not provide certainty regarding its application, given the varied and subjective interpretation of what constitutes unreasonable conduct. Unreasonableness, as a concept, can be construed differently and vary significantly across different industries and contexts. For instance, in the retail industry, promotional marketing practice are commonly used and typically viewed as acceptable, provided that the terms and conditions are clear. However, in the financial services sector, some promotional marketing practices can be considered much more problematic and unreasonable.[3]

11. A lack of precision in this area may create uncertainty for businesses and consumers as its application may differ from case to case. Without a clear, universally accepted definition, or any industry-specific code of practice to guide the intended interpretation, there is a risk that the term could be applied inconsistently, leading to unpredictable outcomes in legal proceedings.

[3] Royal Commission into Misconduct in the Banking, Superannuation and Financial Industry (Final Report, February 2019) vol 1, <https://www.royalcommission.gov.au/system/files/2020-09/fsrc-volume-1-final-report.pdf>.

12. The Competition and Consumer Committee (**C&C Committee**) of the Law Council's Business Law Section considers that the clarity of the proposed general prohibition could be improved. Currently, many of the concepts used appear to be vague and subjective and, at a minimum, would need to be the subject of detailed and timely guidance from the Australian Competition and Consumer Commission (**ACCC**). There should also be a transitional period during which businesses can adjust their business practices as needed to reflect the ACCC's guidance.

13. In particular, the C&C Committee considers that the ACCC will need to provide guidance on the following aspects of the proposed prohibition:

    - how concepts such as 'distort', 'manipulate' and 'economic decision-making' are intended to be interpreted; and
    - the circumstances in which distortion or manipulation becomes 'unreasonable', noting that this language necessarily implies that some level of exploitative behaviour is reasonable and would not be captured by the proposed prohibition.

14. The C&C Committee also notes the importance of applying a level playing field across both physical stores and the online environment, to avoid the result of a higher compliance cost or threshold being applied to transactions from small business operating 'bricks and mortar' stores as compared with online transactions.

15. In addition, whilst ensuring that businesses retain the flexibility to operate effectively within their respective industries, the Law Institute of Victoria has pointed out that the legislation should strengthen consumers' ability to take legal action where they have been harmed by unfair or deceptive business practices. A well-balanced approach would not only prevent abuse or exploitation but also foster a competitive and fair market environment where both businesses and consumers can thrive.

16. Further comments on various components of the proposed general prohibition are set out below.

Questions 2 and 3:

- **Do the proposed elements for a general prohibition accurately reflect the gaps in the ACL that an unfair trading practices intervention could address?**
- **Are there any unfair practices that would not be addressed by the proposed elements and existing ACL protections?**

17. As outlined in the Law Council's December 2023 submission to the Treasury, the C&C Committee considers that the types of unfair trading practices identified as potential issues within the Consultation Paper (both under the general and specific prohibitions) are already effectively addressed by the existing protections in the ACL, and that the Government ought to carefully consider the extent of any gaps or grey areas within the ACL.

18. The C&C Committee notes, in particular, the fact that the ACCC has been successful in proceedings under the existing provisions of the ACL in relation to many of the types of unfair trading practices identified in the Consultation Paper, resulting in the imposition of large penalties.

19. Further, in a context where the existing consumer protection regime is comprehensive and far-reaching, it is unclear to the C&C Committee what 'gaps' could be addressed by an unfair trading practices prohibition, particularly when compared to other

international jurisdictions that have introduced similar regimes. For example, a misleading act or omission (i.e. misleading or deceptive conduct under the ACL) is deemed to be unfair conduct in the United Kingdom (**UK**). More broadly, the unfair practices regimes in the UK, United States (**US**), European Union (**EU**) and Singapore would likely capture unconscionable conduct under the ACL.

20. Given this local context and international comparison, the C&C Committee encourages the Treasury to carefully consider whether there are any true gaps in existing consumer protection laws. The C&C Committee remains of the view that many of the perceived gaps may be addressed by the raft of other reforms to the ACL and consumer protection-focused laws that have recently been implemented since the first calls for reform, and since the Consultation RIS in 2023.

21. The C&C Committee emphasises that, should gaps truly exist, the Treasury should consider whether the proposed general prohibition would best address such gaps (i.e. whether Europe is the best example of appropriate and targeted unfair trading practices regulation) and whether the gaps warrant the immediate imposition of significant pecuniary penalties.

22. Without these questions being appropriately considered, the C&C Committee is concerned that the prohibition will not strike the right balance, and may lead to uncertainty, over-regulation and increased compliance costs. These outcomes may, in turn, have the effect of stifling innovation, and reducing the range of goods and services available to Australian consumers.

23. Past ACCC enforcement action suggests that much conduct that may be considered to distort, manipulate or undermine consumer choice would already be found to amount to misleading and deceptive conduct under existing protections.[4] However, the C&C Committee observes that, often, multiple practices that distort consumer choice are utilised in combination, for example, by displaying banners that convey an item is scarce, alongside imposing fees gradually throughout the purchasing process, rather than upfront. As such, if the Treasury's concern is that where only one such practice is used in isolation it might not amount to a contravention of the ACL, but in combination with another or other practices, it would, this may better be resolved through guidance materials.

24. In relation to the types of conduct identified on the proposed 'grey list', the C&C Committee considers that these are generally not gaps or grey areas, but rather, that these areas are largely covered by existing protections in the ACL. For example, the C&C Committee notes:

    - **Omission of material information**—material omissions are covered by the misleading and deceptive conduct obligations in sections 18 and 29 of the ACL.
        - Given that the law already provides that if a relevant fact exists it should be disclosed where there is a reasonable expectation of such disclosure, it is unclear whether there is any real gap.

[4] This was the case in the *ACCC v Viagogo AG* [2024] FCA 243 and *ACCC v Bloomex Pty Ltd* [2024] FCA 243.

- For example, in relation to representations that are 'half truths', the ACCC was successful in alleging misleading and deceptive conduct by Coles in relation to claims made by Coles that its 'Cuisine Royale' and 'Coles Bakery' bread was 'Baked Today, Sold Today' and 'Freshly Baked In-Store'.[5]

- In relation to **impeding a consumer's ability to exercise their rights**, the ACCC successfully brought proceedings against Mazda and Fitbit for engaging in misleading and deceptive conduct and making false or misleading representations to consumers about their rights under the consumer guarantees.[6]

25. The C&C Committee also considers that there are avenues available under the ACL that can be relied upon to protect consumers from post-sales unfair trading practices. For example:

    - in *ACCC v Airbnb Ireland UC* [2023] FCA 1633, the ACCC was successful in prosecuting Airbnb for misleading and deceptive conduct that included misrepresenting to consumers, who complained that the price of their accommodation was shown in USD rather than AUD, that the customers had made an election to have the currency denominated in USD. Airbnb was ordered to pay penalties of $15.4 million.
    - the High Court of Australia, in the recent decisions of *Williams v Toyota Motor Corporation Australia Ltd* [2024] HCA 38 and *Capic v Ford Motor Company of Australia Pty Ltd* [2024] HCA 39, remarked in obiter that the lack of availability of repairs may impact on whether the section 54(1) guarantee of acceptable quality is breached, potentially providing another protection to consumers from unfair-post sale practices.

26. The C&C Committee has not otherwise identified any unfair practices that would not already be addressed either by the existing protections under the ACL or by a general prohibition.

27. Ultimately, it should be recognised that, in digitally enabled commerce, business practices will continue to rapidly evolve, and new business practices with the potential to cause consumer harm may emerge. However, a principles-based conduct element of the general prohibition will have the flexibility to be able to continually address new unfair practices as they develop.

28. Accordingly, the C&C Committee cautions against extending the scope of the general prohibition any further and consider that seeking to introduce further regulation would risk interfering with legitimate business activities.

[5] Australian Competition and Consumer Commission, *Federal Court finds Coles' 'Freshly Baked' and 'Baked Today' marketing claims misleading* (Media Release, 18 June 2014).
[6] Australian Competition and Consumer Commission, *Mazda to pay $11.5m for misleading consumers about consumer guarantee rights for serious vehicle faults* (Media Release, 14 February 2024), and *Fitbit to pay $11m in penalties for misrepresentations about consumer guarantee rights*' (Media Release, 12 December 2023).

Question 4:

- **Should the proposed prohibition only apply where the conduct is unreasonable (that is, where it *unreasonably* manipulates or distorts, or is likely to *unreasonably* manipulate or distort, the economic decision making or behaviour of a consumer)? Or would an alternative approach of only capturing conduct where it is not reasonably necessary to protect the business's legitimate interests provide a better level of protection for consumers?**

29. The standard of "reasonableness" (and its counterpart "unreasonableness") is a sensible one to apply in the context of a general prohibition.

30. "Reasonableness" is a well understood concept in Australian jurisprudence, including in several existing provisions in the *Competition and Consumer Act 2010* (Cth) (**CC Act**), and infers a level of objectivity.[7] For example, the standard of "reasonableness" features across the ACL and CC Act, including with respect to:

    - bait advertising and wrongly accepting payment (in the context of businesses having "reasonable grounds" to believe they can or cannot supply goods);
    - consumer guarantees (including where goods of acceptable quality meet the expectations of a "reasonable consumer");[8]
    - product safety standards (which must consist of requirements that are "reasonably necessary" to mitigate risks of injury;[9] and
    - the terms and conditions under the telecommunications access regime being "reasonable".[10]

31. "Reasonableness" introduces an objective standard and supports a common-sense approach. It introduces an assessment of the relevant facts and circumstances. In this context, that assessment would be likely to involve the relevant industry, the goods or services, the mode of purchase, and other factors related to the relevant business and its customers. The C&C Committee observes that businesses are generally well placed to consider what is reasonable in the context of their business and its practices. In contrast, businesses may not be able to effectively estimate a consumer's or regulator's subjective view as to "unfairness".

32. There are also other examples of "reasonableness" in other legislative regimes and in common law. For example, the common law doctrine of restraint of trade specifies that restraints are void unless they are reasonable in the interests of the parties and of the public. When assessing reasonableness, courts will first assess whether there is a "legitimate interest" that requires protection, and, if so, whether or not the restraint does more than is necessary to protect that interest. If the restraint goes beyond what is necessary, having regard to the relevant factors, then it will not be considered reasonable.

33. Absent a standard of "reasonableness", a general prohibition would not meet the important principle of minimising regulatory burden and applying certainty to businesses and consumers. By comparison, while the concept of "unfairness" exists

[7] For example, the term appears in the ACL in s 35 (in relation to bait advertising), s 36 (in relation to wrongly accepting payment), s 40 (in relation to the assertion of a right to payment for unsolicited goods and services), s 43 (in relation to the assertion of a right to payment for unauthorised entries or advertisements), and ss 54, 57, 58 and 62 (various guarantees as to goods and services).
[8] *Australian Consumer Law*, ss 35, 36 and 54.
[9] *Australian Consumer Law*, s 104.
[10] *Competition and Consumer Act 2010* (Cth), s 152AH.

in law (for example, in relation to the unfair contract terms regime), it does not currently exist in any general and abstract provisions of the CC Act. “Unfairness” is also an inherently subjective notion, and will be challenging for businesses to understand the relevant standard to ensure they meet it.

34. We acknowledge, however, that the Legal Practice Section’s Australian Consumer Law Committee (**ACLC**) remains concerned about the risk that consideration of “reasonableness” could become a one-sided assessment of what is “unreasonable” in the context of well-entrenched questionable business practices that clearly cause consumer harm. As such, the ACLC considers that the standard of “unreasonableness” needs to be focused on what a consumer would regard as “unreasonable”, as opposed to what similar businesses operating in that area may consider to be “unreasonable”.

Legitimate interests

35. The Consultation Paper notes that a possible alternative legal standard to “reasonableness” is the standard of “legitimate interest”, with a rebuttable presumption.

36. Both the C&C Committee and the ACLC consider the “unreasonableness” standard to be preferable to a consideration of the protection of a business’s legitimate interests, as the “unreasonableness” standard demonstrates a clear intention to focus on the resulting impact to the consumer of unfair trading practices, rather than the intentions of the business. Such focus is also consistent with section 18 of the ACL, in that the intention of the business is not a relevant consideration.

37. In particular, the C&C Committee does not consider that “legitimate business interest” would be an appropriate legal standard. This is because, while the “legitimate interest” test is a feature of the existing unfair contract terms regime (in which the overall rights and obligations of a clause within the context of the contract as a whole are assessed against the legitimate interests of the party seeking to rely on a particular clause), it is not an appropriate test to apply to a general prohibition on conduct (or omissions).

Professional diligence

38. As a third alternative to the legal standard of “reasonableness”, the Consultation Paper notes that the EU’s Unfair Commercial Practices Directive (**UCPD**) defines a commercial practice as unfair if it is contrary to the requirements of “professional diligence”.

39. In the EU, “professional diligence” means the standard of special skill and care that a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.

40. The C&C Committee observes that, like “unfairness”, “professional diligence” is an inherently subjective notion, and it will be challenging for businesses to understand the relevant standard to ensure they meet it (even with a statutory definition, which itself imports further subjective notions of good faith and ‘honest market practice’).

41. The standard of “professional diligence” in the UCPD is broadly aligned with the Australian common law principle of “good faith”:

> *[P]rofessional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'.*[11]

42. The C&C Committee considers that, as with "legitimate interests", the standard of "professional diligence" also connotes considerations of *reasonableness*, honesty and fairness. Like "legitimate interests", "professional diligence" also has a focus upon the trading business, rather than the consumer. For this reason, the suggested standard of "reasonableness" is the most objective and appropriate standard.

Manipulate or distort

43. In relation to the proposed language of "manipulate or distort" (or "manipulates or distorts"), the C&C Committee considers that this may unintentionally capture genuine and fair business practices that are designed to market and sell goods and services. This creates the risk of making commercially legitimate design and marketing conduct illegal, where it does not cause consumer detriment.

44. The C&C Committee submits that more appropriate language, that would capture the Treasury's understood intention, would be "impair or distort", or "frustrate or distort". This is consistent with the position in the EU, where a commercial practice will be unfair and in breach of Article 5 of Directive 2005/29/EC (UCPD) where it distorts "the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers". This means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that would not have otherwise been taken.

45. The C&C Committee notes that, in the UK, the relevant provision is subject to an ongoing legislative reform process,[12] and that Chapter 1 of the *Digital Markets, Competition and Consumers Act 2024* (**UK Digital Markets Act**) will prohibit conduct that is "likely to cause the average consumer to take a transactional decision that the consumer would not have taken otherwise as a result of the practice" (section 4).

Economic decision making or behaviour of a consumer

46. In respect of "the economic decision making or behaviour of a consumer", the C&C Committee considers that this phrase is internally duplicative (as decision-making is a kind of behaviour) and departs from the standard wording used elsewhere in the ACL.

47. Instead, to the extent considered necessary, the C&C Committee recommends mirroring the language of the EU's UCPD and the UK's Digital Markets Act of "economic behaviour". The C&C Committee also recommends maintaining consistency with other provisions of the ACL through the use of the phrase "the reasonable consumer".

48. The C&C Committee's suggested revised wording would, therefore, read "the economic behaviour of a reasonable consumer".

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[11] *EU Directive* art 2(h); *UK Regulations* s 2(1) ('professional diligence').
[12] *UK Regulations* s 3(3)(b).

Question 5:

- **Is the requirement that detriment or likely detriment be 'material' appropriate?**

49. The proposal to adopt materiality as a threshold for contravention of the general prohibition will help avoid frivolous claims, and will ensure that businesses are not penalised for minor infractions that have negligible effects on consumer behaviour.

50. However, at the same time, this requirement may undermine consumer protection in cases where the detriment is small or subtle but still significant to certain individuals or groups. For example, a consumer might experience a minor but persistent detriment, which could erode trust or lead to long-term financial costs but might not be seen as 'material' in a strict legal sense. The concern in this respect is that small harms, if aggregated across many consumers, could lead to systemic issues.[13] Therefore, limiting the prohibition to only those cases where detriment is material may fail to address potentially harmful practices that affect consumers in subtle, long-term, or collective ways.

51. Overseas examples also include a comparable materiality threshold. For example, the EU UCPD relates to conduct that "is likely to materially distort".[14] In the UK, the relevant provision also contains a "materially" threshold, although this will be removed from April 2025.[15] In the US, the test for unfair trade practices under the *Federal Trade Commission Act of 1914* (at 15 U.S.C. § 45(n)) requires the Federal Trade Commission to prove that actual or potential harm ("substantial injury") has been, or will be, caused to consumers by the impugned act or practice.

52. If a "material detriment" threshold is pursued, greater clarity on how materiality will be assessed in practice, particularly in digital environments where harms may not always be immediately apparent, is needed. To that end, the Law Council suggests that the following matters relevant to the materiality threshold be considered:

    - **Broadening the definition of "detriment"**: Instead of requiring detriment to be only financial or easily quantifiable, the definition of detriment could be expanded to include psychological, emotional, and trust-based harms. Many unfair practices, such as deceptive advertising, manipulative freemium models, or hidden data exploitation, may not lead to immediate or large financial losses but can cause significant harm to consumers' trust, decision-making, and long-term well-being. This broader understanding of detriment would help ensure that businesses exploiting consumers through such tactics are held accountable. It would be necessary for such an expanded understanding to be accompanied by guidance for businesses on what might fall within the expanded definition.
    - **Incorporating cumulative and long-term harm into the understanding of "material"**: Legislation could explicitly recognise the potential for cumulative harm resulting from unfair trading practices. This means that a series of small but unfair actions that, when aggregated, lead to significant detriment for consumers, could be considered material, even if each individual instance does not cause immediate or obvious harm. A flexible interpretation of materiality, one that considers the cumulative impact of repeated offenses, would address this gap.

[13] Carey, Nicholas, 'Presumptions upon presumptions: Problems with the threshold of materiality (2021) 44(2) *UNSW Law Journal* 548.
[14] *EU Directive* art 5(2)(b).
[15] *UK Regulations* s 3(3)(b).

- **Presumption of harm for vulnerable consumers**: In cases involving vulnerable groups (for example children, or elderly or low-income populations), unfair practices could be presumed to cause material harm. This would recognise the specific vulnerabilities (such as cognitive biases or limited access to information) inherent in members of these groups. This could be done by establishing presumption provisions that automatically deem certain practices harmful to these groups (clearly defined), without the need for proof of significant individual detriment. Such an approach would better protect those who are disproportionately at risk of exploitation.
- **Adjustable harm thresholds based on practice type**: It is appropriate that the threshold for materiality is adjusted, based on the type of unfair trading practice. For example, certain practices, like misleading advertising or privacy violations, might have a lower threshold for what constitutes material harm, due to the potential for widespread impact and long-term consequences. By contrast, other practices might involve higher thresholds if their harm is more isolated or specific.

Question 6:

- **Does the proposed grey list provide adequate guidance for businesses and regulators regarding how the courts will interpret the prohibition? Are there any additional examples that should be listed?**

53. The inclusion of a properly constructed grey list will provide useful guidance for businesses and regulators on how the courts may interpret the prohibition and will be a valuable tool for providing clarity on how unfair trading prohibitions will be interpreted.

54. That said, the Law Council cautions that it should not be viewed as a static or exhaustive list. As technology, business practices, and consumer behaviour evolve, it must be regularly reviewed and updated to reflect new forms of manipulative tactics. By expanding the list to include specific examples from digital commerce, such as misleading countdown timers, pre-ticked boxes, and default opt-in subscriptions, businesses will have a clearer understanding of what is considered unfair, and regulators will be better equipped to enforce existing protections.

55. We have received further views from the ACLC and C&C Committee. These are set out below for the Treasury's consideration.

Views of the ACLC

56. The ACLC notes that the grey list examples given in the Consultation Paper in relation to the omission of material information and the provision of material information in an unclear, unintelligible, ambiguous or untimely manner, including in a manner or form that overwhelms a consumer, would go some way to covering the gaps in the Australian Consumer Law.

57. In addition, the ACLC would like to see grey list examples of unfair trading practices relating to retention/misuse of personal information, given the limits of the application of existing privacy legislation.

Views of the C&C Committee

58. The C&C Committee notes that grey lists have previously been of assistance in interpreting the scope of other ACL protections, such as in relation to the unfair contract terms regime.

59. However, while the Consultation Paper notes that the grey list is intended to provide a non-exhaustive list of examples of conduct that may, depending on the circumstances, be unfair, it is unclear to the C&C Committee whether this will be the case in practice or whether it will become a 'black list' of examples that will generally be deemed unfair in respect of which enforcement action will be the default position. The C&C Committee observes that this is how the grey list for unfair contract terms has functioned to a significant degree.

60. In relation to some items in the grey list, it is not clear to the C&C Committee that there is a real gap in existing laws that needs to be addressed via the proposed unfair trading practices prohibition grey list items. For example:

    - in relation to the first item in the grey list—"omission of material information"—it is not clear whether there is a gap in existing laws that needs to be addressed by the proposed new prohibition, given that the law already provides that if a fact exists it should be disclosed where there is a reasonable expectation that it would be.
        - As presently drafted, this item is vague and should be more targeted, such as by being revised to "omission of material information about the price of goods or services", or referring to other critical features of the good or service, as is the case for section 29 of the ALC ("false or misleading representations about goods or services"), such as in paragraphs 29(1)(a) or (g).

    - the second proposed grey list item—"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"—could be seen as contradicting the first grey list item ("omission of material information").
        - The C&C Committee considers that smaller, unadvised businesses may struggle to know how to get the balance right between providing all material information and providing information with sufficient clarity, as this will change business to business, sector to sector, product to product.

        - It is also not clear whether or why what the information businesses are required to provide should differ for different industries and sectors, or between goods sold in 'brick and mortar' stores, compared to goods predominantly sold in the online environment.

61. Furthermore, the proposed list includes some concepts that are unclear and inherently subjective. For example, the C&C Committee queries at what point a "design element" will be said to unduly pressure, obstruct or undermine a consumer in making an economic decision.

62. In some cases, it is unclear how far businesses will be required to go to comply. For example, in relation to the third proposed grey list item—"*impeding the ability of a consumer to exercise their contractual or other legal rights*"—in some cases, it may be difficult for businesses to understand to what extent they may be required to go

beyond removing practices that may impede a consumer from exercising rights to being obliged to move in the direction of facilitating consumers exercising their rights. If this grey list item is intended to address subscription-related practices, and challenges in unsubscribing, the C&C Committee considers that these would be better addressed through a specific prohibition.

Question 8:

- **Would there be compliance costs for businesses if the proposed general prohibition is introduced into the ACL? Would small businesses be disproportionately impacted noting that ACL reforms apply economy wide? Where possible, please provide quantitative information.**

63. The proposed general prohibition will result in businesses, especially small businesses, facing significant compliance costs. These costs would primarily arise from the need to review and update existing practices, processes, and legal frameworks to ensure conformity with the new prohibition. This would involve expenses related to legal consultations, staff training, updating contracts, revising marketing materials, and potentially implementing new systems or technology to track compliance.

64. For larger businesses with established legal teams and resources dedicated to compliance, the financial burden may be more manageable, as they can allocate resources to ensure adherence to the new prohibition. However, small businesses could face disproportionate impacts, due to their limited resources. Smaller businesses often lack dedicated compliance departments or legal teams, and their ability to seek expert advice or invest in technology may be constrained. Therefore, the compliance costs for small businesses, relative to their size, could be significantly higher.

65. Moreover, while the proposed general prohibition has been drafted to apply on an economy-wide basis, it seems difficult to envisage a ‘one size fits all’ approach being taken to the level of information required to be provided. This could lead to a disproportionate burden falling on retailers with a physical presence, compared to those operating predominantly in the online environment.

66. To minimise the burden on small businesses, a targeted support approach should be adopted. This could include, for example, the ACCC providing detailed and timely guidance on how key aspects of the general prohibition will be interpreted, and making these available on a timely basis so that businesses can adjust their practices and implement compliance processes, as required. The support approach could also include offering free resources such as accessible guides, simplified compliance checklists, or workshops to provide support.

67. Additionally, creating a more straightforward and less resource-intensive reporting process could help small businesses meet the requirements without overwhelming their limited staff.

Question 9:

- **What additional resources (for example guidance material) may be required to support businesses, including small businesses, with implementing changes to their practices?**

68. As noted in the response to Question 8, clear and specific guidance material will be required, including guidance from the ACCC on how it will interpret the relevant elements of the general and specific prohibitions on unfair trading practices.[16]

69. The C&C Committee recommends that the ACCC publish comprehensive guidance, similar to the approach adopted by the Competition and Markets Authority (**CMA**) in the UK, through its guidance to help businesses comply with the *Consumer Protection from Unfair Trading Regulations 2008* (**CPRs**).[17]

70. This publication provides an overview of the scope of the CPRs and includes a flowchart to assist businesses in assessing whether their practices are likely to be considered unfair. The guidance provides detailed consideration of the types of commercial practices that are prohibited under the CPRs and uses a wide range of examples across each category of conduct to illustrate likely contraventions (and how the CMA will interpret and apply the relevant elements). The guidance also outlines the regulatory approach to enforcement and the scope of investigative powers available to enforcement officers.[18] Such guidance should be updated regularly.

71. Detailed ACCC guidance will be necessary, particularly on the 'grey list' items. Here, the ACCC should consider whether further guidance (including in the form of a separate resource or document) is needed to provide clarity to businesses.

72. For example, in Singapore, the Competition & Consumer Commission Singapore has published guidelines on pricing transparency (relating to a narrower set of unfair practices) to indicate how it considers the *Consumer Protection (Fair Trading) Act 2003* (Singapore) applies to display/advertisement of prices and pricing practices such as time-limited discounts, free offers and price comparisons.[19] This is also accompanied by an infographic, detailing potential infringement examples for specific practices, such as drip pricing.[20]

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[16] There are varied approaches to the guidance provided in other jurisdictions. For example, the European Parliament and the Council published guidance on the interpretation and application of the UCPD, see *Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market* at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229(05)>.
While regulatory guidance in relation to unfair trading practices in the US is more limited, the FTC has published a 'FTC Policy Statement on Unfairness' which sets out the scope of the FTC's jurisdiction over consumer unfairness, including its interpretation on the relevant elements of unfairness.[16] Federal Trade Commission, *FTC Policy Statement on Unfairness* (first published 17 December 1980), <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness>. This Policy Statement is referred to in other resources (e.g. the 'FTC's advertising FAQs: A guide for small business' which addresses a range of advertising practices: <https://www.ftc.gov/business-guidance/resources/advertising-faqs-guide-small-business>.

[17] Office of Fair Trading, *Consumer Protection from Unfair Trading Regulations 2008* (1 August 2008). This guidance has been adopted by the CMA Board and is published on the CMA's website at <https://www.gov.uk/government/publications/consumer-protection-from-unfair-trading-regulations-traders>.

[18] Ibid, Part 4.

[19] Competition & Consumer Commission Singapore, *CCCS guidelines on price transparency* (7 September 2020), <https://www.cccs.gov.sg/legislation/consumer-protection-fair-trading-act>.

[20] Competition & Consumer Commission Singapore, *Infographics summary of the CCCS guidelines on price transparency* (7 September 2020) <https://www.cccs.gov.sg/legislation/consumer-protection-fair-trading-act>.

Questions 10 and 11:

- **What is the maximum civil penalty a court should be able to impose for a breach of the proposed general prohibition?**
- **Should civil penalties commence when a general prohibition commences, or following a transition period? If you support a phased approach, is a two-year transition period adequate to give businesses confidence around the operation of the law before penalties apply?**

Views of the ACLC

73. The ACLC considers that the maximum civil penalty for a contravention of the unfair trading practices prohibition should be consistent with the maximum civil penalties applied to other contraventions of prohibitions contained within the ACL, including the pecuniary penalties available for unconscionable conduct.

74. In addition, the ACLC is of the view that the suite of remedies available under Part 5-2 should also be available for conduct contravening the unfair trading practices prohibition.

Views of the C&C Committee

75. The C&C Committee considers that a proportionate approach should be applied when considering whether civil penalties apply to the general and any specific prohibitions.

76. Consistent with the differential remedies available for contraventions of sections 18 and 29 of the ACL, the C&C Committee considers that penalties for breaches of the proposed general prohibition (which covers a broader range of conduct) should be limited to non-pecuniary measures, including undertakings, injunctions and remedial orders.

77. The proposed specific prohibitions relate to “specific problematic conduct” identified by the government that are likely causes of consumer harm. These types of behaviours are more defined and targeted. It is, therefore, proportionate for the specific prohibitions to attract civil pecuniary penalties—in line with the current maximum civil penalty under the ACL—and to do so after an appropriate transition period to provide businesses with the opportunity to review and amend their practices and processes, as necessary.

78. This distinction between the general and the specific prohibitions would ensure that a targeted and proportionate regulatory response is balanced against the general deterrent effect of consumer law provisions.

79. The C&C Committee also considers that a staged approach to the availability of remedies should be adopted so that the regulator, the business community and consumers are afforded the opportunity to understand how the new prohibition will be interpreted, and what is required under it, before businesses are potentially subject to significant civil penalties.

80. This type of phased approach has been adopted in relation to other ACL reforms. For example, the unfair contract terms regime came into effect in 2010, however, during the period up until 9 November 2023, it was not an offence to propose, include or rely on an unfair term in a standard form contract, and no pecuniary penalties applied.

81. This is particularly important, given the high pecuniary penalties that the Treasury proposes would apply from commencement. In contrast with the EU, where the European Commission can seek a maximum of 4 per cent of trader turnover, or EU $2 million where turnover cannot be determined, in Australia businesses face a maximum pecuniary penalty of up to $50 million or 30 per cent of turnover).

82. A phased approach should also apply to the introduction of any direct consumer remedies, such as the potential for consumers to bring private rights of action and participate in class actions.

83. These comments are also relevant in response to consultation question 24.

Question 12:

- **Would a general prohibition on unfair trading practices, as proposed in this paper, adequately address the use of dark patterns that cause consumer detriment? If not, how should dark patterns be addressed?**

84. The C&C Committee considers that the general prohibition, insofar as it is intended to apply to dark patterns, would introduce unnecessary complexity and duplication into the ACL, leading to increased uncertainty and compliance costs for businesses without improving consumer outcomes.

85. The proposed definition of 'dark patterns' in the Consultation Paper incorporates conduct which, in many instances, has been proven to constitute misleading or deceptive conduct or false or misleading representations under the existing provisions of the ACL. There are several instances of the ACCC prosecuting dark patterns under sections 18 and 29 of the ACL, and successfully securing largely penalties.

86. For example, dark patterns that unreasonably exert pressure on consumers during a purchase were successfully prosecuted by the ACCC under sections 18, 29 and 34 of the ACL in *ACCC v Viagogo AG* [2019] FCA 544. Viagogo was found to have (alongside other contravening conduct) made misleading and deceptive representations to consumers that certain tickets were scarce when reselling tickets for live music and sports events by displaying countdown timers and banners that certain tickets were nearly sold out or prompting consumers to "hurry up" to avoid missing out.

87. Viagogo was ordered by the Federal Court to pay penalties of $7 million. Justice Burley at [75] identified Viagogo's conduct as causing the precise harm that the general prohibition seeks to remedy, noting that the:

> *increasing urges to completion and the "hurry up" messages create[d] such an impression that the consumer [was] at risk of missing out on tickets, that he or she [was] likely increasingly to confine attention to only that information necessary to enter details and complete the transaction.*

88. Similarly, dark patterns considered by the Organisation for Economic Co-operation and Development's (**OECD**) taxonomy of commercial dark patterns (see Appendix B of the consultation paper) to be "social proof" were successfully prosecuted by the ACCC in *ACCC v Bloomex Pty Ltd* [2024] FCA 243 under sections 18 and 29 of the ACL. Bloomex's contravening conduct included (in combination with other breaches) displaying products for sale on its website with a 'star rating' that had remained static since 2015 and included customer reviews for products prepared and delivered outside Australia, as well as ratings from people who may not have been Bloomex customers. Bloomex was ordered to pay $1 million in penalties.

89. In addition, the C&C Committee observes that dark patterns are inherently bespoke to a site design. Given the complex and varied nature of dark practices and their propensity to rapidly evolve with technology, the C&C Committee considers that these issues are more appropriately combatted via robust enforcement action under one of the existing principles based prohibitions under the ACL, such as section 18 and/or 29.

90. Regulatory certainty could be further improved by the release of detailed ACCC guidelines on when dark patterns will amount to misleading and deceptive conduct.

Question 13:

- **Where unfair trading practices have been prohibited overseas, what lessons can be used to inform Australia's approach?**

91. In considering the introduction of a general prohibition into the ACL, it is important to draw from the experiences and insights of overseas counterparts, particularly from the EU and US, where similar measures have been implemented. These jurisdictions provide valuable lessons that can help inform the design and implementation of the prohibition in Australia, ensuring that it is both effective and fair, particularly for small businesses.

92. The EU and US have demonstrated that for unfair trading prohibitions to succeed, certain foundational elements must be present.[21] Clear definitions or guidance on what constitutes unfair trading practices are critical. Without clarity, businesses may struggle to understand their obligations, leading to confusion and inconsistent application of the law. By establishing clear criteria for what qualifies as unfair trading, we can avoid ambiguity that may result in legal disputes or unintentional non-compliance. This clarity not only helps businesses adapt but also provides consumers with confidence that their rights are being protected in a consistent manner.

93. Both the EU and the US experiences emphasise the importance of strong penalties and proactive enforcement. Effective penalties act as a deterrent against unfair practices and help maintain a level playing field for businesses.[22] However, the existence of penalties alone is not enough. It is equally critical that there is also consistent and proactive enforcement to help establish the meaning and application of the new provisions. In the EU, the role of national regulators in monitoring and enforcing compliance has proven effective, particularly when combined with transparency in the enforcement process.[23] This approach provides businesses with clear guidance on what is expected and fosters a climate of accountability.

94. It is equally important that small businesses are not disproportionately impacted by these new prohibitions. The experience of overseas counterparts underscores the importance of ongoing dialogue with industry stakeholders, including small businesses and consumer advocacy groups, throughout the implementation phase. This consultation process helps identify potential gaps in understanding, as well as the specific challenges faced by smaller businesses in complying with new laws. Small businesses, which often operate with limited resources, may need tailored support to understand and meet the new obligations. Therefore, engaging in frequent and

[21] Felstead, Nicholas, "Beyond Unconscionability: Exploring the Case for New Prohibition on Unfair Conduct" [2022] 45(1) *UNSW Law Journal* 285.
[22] Parker, Christine and Nielsen, Vibeke Lehmann, "How Much Does It Hurt? How Australian Businesses Think about the Costs and Gains of Compliance and Noncompliance with the Trade Practices Act" (2008) 32(2) *Melbourne University Law Review* 554.
[23] Tallberg, Jonas, "Paths to Compliance: Enforcement, Management, and the European Union" [2002] 56(3) *International Organization* 609.

meaningful consultation with these groups is essential to ensuring that the regulation is both practical and fair, taking into account the diverse needs of the business landscape.

95. To build on these lessons and ensure a rigorous understanding of the gaps in the proposed prohibition, the Law Council suggests that consultation should consider deeper engagement with small businesses and consumer advocacy groups by facilitating workshops, surveys, and public consultations. Through this, regulators can gain valuable insights into the practical challenges businesses face and the nuances of consumer concerns. This approach would not only foster a sense of ownership among all stakeholders but also create a regulatory environment that is more adaptable, effective, and balanced.

Further views of the C&C Committee

96. The C&C Committee submits that it is important in considering global comparisons to go beyond the terms of different regimes and to consider the enforcement outcomes.

97. Globally, unfair trading practices regimes have attracted criticism for their uncertainty and the limited consumer-focused outcomes that have been brought about. For example, in the US, the legal test for an unfair act or practice in trade or commerce involves various elements,[24] each of which invite uncertainty and substantial legal and judicial consideration.

98. An unfair act or practice will be unlawful where it causes or is likely to cause substantial injury to consumers unless it:

    (i) is outweighed by countervailing benefits to consumers or to competition; or

    (ii) could have been avoided by consumers.[25]

    This raises difficulties for the Federal Trade Commission in addressing unfair conduct that is likely to cause substantial injury to consumers, because it requires them to establish that there is more than hypothetical or theoretical harm.[26]

99. The US regime has also been criticised for enabling the Federal Trade Commission to pursue cases on the basis of its public policy ambitions, even where there is less evidence of direct consumer harm through unfair practices (for example, in relation to the cigarette industry). Following these criticisms, Congress made amendments to restrict the Federal Trade Commission's ability to use public policy considerations as the primary basis of a determination for unfair trading practices.[27]

100. Furthermore, the EU UCPD has drawn criticism on the basis that it is centred on a very specific characterisation of unfairness. Under this Directive, a trade practice will be unfair if it is contrary to the requirements of professional diligence and materially distorts the economic behaviour of the consumer (i.e. a decision to purchase).[28] Here, the mere compliance with common industry practices may constitute a defence to

[24] *Federal Trade Commission Act of 1914* (US) at 15 U.S.C. § 45(n).
[25] Ibid.
[26] See Alejandro H. Cruz and Michelle W. Cohen, Re-Thinking "Substantial Injury": The FTC's Potential New Need for Victims (7 December 2015) <https://www.pbwt.com/data-security-law-blog/re-thinking-substantial-injury-the-ftcs-potential-new-need-for-victims>, citing *In the matter of LabMD*, Dkt. No. 9357, Initial Decision (Nov. 13, 2015) at 14.
[27] See *FTC Act* as 15 U.S.C. § 45(n). Nico van Eijk, Chris Jay Hoofnagle and Emilie Kannekens, 'Unfair Commercial Practices: A Complementary Approach to Privacy Protection' EDPL (3) 2017, 3.
[28] This prohibition also extends to misleading actions and omissions, in addition to aggressive practices.

unfair trade practices (on the basis that it is the standard of professional diligence in practice, even where this is not desirable from a consumer protection standpoint). Additionally, this concept of unfairness is restricted to economic unfairness, because it only considers whether there has been a change in economic behaviour (but does not extend to consumer harm generally, as in the US).[29]

101. Further, in the UK, the Government has previously acknowledged that its consumer law "is failing to keep pace" with digital practices which erode consumer choice, like subscription traps and the proliferation of fake reviews.[30]

102. More broadly, a UK Government research report exploring the impact of regulations on businesses throughout the UK economy identified that the financial cost and time (including to ensure and maintain compliance with changes) as the most frequently cited negative impacts of regulations.[31] These findings highlight the need for the Australian approach to be clear and predictable (and accompanied by detailed guidance to assist businesses with compliance).

Specific prohibitions

Subscription-related practices

Question 17:

- **How can the ACL be amended to introduce specific prohibitions to address unfair subscription-related practices? What is your preferred reform option, or combination of options, and why?**

103. The Consultation Paper provides four options to address unfair subscription-related practices.

104. Addressing unfair subscription-related practices under the ACL could involve introducing specific prohibitions on key issues such as lack of transparency, automatic renewals, difficult cancellation processes, and misleading free trial offers. Further, clear statements about consumer rights under the ACL should be required to be provided in a form and manner that is easily understandable for consumers.

105. Support has been expressed to the Law Council for a combination of options 1, 2 and 4 as set out in the Consultation Paper. Together, these options would address both the transparency of subscription contracts and the ease with which consumers can manage them. The combination of these options also allows both consumer empowerment, through clear disclosures and cancellation rights, and business accountability, ensuring businesses adhere to fair practices in their subscription mode.

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[29] Howells, Geraint , "The Rise of European Consumer Law - Wither National Consumer Law?" [2006] SydLawRw 4; (2006) 28(1) Sydney Law Review 63, [4] <https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/SydLawRw/2006/4.html>.

[30] See *Digital Markets, Competition and Consumer Bill 2022-23: Consumer provisions, House of Commons Research Briefing*, p. 9. In April 2023, the Digital Markets, Competition and Consumer Bill [Bill 294, 2022-23] was introduced in the UK House of Commons. The Bill focuses in part on the UK's consumer protection regime following the 2021 Department for Business, Energy & Industrial Strategy "Reforming Competition and Consumer Policy" paper.

[31] Department for Business and Trade and the Department of Business, Energy & Industrial Strategy, *Challenges businesses face when complying with regulation* (Research Paper) <https://www.gov.uk/government/publications/challenges-businesses-face-when-complying-with-regulation> 5.

Further views of the C&C Committee

106. At the outset, the C&C Committee notes that the three forms of harm identified by the Consultation Paper as stemming from subscription-related practices are, in many instances, already harms that arise from conduct caught by the existing provisions of the ACL.

107. The ACCC has, on multiple occasions, prosecuted subscription-related practices of the kind that the Consultation Paper seeks to address. For example, in 2023 the ACCC instituted proceedings against eHarmony for misleading and deceptive conduct, alleging that eHarmony advertised its basic membership as "free" but failed to disclose material information to customers about the subscriptions' very limited functionality and also failed to disclose that consumers' initial subscription for a premium membership would automatically renew, sometimes at prices that were hundreds of dollars higher.

108. Of the options provided, the C&C Committee considers Option 4 (i.e. removing barriers to cancelling a subscription) to be the most likely to achieve stronger consumer-focused outcomes, ensure clarity of operation of the new provision, and minimise implementation costs to businesses.

109. Any specific prohibition on subscription-related practices should be drafted in a clear and concise manner to provide certainty to businesses about what protections and processes they need to implement. Nonetheless, clarity should not come at the expense of efficiency, ease and flexibility between relevant sectors and businesses. The requirements that a business must follow to avoid breaching any specific prohibition should not be overly proscriptive or onerous.

110. One option could be the "click to cancel" rule recently announced by the Federal Trade Commission in the US.[32] The rule provides that businesses must offer an un-subscription or cancellation mechanism for customers that is at least as easy to use as the mechanism the consumer used to sign up, and must be provided via the same medium. For example, if a customer signed up online, they should be able to cancel or unsubscribe online. The rule applies to "negative options" only, being subscriptions or other arrangements where a consumer's silence or failure to take affirmative action to reject a good or service, or to cancel an agreement, is taken as tacit acceptance of a good or service.

111. Such a rule would put businesses in the best position to ensure compliance with a new specific prohibition. It also has the benefit of tying any un-subscription process to the same level of complexity as the initial subscription process. Where businesses may be incentivised to make it easy for consumers to subscribe, such a provision will ensure that it is just as easy to un-subscribe. The C&C Committee expects that this approach would promote consumer-friendly and easy-to-use processes that will achieve the goals of a specific prohibition.

112. By contrast, the UK is proposing to introduce a more prescriptive and onerous approach to subscription-related practices through the Digital Markets Act. The

[32] Germany has also adopted a similar "two-click cancellation" approach under its *Fair Consumer Contracts Act 2022*, requiring businesses offering subscriptions to provide easily accessible cancellation buttons on their website.

provisions relating to the subscription regime are not yet in force, with the Government currently consulting on its implementation until February 2025,[33] but will:

- impose obligations on businesses to provide clear pre-contractual information to consumers before entering subscription contracts;[34]
- send reminder notices at key points throughout their contract (i.e. prior to the end of a trial or renewal of a long-term contract, and otherwise roughly six months for rolling monthly contracts);[35] and
- provide consumers with easy exit options and access to cooling-off periods.[36]

The C&C Committee considers that, in practice, the combination of these requirements is disproportionate and overly burdensome on businesses, in circumstances where consumer-focused outcomes can easily be achieved through a simpler and more efficient measure such as Option 4.

113. By way of Australian example, the C&C Committee considers that the "unsubscribe link" protections in the *Spam Act 2003* (Cth) is a sensible and commonsense approach to consumer protection, requiring businesses to include a functional unsubscribe link in all commercial electronic messages, and that the link must meet the simple requirements set out in the *Spam Regulations 2021* (Cth)—.

114. In contrast, the C&C Committee warns against a specific prohibition that is too prescriptive and imposes overly onerous obligations on business to comply. An example of a new regulatory regime that has imposed unworkable and overly technical requirements on businesses, in the view of the C&C Committee, is the Consumer Data Right regime. Under the requirements of that regime, onerous and detailed requirements regarding consumer consent design and other elements of data sharing have led to cost blow outs and customer friction, with continued low take up by consumers. The C&C Committee would consider it a mistake to impose a similarly proscriptive requirement under any specific prohibition regarding subscription practices.

115. Finally, the C&C Committee does not consider that a specific prohibition related to subscription practices should apply in the business-to-business context. While small businesses benefit from a range of protections under the ACL, including under the unfair contract terms regime, as well as the general and specific prohibitions on false and misleading conduct and representations, the C&C Committee does not consider that small businesses require additional protection in the context of subscription-related practices.

116. These comments are also relevant in response to consultation question 22.

[33] *Digital Markets, Competition and Consumer Act 2024* (UK), Chapter 2 of Part 4. See also Department for Business and Trade, *Consultation on the implementation of the new subscription contracts regime* (Web Page, 2024) <https://www.gov.uk/government/consultations/consultation-on-the-implementation-of-the-new-subscription-contracts-regime>.
[34] *Digital Markets, Competition and Consumer Act 2024* (UK) ss 256, 257.
[35] Ibid ss 258, 259.
[36] Ibid ss 260 – 266.

Question 18:

- **Do you consider that the proposed specific prohibition should apply to all businesses that offer products or services using a recurring payment model or should certain businesses/sectors be exempt? For example, sectors already subject to relevant industry specific regulation (for example, telecommunications).**

117. The C&C Committee submits that any specific prohibition on subscription-related practices should contain a carve-out for businesses that are already subject to similar obligations in industry-specific regulations. For example, financial services, insurance, telecommunications, energy and other essential services providers should be exempt from the provision where relevant industry legislation provides similar consumer protections.

Question 19:

- **If you support Option 1 (pre-sale disclosure), what material information should businesses be required to provide to customers at the point of sale?**

118. If such an option is adopted, the C&C Committee submits that the disclosure requirements should be clear, and confined to the essential facts about the subscription. This information should be confined to:

    - the fact that the customer is entering, or will enter after the end of a free trial period, a subscription contract;
    - if the customer is entering a free trial period, the term of that trial period and the date by which, and how, the customer can end the trial period before commencing a subscription;
    - the term of the subscription, or whether it is ongoing;
    - the price of the subscription (in terms of a weekly, monthly or yearly subscription fee, depending on how frequently the customer will be invoiced); and
    - information on how and when the customer may exit the subscription.

119. The C&C Committee considers that these requirements would strike the appropriate balance between providing customers with the relevant information with which to make informed decisions, while balancing the costs to business of meeting the requirements of a new prohibition. The list of information above is also capable of being clearly understood, supporting implementation by the business community.

Question 20:

- **If you support Option 1, should businesses be required to provide material information in a specific form? If so, please provide further details.**

120. The C&C Committee is of the view that businesses should not be required to provide relevant information in a specific form. As outlined above, where regulatory regimes have mandated the particular form and style of information to be provided to customers (e.g. the Consumer Data Right), this has increased compliance costs to businesses to unsustainable levels, and has led to customer friction and low take-up.

Question 21:

- **If you support Option 2 (notification requirement), what information should businesses be required to include in a notification?**

121. Customer prompts have been recommended by the ACCC in relation to home loans and deposit products following its respective inquiries into these products in the financial services sector in 2019 and 2023. However, neither recommendation has been taken up by Treasury to date.

122. The C&C Committee considers that multiple reminders, as suggested in the Consultation Paper, could give rise to notification information fatigue. Consumer-based outcomes of improved transparency about subscriptions and ease of exit will be better served by Option 4 (and possibly Option 1).

Drip pricing practices

Question 25:

- **What unfair drip pricing practices causing consumer harm do you consider are not adequately covered by the existing ACL provisions?**

123. It is noted that the ACL currently prohibits a person from disclosing part of the price for a good or service without also disclosing the minimum quantifiable price for the good or service, with some exceptions. To further address unfair drip pricing practices, consideration could be given to requiring businesses to disclose all mandatory fees (such as local hotel taxes, booking fees or resort fees, etc.) upfront before consumers enter the purchasing process.

124. Additional reforms such as clearer fee definitions, prohibition of late-stage fees, and mandatory price breakdowns would enhance transparency, helping consumers make more informed choices.

125. We acknowledge, however, that the C&C Committee considers that forms of harmful drip pricing practices are adequately covered by the protections against misleading and deceptive conduct, and false and misleading representations, as well as the single price disclosure requirements.

126. Further, the C&C Committee notes that the ACCC has successfully taken enforcement action for drip pricing practices under these existing provisions, with outcomes including the imposition of significant penalties as well as infringement notices. For example:

    - in *ACCC v Viagogo AG,* Viagogo was found to have misrepresented to consumers that they could purchase tickets for a particular price, when in fact significant fees, such as a 27.6 per cent booking fee, Secure Ticket Handling Fee' and "VAT and Booking Fee" were imposed, and were not disclosed until late in the booking process, in breach of sections 18, 29 and 34 of the ACL. Additionally, the ACCC also successfully argued that by failing to display a price for the tickets that excluded further fees payable and specify in a prominent way, the price of the tickets as a single figure, Viagogo also contravened section 48; and

- in *ACCC v Bloomex Pty Ltd,* Bloomex's failure to adequately disclose that it was imposing a surcharge ranging from $1.95 to $4.95 on orders made via its website, was found also found to breach sections 18, 29 and 48 of the ACL.

127. The C&C Committee notes that the ACCC has previously issued infringement notices where the drip pricing practice involves a breach of section 48(1) of the ACL, without necessarily also constituting misleading and deceptive conduct or involving a false or misleading representation. For example, an infringement of $10,800 was issued to Palace Cinemas in 2016 for failing to disclose the total single price, including the compulsory booking fee for cinema tickets purchased using its online booking process.

128. Given the effectiveness of the existing provisions in the ACL in addressing drip pricing, the C&C Committee considers that no gap exists that would warrant the introduction of a specific prohibition on drip pricing practices. The risk of the imposition of significant penalties under the existing provisions is a sufficient deterrent to businesses engaging in the practice of drip pricing.

Question 26:

- **What reforms to the ACL may be required to address any unfair drip pricing practices? For example, should businesses be specifically required to disclose 'per transaction' fees up-front before consumers enter a purchasing process? What other reform options should be considered?**

129. The C&C Committee's observations are set out below in relation to how overseas regulations have addressed drip pricing. Broadly, where a regime specifically prohibits drip pricing, it has done so by mandating the upfront disclosure of particular information (for example, the total price of the good or service including any additional charges that can be calculated at the time, or the disclosure of fees that cannot be calculated in advance but will be added at a later point).

130. In the UK, the Digital Markets Act requires the total price of products to be provided upfront. From April 2025, a specific prohibition on drip pricing is expected to come into force. This will replace and expand on the existing prohibition in the CPRs against the omission of material information from an *invitation to purchase* (i.e. upfront). The following matters (amongst others) will constitute material information which must be disclosed:

    - the total price of the product (including any fees, taxes, charges or other payments that will necessarily be incurred if the consumer purchases the product);
    - if, owing to the nature of the product, the whole or any part of the total price cannot reasonably be calculated in advance, how the price (or that part of it) will be calculated; and
    - any freight, delivery or postal charges, including any taxes, not included in the total price of the product but which the consumer may choose to incur (or where those additional charges or taxes cannot reasonably be calculated in advance, the fact that they may be payable).

131. A breach of this prohibition will constitute an offence, and will give rise to rights of redress where the prohibited practice was a significant factor in the consumer's decision to make payment for the relevant goods or services.

132. In the US, there is no federal law that specifically prohibits drip pricing (noting that the *Junk Fee Prevention Act* was introduced, but did not pass US Congress in April 2023).

However, a number of States have passed legislation that specifically addresses drip pricing or the application of "junk fees". These prohibitions often apply in, or with the exception of, certain industries, for example:

- **California**: The *California Consumers Legal Remedies Act*, as amended in 2024, prohibits the addition of fees later in the checkout process after initially advertised a lower price for a product. The law contains carveouts for designated industries, including rental car companies, automobile dealerships, property managers, and food delivery companies.
- **New York**: In August 2022, *Arts and Cultural Affairs Law Section 25.07(4)* became effective, which applies only in relation to the sale of tickets, and requires that the total cost of the ticket (inclusive of all ancillary fees) must be listed before the ticket is selected for purchase and that the price of the ticket shall not increase during the purchase process.

133. The EU does not currently have a specific prohibition in relation to drip pricing. Article 7 of the UCPD prohibits misleading omissions, specifically including the omission of certain material information at the time of an invitation to purchase where this "causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise". However, the Directive does not specifically set out the conduct that constitutes "material information" (unlike the UK Digital Markets Act, which specifically sets out that the total price (amongst other content) constitutes 'material information').

134. In Singapore, there is no specific prohibition against drip pricing. However, the CCCS has indicated in its *Guidelines on Price Transparency* (September 2020) how pricing practices (including drip pricing) could potentially infringe the *Consumer Protection (Fair Trading) Act*. The Guidelines note that drip pricing conduct could potentially infringe that Act where businesses charge a substantially higher price than the advertised price, or through omission and concealment of material facts and the supply of unsolicited goods and services.

135. As noted in the response to question 25, the C&C Committee is of the view there is no relevant gap in the law in this respect.

Dynamic pricing

Question 27:

- **What reforms to the ACL are required to protect against dynamic pricing where businesses increase the price of the goods or services during the course of the purchasing process? Should the ACL be amended to specifically prohibit this practice?**

136. As mentioned in the Consultation Paper, the ACL does not specifically prohibit dynamic pricing, but any issues relating to price will be categorised under misleading or deceptive conduct, or false or misleading representations.

137. The Law Council has received support for introducing provisions that explicitly prohibit price increases during the purchasing process unless such increases are clearly disclosed upfront. Additional reforms, such as price locking after commitment, transparency requirements for dynamic pricing models, and time-limited price guarantees, would help safeguard against exploitation.

Further views of the C&C Committee

138. In the view of the C&C Committee, it is unclear that there is any gap in the existing ACL in relation to dynamic pricing that needs to be addressed.

139. The C&C Committee is not aware of any ACCC enforcement action in relation to dynamic pricing. However, the C&C Committee considers that the issues identified in the Consultation Paper regarding dynamic pricing are likely to be largely covered by existing consumer protections such as:

- the prohibitions on misleading and deceptive conduct or false and misleading representations (section 18 and 29 of the ACL) if a business provides an upfront price for a good or service but then increases the price during the transaction without the business alerting consumers to the possibility prices may change.
  - If consumers have been alerted to the possibility that prices could change, it is difficult to conceive of the relevant consumer detriment;

- bait advertising, prohibited by section 35 of the ACL on the basis that the business at the time of setting the upfront price, could not have had reasonable grounds to believe it would be able to supply the good or service at that price for a reasonable period and in reasonable quantities.
  - The examples given in the Consultation Paper indicate that bait advertising provisions are unlikely to protect consumers in the context of dynamic pricing for hotel room or booking sales where the businesses clearly disclose there is a limited supply of those items.
  - However, it is difficult to envisage the consumer detriment in these circumstances, unless the limited availability has not been clearly communicated to consumers.

Online account requirements

Question 29:

- **Do you consider reform to the ACL is necessary to address consumer harms associated with businesses requiring account creation for online purchases? If so, is requiring a retailer to provide a 'guest' check-out option appropriate to address the consumer harm? Are there other options that should be considered?**

140. The Law Council is generally supportive of reform to the ACL to address the consumer harms associated with businesses requiring account creation for online purchases, and that a 'guest' checkout option is a practical and appropriate solution that would remove unnecessary barriers to purchase, address privacy concerns, and streamline the consumer experience.

141. Other options, such as stronger data protection, optional account creation, and improved transparency, should also be considered to further enhance consumer rights and experiences. These reforms would ensure that businesses offer consumers the freedom to choose how they engage with online retail, while also improving data privacy protections.

Further views of the C&C Committee

142. The C&C Committee understands that the concerns identified in the Consultation Paper are two-fold and relate to customers:

    - being required to disclose more personal information than is reasonably necessary in order for a business to provide a good or service; and
    - complaining about having to undertake a lengthy sign-up process, especially in circumstances where they are making a once-off transaction and receiving unwanted marketing material following account creation.

143. The C&C Committee considers that these concerns are best addressed by existing privacy obligations that apply to the way businesses collect information under the *Privacy Act 1988* (Cth), and proposed Privacy Act reforms, rather than via reform to the ACL.

144. The existing Australian Privacy Principles (**APPs**) already regulate the collection, use and disclosure of personal information. For example, requiring customers to create online accounts and provide significant amounts of personal information in order to make an online purchase may constitute a breach of APP3 if the collection of a customer's personal information is not reasonably necessary for the business to provide the good or service.

145. It is arguably not "reasonably necessary" for a business to require consumers to create an online account or provide significant amounts of personal information if the consumer is likely to be making a one-off purchase.

146. The *Privacy and Other Legislation Amendment Act 2024* (Cth) received royal assent on 10 December 2024. Amongst other things, this Act will require businesses to include additional information in their privacy policies where computer programs will use personal information to make a decision that "could reasonably be expected to significantly affect the rights or interests of an individual". This obligation will only take effect on and from 10 December 2026.

147. There are further reform proposals slated, including a requirement for the collection, use and disclosure of personal information to be fair and reasonable in all the circumstances, regardless of an individual's consent to collection of the information.

148. The C&C Committee submits that any changes to address these concerns need to be carefully considered so as not to overlap with existing obligations and new privacy obligations yet to take effect, in addition to protections in relation to some sectors under the Consumer Data Right, and may be difficult to reconcile with consumer expectations in circumstances where they do end up making repeat purchases. For example, it is uncertain how these proposals and an obligation for retailers to provide a guest check out option aligns with customer expectations of receiving loyalty discounts, participation in rewards programs, and similar.

Question 30:

- **Should any prohibitions relating to dynamic pricing and online account requirements also apply to protect small businesses in their dealing with other businesses?**

149. The concerns raised in the Consultation Paper regarding dynamic pricing and online account requirements appear to be confined to dealings consumers have with

businesses, rather than being issues faced by small business in their dealings with other businesses.

150. Accordingly, the C&C Committee does not consider that any prohibitions relating to dynamic pricing and online account creation need to apply to protect small businesses in their dealings with other businesses. For example, the key concern in relation to online account requirements relates to the provision of personal information by consumers, which will be less relevant in the context of a small business providing its contact information to another retailer, given presumably much less personal information would need to be disclosed.

151. Similarly, the examples of dynamic pricing all appear to relate to consumers having the price of a good or service that was presented upfront increase during the purchasing process, such as concert tickets. These concerns do not readily translate to the small business context, where it is less likely that there is a finite number of goods or services available for purchase by small businesses, and the price payable by the retailer increases during the purchasing transaction.

Barriers to accessing customer support

Question 32:

- **Would a general prohibition on unfair trading practices, as proposed in this paper, adequately address consumer harm arising from a business's failure to provide a direct point of contact or access to customer support? If not, should there be a specific prohibition and how could this be designed?**

152. The Consultation Paper asks whether a general prohibition on unfair trading practices would address consumer harm arising from a business's failure to provide a direct point of contact or access to customer support. While it is possible that this type of consumer harm could be captured by the general prohibition, particularly by the inclusion in the 'grey list' of 'impeding the ability of a consumer to exercise their contractual or legal rights, a specific provision to target this conduct would be preferable.

153. A specific prohibition would be able to clearly define what constitutes unfair conduct in this context, which in turn will clearly define consumer expectations around businesses' obligations to ensure they can reach customer support in a reasonable manner, and will also ensure businesses are held accountable for providing consumers with timely and accessible support. In so doing, it will enhance consumer protection, increase transparency, and ensure that consumers can resolve issues promptly, thereby reducing harm.

154. As to the form and content of a specific prohibition, the Law Institute of Victoria has submitted that consideration should be given to the following:

    - businesses should be required to provide a direct point of contact for customer support, whether via phone, email, live chat, or other more accessible means.. Businesses must also clearly display customer support contact details on their websites, in emails, and on receipts, ensuring consumers can easily find ways to reach support;
    - businesses should be prohibited from making it unreasonably difficult for consumers to access support (e.g., by requiring long forms, using automated systems with no clear way to reach a human representative, or charging for access to support);

- the level of customer support required should vary based on the complexity of consumer issues; and
- businesses should be allowed to not respond to customer support cases only where external circumstances (e.g., system outages, pandemics) prevent the business from providing support within a reasonable timeframe. In such cases, businesses must notify consumers of expected delays and provide alternative methods for reaching support.

155. The ACLC adds that consumers in the financial services regime have the benefit of a highly structured internal and external dispute resolution schemes, with legislated timeframes and disclosures of escalation pathways. While the process can be lengthy, access is free and consumer-focused, with no risk of legal costs.

156. The C&C Committee observes that it is difficult to conceive of a single approach to providing appropriate access to customer service support that does not differ depending on the retailer or the industry in which the relevant goods or services are provided. Consideration should also be given to companies operating in sectors with existing obligations for customer contact and dispute resolution benefiting from safe harbours if they are compliant with those regime's requirements.

Question 33:

- **Should any such prohibition also apply to protect small businesses in their dealings with other businesses?**

Views of the C&C Committee

157. The C&C Committee considers that the examples of the concerns regarding barriers consumers face in accessing customer support fundamentally arise in the consumer context, where consumers find it difficult to enforce their rights or need to navigate a complex customer service system.

158. Currently, small businesses benefit from other protections under the ACL in their dealings with other businesses, for example, when another business includes an unfair contract term in their contracts with a small business customer. In the business context, where retailers actively compete to have the goods and services stocked by small business customers, there is a clear incentive for retailers to provide adequate customer service support to small business customers, or they face reduced sales when dissatisfied small businesses take their customer elsewhere.

159. Given this context, the C&C Committee is not aware of a need for any general prohibition on unfair trading practices to also apply to protect small businesses in their dealings with other businesses.

160. If applied in the business-to-business context, the C&C Committee considers that a staged approach would be appropriate, such as that which applied to the introduction of the unfair terms regime. From 2010, that regime only applied to unfair terms in consumer contracts. It was extended so as to apply to small business contracts entered into on or after 12 November 2016, and existing contracts that were varied or renewed after that date.

Views of the Queensland Law Society

161. The Queensland Law Society's Franchising Law Committee has indicated that it does not support a general prohibition for the franchising sector at this time given recent

changes to unfair contract terms (**UCT**) laws and upcoming changes to the Franchising Code of Conduct.

162. In the view of the Franchising Law Committee, the UCT laws provide flexibility and balance, which is particularly important in business-to-business dealings given the wide range of business activities involved and the varying power dynamics compared with business-to-consumer relationships. Allowing the UCT laws to take full effect before considering further changes will ensure businesses have time to adapt and regulators have the ability to evaluate their effectiveness before introducing potentially broader and overlapping prohibitions relating to unfair trading practices.

163. The Franchising Law Committee is concerned that the premature application of a general prohibition to the franchising section could lead to unintended consequences including confusion about compliance with multiple regimes which could result in infringement and exposure to penalties. The UCT laws and the protections under the Franchising Code (particularly the upcoming amendments and the increased penalties), are arguably better suited to addressing issues in this sector. Overregulating small businesses risks making it harder for them to operate and could inadvertently harm the broader business ecosystem.

164. The Franchising Law Committee submits that allowing additional time to assess these changes will provide valuable data with respect to any gaps in protection. This evidence can help shape future prohibitions, if needed, ensuring that they are targeted and effective without creating unnecessary regulatory burdens. If further issues emerge, then updates to the UCT laws or industry specific codes like the Franchising Code would likely be the more appropriate means by which to address these.

Other considerations

Financial services

165. Parliament has made an informed choice to separate financial services consumer protection law from the ACL but that, in respect of key consumer protections, the provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) mirror the relevant provisions of the ACL.

166. It is desirable for there to be harmonious consumer protection laws that apply across financial services and other goods and services, including in respect of any unfair trading prohibition. Accordingly, if the Government decides to introduce an unfair trading practices prohibition into the ACL, the prohibition should be mirrored in financial services consumer protection law, with ASIC continuing in its role as the relevant regulator for financial services consumer protection matters.

167. The inclusion of financial services and financial products in an unfair trading prohibition regime should be effected at the same time as for all other goods and services. Otherwise, a separate process for consideration of unfair trading reform in the context of financial services risks differing terms and may result in arbitrary gaps in consumer protection and would be vulnerable to exploitation by suppliers designing products or contracts to seek to have their conduct regulated in what they may perceive to be the less restrictive environment.

168. Another benefit of harmonious consumer protection laws for financial services and consumers of other goods and services is that community education about legal rights and consumers' expectations and understanding about their legal rights can be aligned.

169. For these reasons, the Law Council encourages continued consideration of the application of unfair trading practice reforms to financial services.