

Submission

Make unfair illegal

Submission from consumer advocates on Treasury's Consultation Regulatory Impact Statement, *Protecting consumers from unfair trade practices*

November 2023



About the submission

The development of the submission was led by the Consumer Policy Research Centre (CPRC) in partnership with Gerard Brody and with consultation with various consumer groups.

This submission is being jointly made by Consumer Policy Research Centre and the following organisations:

- Australian Communications Consumer Action Network
- AMES Australia
- CHOICE
- Consumer Action Law Centre (CALC)
- Consumer Credit Legal Service WA (CCLSWA)
- Consumers' Federation of Australia (CFA)
- Energy Consumers Australia (ECA)
- Financial Counselling Australia (FCA)
- Financial Rights Legal Centre (FRLC)
- Owners Corporation Network (OCN)
- Public Interest Advocacy Centre (PIAC)
- Queensland Consumers Association (QCA)
- Redfern Legal Centre
- Reset Australia
- Super Consumers
- Westjustice

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Statement of Recognition

Signatories of this submission acknowledge the Traditional Custodians of the lands and waters throughout Australia. We pay our respect to Elders, past, present and emerging, acknowledging their continuing relationship to land and the ongoing living cultures of Aboriginal and Torres Strait Islander Peoples across Australia.

It's time for change – it's time to make unfair illegal

An economy-wide prohibition on unfair trade practices is a vital addition to Australia's consumer laws. There are a range of practices that cause consumer harm, and are detrimental to the competitive process, that are not currently unlawful. These practices have become more prevalent with the widespread uptake of online commerce, while also existing in the offline world.

The traditional approach to consumer protection, focusing on preventing misleading, deceptive or unconscionable conduct and outlawing only the worst forms of exploitation, falls short of addressing the complex psychological biases that influence consumer decision-making. Market factors such as information overload, complex product choices, and limited competition can also undermine or impede consumer autonomy. Organisations can exploit these biases and factors, often in nuanced ways, resulting in consumer manipulation and distrust. Furthermore, most Australians believe that unfair practices are unlawful, demonstrating the law is out of step with community expectations. Harms can result not only from sales and marketing, but also from product design and pricing, and after-sales conduct (such as making it difficult to access customer service, a remedy or repairs). Moreover, distrust can lead to consumer disengagement, ultimately affecting marketing effectiveness and healthy competition.

This submission argues that a new economy-wide prohibition, reflected in both the Australian Consumer Law and the *Australian Securities and Investments Act*, is required. We posit this reform is crucial for maintaining consistency in consumer protection across sectors, addressing potential loopholes and preventing regulatory arbitrage. We argue that exempting financial services from the unfair trading prohibitions would incentivise businesses to exploit regulatory loopholes, creating confusion among consumers.

To deliver the greatest benefit, a new prohibition should be drawn broadly **and prohibit any conduct or practices which are, or are likely to be, unfair**. A broad prohibition will mean the law is responsive to conduct and practices that exist today and those that may develop over time. The prohibition should be accompanied by a definition of unfairness that includes conduct and business practices that:

- unreasonably distort or undermine the autonomy and economic choices of consumers
- take unreasonable advantage of a lack of consumer understanding or ability to protect their own interests, or consumers' reasonable reliance on the trader
- omit, hide, or provide unclear, unintelligible, ambiguous, or untimely material information, or
- unreasonably inhibit access to, or enjoyment of, a good or service already purchased.

This definition promotes the National Consumer Policy Objectives¹, particularly the enablement of confident consumer participation in markets and fostering effective competition. It is also responsive to gaps in existing laws and draws upon norms from international laws, thereby removing uncertainty in interpretation of the scope.

An unfair trade practices prohibition could also respond to businesses that exploit First Nations Australians, for example, via the design of marketing and products. Many court decisions (discussed herein) have found such practices to have not breached consumer laws, leaving Aboriginal and Torres Strait Islander consumers vulnerable. In this way, a new prohibition would support the **National Indigenous Consumer Strategy**.²

¹ Intergovernmental Agreement for the Australian Consumer Law, Clause E, July 2009, <https://federation.gov.au/about/agreements/intergovernmental-agreement-australian-consumer-law>.

² See <http://nics.org.au/>.

This submission responds to each of the options in the Consultation Regulatory Impact Statement (RIS), and concludes that **Option 4 would present the greatest net benefit**. Option 4 would not only ensure protection from the broadest range of both current and emerging unfair trade practices, but would also promote business certainty through a 'blacklist' of specified unfair practices.

Crucially, an economy-wide prohibition on unfair trade practices would also promote equity and the Federal Government priority of promoting wellbeing across the community. The subtle nature of many unfair practices often goes unnoticed by consumers, impeding recognition of potential victimisation. Even in cases of accurate identification of unfair treatment, consumers making different choices might not influence providers to act more fairly. Furthermore, the widespread use of sophisticated targeting technology able to distinguish customers based on vulnerabilities not only harms consumers, but can have widespread anti-competitive effects, by giving businesses engaging in unfair practices a competitive advantage over those that do not.

Enforcing a provision against unfair trade practices would ensure more equitable economic transactions, and would foster a healthier marketplace, particularly benefiting vulnerable individuals unable to protect their own interests. Lastly, fair transactions contribute to the development of a cohesive social environment and shared values, aligning with the **Federal Government's commitment to wellbeing**.

This submission is set out as follows:

- Section 1 provides a comprehensive overview of unfair trade practices that cause harm.
- Section 2 provides an overview of the gaps in the Australian Consumer Law relating to unfair trade practices.
- Section 3 summarises the economic and social benefits of prohibiting unfair trade practices.
- Section 4 proposes a design of a prohibition on unfair trade practices.
- Section 5 provides a response to the options in the Consultation RIS, including the preferred option.
- Section 6 explains in detail why the prohibition on unfair trade practices must also apply to financial services, opposing the proposed carve-out.
- Section 7 outlines the need for comprehensive remedies and sanctions to apply to the new prohibition.

Summary of recommendations

Recommendation 1:

In developing the design of an unfair trading prohibition (including the definition of 'unfair'), ACL Ministers should adopt the following principles:

1. The provision should promote the National Consumer Policy Objectives, particularly to enable confident participation of consumers in markets and to foster effective competition.
2. The provision should respond to gaps in Australia's existing consumer protection laws.
3. The provision should build upon existing norms and laws internationally, so as to promote greater certainty in scope.

Recommendation 2:

An unfair trading prohibition should be drawn broadly, enabling it to be responsive to conduct and practices that exist today and those that may develop over time, as follows: *"A person must not, in trade or commerce, engage in conduct or practices that are, or are likely to be, unfair"*.

Recommendation 3:

An unfair trading prohibition should be accompanied by a definition of 'unfair', that includes conduct or practices that:

- unreasonably distort or undermine the autonomy and economic choices of consumers
- take unreasonable advantage of a lack of consumer understanding or ability to protect their own interests, or consumers' reasonable reliance on the trader
- omit, hide, or provide unclear, unintelligible, ambiguous, or untimely material information, or
- unreasonably inhibit access to, or enjoyment of, a good or service already purchased.

Recommendation 4:

An unfair trading prohibition should be further accompanied by a guiding principle that requires consideration of consumer vulnerability, such as whether the conduct or practice causes or exacerbates consumer vulnerability.

Recommendation 5:

An unfair trading prohibition should not adopt principles relating to the supplier's 'legitimate interests', the 'average' consumer, or a 'substantial' harm or detriment test.

Recommendation 6:

An unfair trading practices prohibition should adopt the model proposed in Option 4 of the Consultation RIS, incorporating a general prohibition together with a 'blacklist' of specified unfair trade practices.

Recommendation 7:

The 'blacklist' of unfair trade practices should be specified and managed by the regulator, and subject to public consultation.

Recommendation 8:

An unfair trade practices prohibition should be economy-wide, and there should not be a carve-out for financial services. The reform should apply to both the *Australian Consumer Law* and the *Australian Securities and Investments Commission Act*.

Recommendation 9:

The full range of penalties and remedies, including civil penalties and actions for damages and compensation, should be available for breach of an unfair trade practices prohibition.

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1. Unfair trade practices that cause consumer harm

There are a range of unfair trade practices that cause consumer harm. The Consultation RIS lists a selection of practices, but there are many more.

Unfair practices can be categorised as follows:

- Marketing and selling practices—includes manipulative design online, as well as failing to be upfront or complete in consumer communications (online or in-person).
- Product or service design and pricing—includes designing a product or service or using a pricing strategy that disadvantages consumers, or is not aligned with consumer and community expectations.
- Post-sale practices—includes imposing unreasonable barriers on accessing customer service, complaint processes, or service cancellation.

Table 1, on the following pages sets out a range of unfair practices and examples that are unlikely to be prohibited under the Australian Consumer Law. Many of the examples comprise of practices that have raised concerns among international consumer protection regulators with regard to breaching fairness standards.

The practices discussed in Table 1 are also considered unfair by the Australian community, as demonstrated by 2023 nationally representative CHOICE research³ which found substantial perceived unfairness of the following:

- Businesses charging higher prices for a product or service based on the personal information they collect online—89%.
- Businesses that force consumers to use their chatbot for customer service without providing alternative contact details (e.g. a phone number)—84%.
- Businesses that make it difficult to cancel an online subscription to an unwanted product or service—90%.
- Businesses selling an extended warranty product that does not provide coverage for anything additional to what is available under the law—84%.
- A business requiring consumers to endure a marketing presentation/pitch to get a price or conditions of what is for sale (e.g. holiday timeshare)—74%.
- A debt company targeting someone who has a limited understanding of finances and/or English, offering to relieve them of debt for a fee—86%.
- A company that uses aggressive sales tactics to sell unaffordable and poor value products to people living in remote Indigenous communities—89%.

³ CHOICE, Consumer Pulse Survey, June 2023.

TABLE 1: EXAMPLES OF UNFAIR TRADE PRACTICES

Category	Practice	Examples
<p>Marketing and selling</p>	<p>Using manipulative techniques on online shopping and other websites</p>	<p>Practices that create false urgency or scarcity. For example, limited time only deals without an end-date can create urgency. The UK Competition and Markets Authority’s (CMA) enforcement program will focus on ‘urgency tactics such as countdown clocks, to pressure shoppers to make quicker purchases.’⁴ The UK CMA example in the Consultation RIS relating to action against hotel booking sites for showing other customers looking at the same hotel, in the absence of clarity around search dates is relevant here.⁵</p>
		<p>Using pre-ticked boxes or adding unsolicited items or costs into a ‘basket’ during an online checkout process. CPRC’s <i>Duped by Design</i> described several online retailers, including Appliances Online, which automatically includes a ‘care plan’ in a shopper’s online cart, requiring the consumer to opt-out if they don’t wish to purchase this.⁶</p>
		<p>Trick questions or ambiguous language which can manipulate or confuse consumers. In its guidance on unfair commercial practices, the European Commission includes the following example: <i>During the ordering process in an online marketplace, the consumer is asked several times to choose ‘yes’ and ‘no’: ‘Would you like to be kept informed about similar offers? Would you like to subscribe to the newsletter? Can we use your details to personalise our offer?’ Halfway through the click sequence, the buttons ‘yes’ and ‘no’ are reversed intentionally. The consumer has clicked ‘no’ several times, but now clicks ‘yes’ and accidentally subscribed to a newsletter.</i>⁷</p>
		<p>Design used on websites or online services to enable unwanted charges or product sign-up. The example in the Consultation RIS of Fortnite using ‘counterintuitive, inconsistent, and confusing button configuration leading players to incur unwanted charges based on the press of a simple button’ is relevant.⁸ Another example implicates accounting software provider MYOB, that funnelled customers to an underperforming, high-fee superannuation fund via its employee onboarding software, and hid the ability of employees to maintain contributions with their existing fund.⁹</p>
		<p>Requiring extensive personal or credit card details to view product websites and prices (e.g. membership or meal delivery services)</p>

⁴ UK CMA has published an open letter in March 2023 about the risk of unfairness associated with urgency claims: <https://www.gov.uk/government/publications/using-urgency-and-price-reduction-claims-online>. The regulator has opened two investigations, one in relation to [Emma Sleep](#) and another in relation to [Wowcher](#).

⁵ UK CMA, Hotel booking sites to make changes after CMA probe, 6 February 2019, <https://www.gov.uk/government/news/hotel-booking-sites-to-make-major-changes-after-cma-probe>

⁶ CPRC, *Duped by Design*, 2022, at <https://cprc.org.au/dupedbydesign/>, page 11.

⁷ European Commission, *Guidance on the interpretation and application of Directive concerning unfair business-to-consumer commercial practices*, https://commission.europa.eu/law/law-topic/consumer-protection-law/unfair-commercial-practices-law/unfair-commercial-practices-directive_en, Page 101.

⁸ FTC, Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges, 19 December 2022, <https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations>.

⁹ Hanna Wootton, ‘MYOB allegedly manipulating users into joining its sub-par super fund’, *Australian Financial Review*, 12 March 2023, <https://www.afr.com/policy/tax-and-super/myob-allegedly-manipulating-users-into-joining-its-subpar-super-fund-20230307-p5cpvj>.

Category	Practice	Examples
	Using personalised persuasion techniques or limiting access to services, through use of data or personalised insights	<p>Practices that draw upon aggregated data about consumer behaviour and preferences. Using this data in an opaque and non-transparent way exacerbates unfairness, as does using information about the vulnerabilities of specific consumers or a group of consumers for commercial purposes. In its guidance on unfair commercial practices, the European Commission includes the following example: <i>A trader is aware of a consumer's history with financial services and the fact that they have been banned by a credit institution due to the inability to pay. The consumer is subsequently targeted with specific offers by a credit institution, with the aim of exploiting their financial situation.</i>¹⁰</p> <p>Collecting excessive amounts of personal information and data for surveillance. This practice was identified as the second most common unfair practice in the CHOICE supporter survey (49.7%). As an example, "RentTech" providers (third-party online services designed to aid tenancy applications), have been found to collect excessive data. Concerns have been raised about potential discrimination or unfair treatment and/or surveillance of renters based upon this data.¹¹</p> <p>Using screen scraped data to monitor, identify and target consumers. Lenders using bank account information captured as part of loan application, where screen scraping technology can then identify when borrower is low on cash, and subsequently directly advertise to the customer (e.g. has been found to occur with payday lenders).¹²</p>
	Omitting important information, failing to provide or making it difficult for the customer to obtain upfront and complete disclosure, which may not amount to misleading conduct	<p>Extended warranty promotions. Promoting the value of an extended warranty product should not be done in the absence of upfront information about existing consumer guarantee rights and remedies in the Australian Consumer Law. In the case of <i>Director of CAV v Good Guys</i>, this was found not to amount to misrepresentations.¹³</p> <p>Furthermore, extended warranty products (which may also be described as some form of enhanced or premium 'service') may set out prescriptive rights and remedies (for example, a fixed number of times a failed good may be serviced by a trader before a consumer can ask for a refund) which in fact provide weaker recourse than the existing ACL rights. Ready access to customer service to raise a problem with a good or service may also be conditional on paying extra for such a product, while consumers who do not pay for an extended warranty may face additional delays and barriers in raising an issue.</p> <p>Practices that prevent customers from receiving full disclosure and other material information, including about extended warranty exclusions have been observed being used by a number of second-hand car dealers.</p> <p>Rental Cars and Car Hire Damage Waivers or Excess Reduction. Consumers renting a vehicle are told there is cover if there is a collision or damage to the vehicle and told they can pay a fee to reduce the cost of any damage, which would otherwise automatically run in the thousands. Often these contracts also contain terms that are not explained to consumers at the point of hire, which exclude any damage cover for a sweeping range of situations, including the driver not taking reasonable care or the driver breaching any road rule.</p>

¹⁰ European Commission, *Guidance on the interpretation and application of Directive concerning unfair business-to-consumer commercial practices*, Page 100.

¹¹ CHOICE, RentTech platforms making renting that much harder, 2023, <https://www.choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/choice-renttech-report-release>.

¹² Financial Rights Legal Centre, Consumer Action Law Centre & Financial Counselling Australia, Submission to ePayments Code Review, January 2021, page 9, https://financialrights.org.au/wp-content/uploads/2021/04/210118_ePaymentsCodeProposal_Letter_FINAL.pdf.

¹³ *Director of Consumer Affairs Victoria v Good Guys Discount Warehouses (Australia) Pty Ltd* [2016] FCA 2022.

Category	Practice	Examples
		<p>Sign up processes completed on tablets. Frontline services such as Consumer Action Law Centre regularly speak to people who have no knowledge or copies of any terms or conditions signed by them because they were just handed a tablet to sign, which had already been ‘scrolled through’ by the salesperson to the signature spot. This often seems to occur in tandem with other high-pressure situations, such as when a salesperson attends the consumer’s home for a service or sales pitch.</p> <p>Making unsubstantiated green claims. The following practices with respect to ‘greenwashing’ have been considered unfair under UK and EU regimes for failing to be upfront, or being misleading by omission:¹⁴</p> <ul style="list-style-type: none"> • Making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and an independent monitoring system. • Making an environmental claim about the entire product when it concerns a single aspect of the product. • Displaying an unsubstantiated ‘sustainability’ label, i.e. labelling that is not based on a certification scheme or not established by public authorities.
	Subscription traps	<p>Keeping consumers subscribed. For example, the use of marketing tools that trick people into ongoing subscriptions, through free trials or other means. For example, CPRC’s research found that Kogan automatically adds a free 14-day trial to its membership program via a pre-ticked selection during checkout. The onus is then on the consumer to realise and then make the effort to unsubscribe to a service they may not have intended to purchase in the first place.¹⁵ The US Federal Trade Commission (FTC) recently alleged unfair conduct by Amazon, whereby the option to purchase items on Amazon without subscribing to the Amazon Prime service was more difficult for consumers to locate.¹⁶</p> <p>The practices of subscription traps can also include making the process to unsubscribe difficult to navigate. This is further covered in the post-sale practice section of this table.</p>
	Subverting choice of communication to enable marketing pressure	<p>Unsolicited calling after a consumer lodges an online enquiry. Several insurers and insurance brokers call consumers unexpectedly after they make an inquiry via an online quote process, without having made this expectation clear on their website.</p>
	Pressure selling that may be endemic in a particular market	<p>Pressuring potential buyers. Potential buyers may be put under considerable pressure, for instance, by companies that create barriers to consumers leaving a sales presentation by ‘locking’ them in a room and pressuring them to sign a contract before exiting (e.g. timeshare providers).</p>

¹⁴ European Commission, ‘Circular Economy: Commission proposes new consumer rights and a ban on greenwashing’, 30 March 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2098. CMA, Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government, March 2022, <https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government>

¹⁵ CPRC, *Duped by Design*, 2022, at <https://cprc.org.au/dupedbydesign/>, page 12.

¹⁶ FTC, FTC Takes Action Against Amazon for Enrolling Customers in Amazon Prime without Consent, 21 June 2023: <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-takes-action-against-amazon-enrolling-consumers-amazon-prime-without-consent-sabotaging-their>.

Category	Practice	Examples
Product/service design and pricing	Altering a product attribute or pricing without informing customers of the implications	Changing agreements without informing consumers. Medibank phased out agreements with hospitals, resulting in customers losing access to 'no gap' radiology and pathology services. In <i>ACCC v Medibank</i> , ¹⁷ this was found not to be unconscionable nor misleading.
		Shrinkflation. Supermarkets often reduce package sizes without transparently informing the customer. This has been found to be unfair by the Spanish Competition Regulator. ¹⁸
		Premium increases without explanation. Insurers have been found to increase consumers' premiums substantially without any explanation as to why.
		Charging for a service attribute that was previously part of a free membership. Charging for previously free membership services without updating (reducing) the price of the membership accordingly, can be deemed unfair.
	Pricing practices that penalise loyalty	'Price walking'. The UK FCA has found many insurance companies have increased prices for existing customers at renewal, known as 'price walking'. ¹⁹ This sort of loyalty charging can be considered unfair.
	Using personalised pricing practices that are unreasonable or not based on a legitimate need	Using pricing optimisation techniques or algorithms. Using these techniques that result in higher prices for cohorts of consumers without a reasonable basis (i.e. the consumer presents higher risk for the trader). The Australian Securities and Investments Commission (ASIC) has recently launched legal action against Insurance Australia Group (IAG) for enticing customers to renew their insurance using a price optimiser that allocated a smaller price increase to policies predicted to be less likely to renew at higher prices; and a larger price increase to the policies that were predicted to be more likely to renew at higher prices. Among the claims, ASIC alleges this contravenes the insurer's obligation to provide services efficiently, honestly and fairly. ²⁰ Also a study currently being conducted jointly by CPRC and RMIT has found some initial evidence of businesses engaging in personalised pricing based on a range of factors that consumers are unlikely to be aware of.
		Better rates for selected customers. Mortgage providers offering reduced/better interest rates to select customers, (e.g. those with higher likelihood of switching), while excluding customers who may not be able to easily switch (i.e. older customers, low mortgage balance).
	Limiting payment options, or imposing additional fees for payment, for an essential service	Limited payment options. Some utility providers, particularly telecommunications, require payments to be via 'autopay' or direct debit, despite this payment method disadvantaging many financial constrained consumers.

¹⁷ *ACCC v Medibank Private Limited* [2018] FCAFC 235.

¹⁸ Consumer and User Organisation, OCU denounces six companies in the fact of competition, 23 June 2022: <https://www.ocu.org/organizacion/prensa/notas-de-prensa/2022/reduflacion>.

¹⁹ FCA, FCA confirms measures to protect customers from the loyalty penalty in home and motor insurance markets, 28 May 2023: <https://www.fca.org.uk/news/press-releases/fca-confirms-measures-protect-customers-loyalty-penalty-home-motor-insurance-markets>.

²⁰ ASIC, ASIC alleges IAG misled home insurance customers on pricing discounts, 25 August 2023: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-228mr-asic-alleges-iag-misled-home-insurance-customers-on-pricing-discounts/>.

Category	Practice	Examples
		<p>Additional fees. Some rental providers impose additional fees for making rental payments online, or there may be additional fees charged for rental application processes, e.g., background checks. Tenants are also regularly directed and given little practical choice by real estate agents but to make rental payments via direct debit through the agency’s nominated third-party rental payment app that often charge additional fees.</p> <p>Monthly pricing higher than annual pricing. Insurance firms can charge higher amounts for customers who pay their premiums monthly, instead of yearly.</p> <p>‘Auto-pay’ limitations. Credit card providers can limit options to set up ‘auto-pay’ to make repayments, increasing the risk of consumers being charged interest or overdue fees.</p>
	Designing product or business model that targets financial vulnerability, desperation or addiction	<p>The following practices leverage a customer’s desperation or inability to protect themselves:</p> <ul style="list-style-type: none"> • Pawnbroking. The general practice of pawnbrokers is to provide a short-term low-value loan on security of an item that often has sentimental value. This often encourages people in financial distress to extend payment arrangements month after month as they cannot repay the principal lent and can only meet the period fees and interest. • Debt negotiation services. In <i>Wade v J Daniels & Associates</i>,²¹ the claim alleged that the debt negotiation provider knew of the consumer’s financial position and did not advise its services were unlikely to achieve a solution to keep her home, such as a refinance. The court found that the arrangement did not breach consumer laws. • Exploitation of visual stimuli. Poker machine design has exploited visual stimuli displayed whenever a player receives a return, whether or not the amount won exceeded the amount waged. Features have also been designed to inflate and misrepresent to the player the likelihood of winning. In <i>Guy v Crown Melbourne & Anor</i>,²² the Federal Court held that the conduct was not unconscionable and the representations made were not misleading, despite agreeing that the information displayed was confusing. • ‘Carnapping’. ‘Carnapping’ is a co-ordinated practice organised by businesses in tandem – at various times involving car hire, smash repairs, tow truck companies, and debt recovery lawyers (“legal recoveries firms”) – which take advantage of drivers’ limited legal, insurance and mechanical knowledge, as well as their understandable stress and worry following motor vehicle accidents. A typical carnapping matter involves roadside referral by an attending tow truck driver or via search-optimised online advertising directing the ‘not-at-fault’ driver to specific car hire, smash repairs and recoveries firms. The driver often signs documents at or directly after the scene of an accident.²³ While legal services boards have issued clear professional conduct directives and taken enforcement action against some legal practitioners acting to recover alleged debts in these matters²⁴, there is not an outright prohibition on these arrangements where they amount to unfair conduct by all participants.

²¹ [2020] FCA 1708.

²² [2018] FCA 36.

²³ Westjustice, *Don’t Settle For Less: The Settlement Justice Partnership and Fairer Outcomes For Refugees in Melbourne’s West*, at https://westjustice.org.au/cms_uploads/docs/westjustice-settlement-justice-project-report-final.pdf on p.59.

²⁴ See for example Victorian Legal Services Board and Commissioner, *Acting in Motor Vehicle Accident Claims*, https://lsbc.vic.gov.au/sites/default/files/2020-05/Fact%20sheet%20-%202015-06-17%20-%20FINAL%20Acting%20in%20motor%20vehicle%20accident%20claims%20-%20LPL%20Update%28rev%2020%29_0%20%281%29.pdf.

Category	Practice	Examples
	Product or service models that create a reasonable reliance by the consumer that their interests will be safeguarded	<p>Selective comparison services. Comparison services or intermediaries may create an expectation that it will act in the person's best interests. It may be unfair for such services to not compare the entire market, or to not promote the best offer, where this isn't disclosed to the user. While the service is not unfair per se, there should be a higher standard.</p> <p>Bundled essential services. Some intermediary companies offer arrangements where utility connection may be automatically arranged in tandem with moving into a new home (for example, through a real estate agency's promotion of the service). There are no standards to ensure the utility that the consumer is connected to will offer the most affordable or appropriate plan, or that important information such as concessions are disclosed and factored into billing at the point of entry into a contract.</p>
	Charging for a service that a consumer can access for free, without informing them	<p>Credit repair agencies commonly charge customers to correct credit reports when complaints can be made for free via external dispute resolution firms. There are also organisations which charge for applications for early release of superannuation, and take a proportion of the funds, without clearly informing customers that they can make applications directly.</p>
	Designing complex products to evade particular consumer protections or regulatory standards	<p>Artificial structures. Some warranty firms design their product so that the provider is an 'administrator' only, rather than the warranty provider, and posit that the retailer (often a car dealer) is the warranty provider. This is despite the warranty firm designing the product, and managing and deciding claims. The artificial structure appears designed to limit consumer access to redress and avoid standards that would be required if the warranty firm issued the product directly, for example, access to external dispute resolution and licensing standards.</p> <p>Bonus content in the education market: Consumer advocacy organisations have also come across arrangements (particularly in the unregulated private courses and education market) where significant portions of the service being paid for are classified as "bonuses" included as free additions to the agreement, with only nominal elements of the service being treated as being provided for consideration. This then creates a consumer impediment if the service fails to meet consumer guarantees, but a provider claims that the consumer is ineligible for any refund on any free 'bonus' material.</p> <p>Embedded networks. Owners of apartment buildings or strata schemes can be subject to unfair practices as a result of the practices of developers and related entities. For example, the creation of embedded networks to provide electricity, gas, water, and telecommunications can mean that residents are not entitled to the same protections as other customers. Embedded networks are installed by a developer often for free (or the embedded network operator will pay the developer a fee), in return for a long-term arrangement allowing the operator to provide monopoly and inflated contracts. This arrangement also impacts both resident owners and tenants, who are held captive to that provider.²⁵</p>

²⁵ See interview by MP Ray Williams (Member for Castle Hill) on embedded network issues: <https://www.raywilliamsmp.com.au/rw-blog/fighting-to-stop-the-embedded-network-rot>

Category	Practice	Examples
		Similar issues have been observed in relation to long-term building management contracts entered into on behalf of owners, which impedes residents' choice of service provider. These arrangements (contracts commonly between the service provider and an owners corporation) are not commonly covered by unfair contract term laws. ²⁶
	Planned obsolescence	<p>Planned obsolescence. The EU Unfair Commercial Practices Directive includes this as an unfair practice, involving 'deliberately planning or designing a product with a limited useful life so that it will become obsolete or non-functional after a certain period of time'. Related unfair practices could include:</p> <ul style="list-style-type: none"> • undisclosed, planned obsolescence that relies on high switching costs to force consumers to regularly purchase additional or replacement products • a lack of disclosure that a product will be obsolete in an unreasonably brief period of time, as a result of internal decisions of future support, or • not providing security updates for smart products for a reasonable amount of time, thereby putting sensitive consumer information at risk. <p>The example in the Consultation RIS of CMA UK taking action against Apple Inc where customers were not warned that their phone's performance could slow down following a software update also fits in this category.²⁷</p>
	Including a condition or exclusion in an insurance policy that is unrelated to the risk insured	Unrelated disclosure clauses. Consumer advocates have raised concerns about insurance policies that require disclosure of bankruptcy, and then deny cover should there have been non-disclosure, in circumstances where the bankruptcy is unrelated to the insured risk being covered.
	Bundling products or costs into one item, making it difficult to compare	Bundling. Funeral homes commonly bundle various goods and services, making it difficult to compare quotes across different providers (different packages have different inclusions). ²⁸
	Other pricing practices of concern	Non-display of selling price on or close to a product. This lack of price clarity and transparency often occurs in convenience stores, bars and pubs. The practice prevents informed choice and price comparison.
		No scales provided. A supermarket not providing scales to allow consumers to weigh products (especially fruit and vegetables) prevents weight-based price comparison, as well as impeding knowledge of the total cost.
		Ambiguous label design. A supermarket or store using the same or similar design as a 'special' or 'discount' price ticket to advertise full-priced items can be misleading and lead to higher priced purchases. This can also include was/now price labelling strategies where the "now" price is actually the full-price from weeks/months ago. ²⁹

²⁶ For more information, see Expert Panel, Embedded Network Review Final Report, July 2022, <https://engage.vic.gov.au/embedded-networks-review>.

²⁷ CMA, Apple iPhones consumer protection case, 22 May 2019: <https://www.gov.uk/cma-cases/apple-iphones-consumer-protection-case>.

²⁸ See CHOICE, Funeral Home investigation, September 2019, <https://www.choice.com.au/health-and-body/healthy-ageing/ageing-and-retirement/articles/funerals-investigation-how-much-do-funerals-cost>.

²⁹ See CHOICE's Shonky Award to Coles and Woolworths, 2 November 2023, <https://www.choice.com.au/shonky-awards/hall-of-shame/shonkys-2023/coles-and-woolies>.

Category	Practice	Examples
		<p>Pricing claims that are impossible to verify. For example, advertising a therapeutic bed with a \$1000 discount without being upfront about the price, or requiring a sales consultation to verify the price is underhanded and could be considered unfair.</p> <p>Hiding commissions and other payments in a charge described as an ‘insurance premium’. This practice has been raised in the context of owners’ corporations.³⁰</p> <p>Increasing annual or regular prices for services without explaining why prices are increasing. This is particularly unfair in relation to insurance where the consumer may be able to take some action to mitigate the price increase, especially for insured items that depreciate in value over time.</p>
Post-sale practices	Designing customer service systems which impede access to support or remedy	<p>Impeding access to effective customer service / complaints processes. In the case of <i>ACCC v Mazda</i>, the court found that Mazda gave consumers who reported faults with their vehicle the “<i>run around’ by engaging in evasion and subterfuge, and providing ‘appalling customer service’</i>”. The Full Federal Court found that this did not amount to unconscionable conduct.³¹</p> <p>Other unfair practices might involve forcing a customer to use a particular service channel (i.e. forcing to use online communication when the customer’s preference is for phone; or vice versa) or simply imposing unreasonable delays or other barriers to customer service.</p>
		<p>Complicating the cancellation process. The US Consumer Protection Regulator (FTC) has alleged that Amazon knowingly complicated the cancellation process for Prime subscribers who sought to end their membership.³² The UK FCA said that breaches fairness standards include imposing unnecessary questions or steps before a customer is able to confirm their instructions to cancel an automatic renewal feature, and having unreasonably longer call wait times to cancel the auto-renewal feature (compared to purchasing a new policy).³³</p> <p>‘Confirm-shaming’. The use of emotional and judgemental language to discourage digital service cancellation is unfair. The European Commission Guidance on Unfair Commercial Practices includes the following example: <i>In order to unsubscribe from a digital service, the consumer is forced to take numerous non-intuitive steps in order to arrive at the cancellation link. These steps include ‘confirm-shaming’, whereby the consumer is prompted, without reasoned justification, to reconsider their choice through emotional messages several times (‘We’re sorry to see you go’, ‘Here are the benefits you will lose’) and ‘visual interference’, such as prominent images that encourage the user to continue with the subscription instead of cancelling.</i>³⁴</p>
	Creating unnecessary barriers to service cancellation	

³⁰ CHOICE, Backroom deals in strata insurance and how they're costing you', 10 October 2023, <https://www.choice.com.au/money/insurance/home-and-contents/articles/conflicts-of-interest-in-strata-insurance>.

³¹ *ACCC v Mazda Australia Pty Ltd* [2023] FCAFC 45.

³² FTC, FTC Takes Action Against Amazon for Enrolling Customers in Amazon Prime without Consent, 21 June 2023: <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-takes-action-against-amazon-enrolling-customers-amazon-prime-without-consent-sabotaging-their>.

³³ UK FCA, ICOBS 6A.6 Cancellation of automatic renewal, <https://www.handbook.fca.org.uk/handbook/ICOBS/6A/6.html>.

³⁴ European Commission, *Guidance on the interpretation and application of Directive concerning unfair business-to-consumer commercial practices*, Page 102.

Category	Practice	Examples
		Impeding access to guarantees. Marketing a product with a ‘money back guarantee’, but then making it difficult to access the guarantee is unfair. This may include, for example, products or services where a person is required to engage with a ‘gauntlet’ of customer service staff to finalise a refund request, pressured to continue using the product, or otherwise delayed in a way that may cause an advertised or contractual guarantee to expire and prejudice other consumer rights and remedies.
	Omitting pertinent information about refund or return entitlements	Omitting information about consumer guarantees. In the case of <i>ACCC v LG</i> , the Full Federal Court determined that LG’s practice of ‘negotiation’ around remedies, without reference to consumer guarantee rights, was not misleading conduct. ³⁵
	Imposing unfair conditions of service access	Imposing unreasonable conditions on flight credits. CHOICE asserts that Qantas charging additional money to use a flight voucher, or putting unreasonable limitations on credit redemptions or access is unfair. ³⁶ This is outside of the terms of service, and extends to credit redemption systems meaning that consumers could not access flight credits.
	Limiting repair rights unreasonably	‘Authorised repairers only’. Requiring a product to only be repaired through particular or authorised repairers, or limiting rights when customer chooses alternate repairer (i.e., access to further support) is unfair. This appears to be a recurring issue among insurers, particularly where it is suggested that honouring a claim is conditional on a designated repairer irrespective of how long the repairer takes.
		Common points of failure. Designing goods with known / common points of failure to increase revenue from replaceable parts is unfair.
		Unique parts. Designing goods with unique parts (e.g., curved screen) to limit repairability or increase revenue from replaceable parts is unfair.
	Using unfair tactics to require payments, beyond legitimate interests	Leveraging unreasonable payments. Storage companies, towing companies and pawnbrokers can hold goods of value (including sentimental value) to demand payments, often of amounts far more than the cost of goods or cost of holding goods, affecting people experiencing vulnerability. ³⁷
	Hiding mandated customer information with confusing or distracting information, including marketing	Hiding mandated information. Superannuation funds, which are required to inform their members when and how they fail a performance test, have been observed to include unnecessary information in letters to members to confuse and distract from the test failure, e.g. discrediting the performance test methodology, referring to other awards or rankings their product had received.

³⁵ *ACCC v LG Electronics Australia Pty Ltd* [2018] FCAFC 96.

³⁶ CHOICE, Qantas flight credit policy unfair to consumers, 12 April 2022, <https://www.choice.com.au/travel/on-holidays/airlines/articles/qantas-flight-credits-failure>

³⁷ See Consumer Action Law Centre, Submission to Review of Warehouseman’s Liens Act, 2017, <https://consumeraction.org.au/review-of-the-warehousemens-liens-act-1958-position-paper/>

2. Gaps in the Australian Consumer Law

The Consultation RIS usefully sets out limitations of existing protections in the Australian Consumer Law (the ACL). This section of the submission responds to that discussion and considers limitations both with the standards-based provisions in the ACL as well as the specific provisions, which prohibit defined behaviours. In both cases, we demonstrate that the existing laws do not respond effectively to the types of unfair practices listed in Table 1.

The majority of the general community already think businesses are required to treat consumers fairly, demonstrating that the community expectation is inconsistent with the existing requirements. Research conducted in 2023 by CHOICE found that **72% of consumers believe that Australian businesses are already required by law to act fairly towards consumers**, and **69% believe Australian businesses already face penalties if found to have been acting unfairly**.³⁸ As will be further discussed in section 3 (below), inconsistency between the law and community expectations can contribute to consumer distrust and impede market effectiveness and healthy competition.

2.1 Limitations of standards-based provisions in the ACL

The standards-based provisions in the ACL include the following:

- The prohibition on misleading and deceptive conduct.³⁹ The standard set by this prohibition is also reflected in the provisions which prohibit false and misleading representations in specific circumstances.⁴⁰
- The prohibitions against unconscionable conduct. This includes both the statutory prohibition in connection with the supply or acquisition of goods and services,⁴¹ and the prohibition on ‘unconscionable conduct within the meaning of the unwritten law’.⁴²
- The prohibition on unfair terms in consumer and small business contracts.⁴³
- The prohibition on physical harassment, undue harassment, and coercion.⁴⁴

Misleading and deceptive conduct

There are several difficulties with the prohibition on misleading and deceptive conduct when applied to unfair practices, as demonstrated in Table 1 above. The first relates to misleading **omissions** or **silence**, which is acknowledged in the Consultation RIS.

Lack of obligation to be upfront in communication

First, judicial interpretation confirms that the prohibition on misleading and deceptive conduct does not require a business to be upfront in its communication, or to specifically inform the consumer about all material aspects of the product or service supply or acquisition. While the Consultation RIS refers to the case of *ACCC v AGL South Australia Pty Ltd*,⁴⁵ there are two further cases that also demonstrate the associated harms, particularly in the context of a business failing to inform a customer of their refund rights.

³⁸ CHOICE, Consumer Pulse Survey, 2023.

³⁹ Section 18, ACL.

⁴⁰ Section 29-31, and section 33-34, ACL.

⁴¹ Section 20, ACL.

⁴² Section 21, ACL.

⁴³ Section 23, ACL.

⁴⁴ Section 50, ACL.

⁴⁵ [2014] FCA 1369.

Australian Competition and Consumer Commission v LG Electronics Pty Ltd⁴⁶

In the context of a defective appliance in combination with an expired manufacturer's warranty, LG Electronics made various representations outlining what it was prepared to offer a customer as a remedy, making no reference to the customer's consumer guarantee rights or remedies under the consumer guarantee provisions of the ACL. These representations were found not to be misleading, even though the consumer guarantee provisions would have provided the customer with remedies greater than what LG Electronics offered. The court held that these were mere 'offers', as part of a 'negotiation', and were not considered to be representations of the consumers' statutory rights. The finding of this case unfairly puts the onus on the customer to know their consumer guarantee rights. A lack of knowledge can arguably cause detriment whereby the result is a poorer remedy than what the consumer is legally entitled to.

Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd⁴⁷

This case was based on five store visits whereby Consumer Affairs Victoria (CAV) inspectors posed as customers during a mystery shop and asked questions about a television. Questions included what would happen if the television was defective or broke down, and in response, salespeople provided information about an extended warranty, in the absence of information about consumer guarantee rights or remedies. It was alleged that this implicitly represented that the consumer's sole source of rights was the extended warranty, (while legally, consumers have rights under the ACL, and may have been entitled to a remedy). The court held that the implied representations were not made, noting that the customer was provided with, or had available a brochure which explained that the extended warranty did not exclude ACL rights.⁴⁸

Both cases confirm that silence is not considered misleading. The prohibition on misleading and deceptive conduct does not require a business to be upfront about consumer rights. There is case law that finds that the court's task is to view the conduct as a whole, including representations and omissions, to determine whether the conduct is misleading.⁴⁹ In other cases, the court has adopted an approach which analyses whether the circumstances give rise to a 'reasonable expectation' that if a relevant fact existed, it would be disclosed to the person who claimed to be misled.⁵⁰

That said, the above cases do confirm a clear gap in the existing law—there is presently no requirement on a business to be upfront and inform the customer about all material matters relating to the supply or acquisition of goods or services. In *ACCC v AGL South Australia Pty Ltd*, the court held that 'the test of reasonable expectation is not satisfied by an appeal to vague notions of fairness or some concept of optimal disclosure'.⁵¹ Furthermore, the case law associated with misleading omissions is complex and inconsistent, thereby impeding business compliance.

Creating confusion doesn't equate to breach of law

A second difficulty with the prohibition on misleading and deceptive conduct is that **there has not been a breach found by an Australian court, even when it has been accepted that a representation is confusing.** It has been held, for example, that the prohibition is not intended "to cover confusing conduct in the sense that the conduct causes the public to reconsider or doubt its preconceived ideas" (see next case example).

⁴⁶ [2017] FCA 1047.

⁴⁷ [2016] FCA 22.

⁴⁸ [2018] FCA 36.

⁴⁹ *Miller v Associated Insurance Broking Pty Ltd* [2010] HCA 31 at [23].

⁵⁰ *Demagoge v Ramensky* [1992] FCA 557.

⁵¹ [2014] FCA 1369 at [24].

McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd⁵²

In 1980, the court rejected the allegation that the use of the expression 'Big Mac' in advertising by McWilliams Wines for one of its brands of wine, may lead potential purchasers to incorrectly perceive a connection between McWilliams and McDonalds.

The above decision may have been reasonable in the context of trade in the 1980s; however, commerce and representations move much more quickly today, such that even fleeting confusing statements may easily lead a consumer into making an erroneous choice or decision. Despite this, the position has been followed as per the example below.

Guy v Crown Melbourne (No 2)⁵³

Shona Guy had suffered from gambling addiction for 14 years and sought a declaration that the Dolphin Treasure gambling machine was designed to be addictive and produce uneven results. The claim alleged that the gambling machine provider knowingly used sounds and visual stimuli which are displayed whenever a player receives a return, regardless of if the amount won did or did not exceed the amount wagered. It was also alleged that the advertised claim of 87.8% returns was false, as this figure is calculated over the lifetime of a machine and includes jackpots that players rarely win. Ultimately, the return of 87.8% is unlikely to be experienced by a player in one 'gambling session'. The court held that the representation was 'likely to cause confusion to the hypothetical gambler' and that 'the gambler is likely to believe, at least momentarily, that the statement is directed at her or his individual chances of winning on the machine'. However, the judge also said that this confusion could be remedied "*by the gambler looking at some of the information available at the casino or on the internet*". The court held that the system was not unconscionable.

Deception isn't captured by the law

A third difficulty with the prohibition on misleading and deceptive conduct relates to the concept of deception, particularly when applied to corporations, where it can be difficult to prove state-of-mind; a relevant consideration for penalties.

Professor Elise Bant has written that it is almost impossible to prove 'deceptive' conduct against large, modern companies. Deception requires showing deliberate dishonesty and knowledge on the part of those who are "*directing mind and will*", and that "*in large corporations, where roles and responsibilities are dispersed between a huge array of managers, employers and agents, attributing knowledge and dishonesty to defined 'leading' individuals is incredibly challenging and expensive for regulators and victim*".⁵⁴

Unconscionable conduct

There are a range of limitations in relation to the statutory prohibition on unconscionable conduct in section 21 of the ACL. One is articulated in the Consultation RIS. That is, **it requires a high threshold to be met**. The cases summarised in the Consultation RIS relating to *Medibank*, *Mazda*, and *Pitt*, all confirm the threshold is high.

It was initially intended that section 21 extend unconscionable conduct beyond the equitable notion in 'the unwritten law', that is, that the threshold should not be so high. Later amendments further attempted to broaden the breadth of conduct it addresses:

- In the second reading for the bill that introduced the statutory prohibition on unconscionable conduct, the explanatory memorandum said it "*was envisaged to prohibit [undue influence and*

⁵² *McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd* [1980] FCA 159.

⁵³ [2018] FCA 36.

⁵⁴ Elise Bant, 'Misleading Conduct? So What!', *Pursuit*, available at <https://pursuit.unimelb.edu.au/articles/misleading-conduct-so-what>.

*unconscionable conduct in equity] but would, in addition, extend to other conduct that is, in all the circumstances, unconscionable”.*⁵⁵

- A 2008 Senate Committee reported that the provision was “*not working effectively because the courts are not interpreting the section as broadly as was the legislative intent*”, and the “*current interpretation of section 51AC sets the bar too high*”.⁵⁶
- New interpretive principles were added in 2012, to make it clear that the provision ‘is not limited to the unwritten law’, that it can ‘apply to a system of conduct or a pattern of behaviour’, and that it ‘can extend beyond the formation of the contract to both its terms and the way it is carried out’.⁵⁷

Not only has the threshold remained high, but it is contested by superior court judges. While the majority now appear to think that the standard does not require ‘moral obloquy’, there is still disagreement among High Court judges.⁵⁸ Perhaps a key reason that the Parliament’s intention has not been reflected by the judiciary, and that there has been confusion and disagreement, is its maintenance of the word ‘unconscionable’ in the provision rather than broader language, like ‘unfairness’.

There are two other limitations in relation to the prohibition on unconscionable conduct. The first is that recent lead authorities have determined that conduct is unconscionable, in breach of the legislation, if it is “*so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience*”.⁵⁹

Such analysis focuses on the **moral conduct of the wrongdoer**. There is less consideration on the impact of the conduct on consumers, or whether the practice impedes the ability of consumers to make effective choices. This was evident in the cases of *Mazda* and *Medibank*, where the courts commented that the conduct may have caused an unfair impact, yet it was not deemed unlawful:

- in *Mazda* where the court noted that “*failures to provide sufficient support and assistance [to customers] and delays in diagnosing the cause of faults [of cars] and taking steps to address them imply poor, even at times what might be characterised as appalling customer service*”.⁶⁰
- In *Medibank*, the court noted that it will not be unconscionable merely because “*hardship has or may be caused to a consumer by conduct*”, also noting “*unfair the conduct may have been*”.⁶¹

To determine statutory unconscionable conduct, the analysis also considers the conduct of the wrongdoer as compared to ‘acceptable commercial behaviour’. That is, it focuses on rogue conduct rather than conduct that is endemic in a market. Where many or all relevant providers engage in similar conduct (e.g. some dark patterns and the like), it will likely be considered ‘acceptable commercial behaviour’.

The focus on the wrongdoer, rather than the impact on consumers, and prohibiting conduct to that which is ‘so far outside the societal norms of acceptable commercial behaviour’ limits the effectiveness of the statutory prohibition.

⁵⁵ House of Representatives, Trade Practices Amendment (Fair Trading) Bill 1997, Explanatory Memorandum at 22.

⁵⁶ Senate, Standing Committee on Economics, The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974 (2008).

⁵⁷ Competition and Consumer Legislation Amendment Act 2011 (Cth), Sch 2, s 4.

⁵⁸ *ASIC v Kobelt* [2019] HCA 18. Kiefel CJ and Bell J noted that ‘moral obloquy’ had been considered to have ‘a role to play’ by the Full Federal Court, but said it was not a substitute for the words of the Act. Keane J said that unconscionable conduct ‘imported the high level of moral obloquy associated with the victimisation of the vulnerable’. Gageler J took a different view, regretting his previous use of the term, saying it potentially misled one into considering the standard had a requirement of conscious wrongdoing.

⁵⁹ *ASIC v Kobelt* [2019] HCA 18 at [91]. This has been followed by numerous Federal Court and other cases. We note, however, that other judges have criticised a requirement to search for societal norms or ‘acceptable social and community standards’, noting that the prohibition does not specifically reference this and the search for such norms and values ‘is little more than intellectual fairy floss’: *AHG WA (2015) Pty Ltd v Mercedes-Bens Australia Pacific Pty Ltd* [2023] FCA 1022 at [3506].

⁶⁰ *ACCC v Mazda Australia Pty Ltd* [2023] FCAFC at [583]

⁶¹ *ACCC v Medibank Private Limited* [2018] FCAFC 235 at [246]

A further limitation of the prohibition on unconscionable conduct is its **mal-adaptability to deal with systemic issues with conduct** or a pattern of harmful practices, rather than merely conduct relating to particular conduct, consumers, or transactions. This is despite direction from Parliament that the section is “capable of applying to a system of conduct or pattern of behaviour”⁶² and is evident in the failure of various regulatory cases that have alleged systemic unconscionable conduct. See the following two examples.

Unique International College Pty Ltd v ACCC [2018] FCA 155

The Full Federal Court held that the ACCC had not established an unconscionable business system on the part of the education provider, Unique International College, regarding the exploitation of the VET FEE-HELP system. The fact that the college had aimed its course at students from low socio-economic backgrounds, Indigenous Australians, people from remote and regional backgrounds, and the unemployed, was found non-determinative as that was the very purpose of the government scheme. In addition, the ACCC had focused on the effect of the business system employed by the college on six individual students. The Court held that this evidence was insufficient because the ACCC failed to demonstrate that the selection of these individual students had been through a random or representative process, with the process disclosed on the evidence.

ASIC v Kobelt [2019] HCA 18

The owner Mr Kobelt, of a remote store in the South Australian APY Lands, offered an informal credit scheme known as ‘book-up’ to the local Anangu community. The local community members were extremely poor, had low financial literacy and had little or no access to credit or vehicles outside the store provided by Mr Kobelt. The book-up scheme allowed Anangu customers to purchase goods and second-hand vehicles on credit by providing their debit cards, PINs, and details of their income. Mr Kobelt used these details to withdraw the whole of the customers’ money from their bank account on the day they were paid. Around half of withdrawn money was used to pay down debt, while the balance was to be used as credit for items or cash advances at the store. The credit charges were not disclosed but were high. ASIC argued that the scheme amounted to systemic unconscionable conduct. The High Court found that the system did not contravene the statutory prohibition, with the majority finding that the system provided Anangu customers with a benefit in enabling them to manage their money more effectively and access credit to purchase second-hand vehicles and other goods offered by the store. A particular focus was on the finding that Mr Kobelt was acting in good faith and not dishonestly.

If, as in *Unique*, a regulator is unable to point to multiple examples of wrongdoing, together with a claim about the way the business practice operates, to sustain a claim of systemic unconscionable conduct, then there are limitations with the existing provision. A particular problem is the focus of the provision on ‘conduct’ rather than broader business practices, which may be systemic. Similarly, the *Kobelt* decision found that the ‘book up’ system was not systemically unconscionable. The court focused on the professional conduct of Mr Kobelt and found he individually did not act dishonestly or against conscience. There was less focus on the impact of the business system established for the Anangu customers, or the question of the business model impeding any freedom of choice (e.g. by binding them to the store). The majority in *Kobelt* did not consider distorting or impeding the choice of customers to be significant or determinative.

Unfair contract terms

The courts have held that the concept of unfairness for the purposes of the unfair contract term provisions is ‘of a lower moral or ethical standard than unconscionability’.⁶³ However, the reach of the regime is **limited to terms of standard form contracts**. As noted by the Consultation RIS, the provisions do not address unfair conduct that may occur prior to entering contracts, or the parties’ dealings while the contract is in place. The test for unfair contract terms also allows the Court to consider whether a term

⁶² Section 21(4)(b), ACL.

⁶³ *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; (2015) 236 FCR 199 [363]–[364]; *Australian Securities and Investments Commission v Bendigo and Adelaide Bank Ltd* [2020] FCA 716 [20].

which would otherwise be unfair is justified due to legitimate business interests. This limits the utility of the unfair contract terms provisions, particularly where a practice may be common across an industry.

Coercion and undue harassment

The other general prohibition in the ACL, while not being described as such by the Consultation RIS, is the prohibition on the use of physical force, undue harassment, or coercion in connection with the supply or possible supply, or payment for, goods and services.

In relation to the examples of unfair practices in Table 1, the prohibitions on the use of physical force or undue harassment will rarely be relevant. The former requires in-person contact; the latter is concerned with repeated, unwelcomed, and unjustified pressure calculated to intimidate, demoralise, or exhaust.⁶⁴ These provisions have been commonly used in relation to debt collection conduct.

The prohibition on coercion; however, is arguably broader and may be more adaptable to forms of unfair conduct or business practices.

It has been held that coercion does not require threatening conduct or intimidation, but that it extends to forms of compulsion which negate free choice.⁶⁵ In *ASIC v Select AFSL Pty Ltd (No 2)*, 14 vulnerable consumers (10 of whom were Indigenous and living in remote Australian communities) were pressured into entering various life, funeral, and accidental injury insurance agreements. Most of these consumers did not speak English as a first language and had little understanding of, and were misled with respect to the products being sold to them. Furthermore, they were rushed through sales discussions and contracts. Questions from the consumers in sales calls often went unanswered, and their requests for time to consider their options were ignored.

However, the court focussed on the need to rule based on “*some conduct, which is capable of compelling a person or applying pressure to act in a particular way*”. Many of the forms of unfair persuasion or manipulation referred to in Table 1 are likely to fall short of the compulsion required to meet the threshold for coercion, demonstrating that despite being more nuanced, this type of manipulation can cause detrimental effects.

2.2 Limitations of specific unfair trade practices provision in the ACL

The ACL includes a range of provisions prohibiting specific types of unfair trade practices. These include:

- bait advertising⁶⁶
- offering rebates, gifts, prizes, or other free items with the intention of not providing them⁶⁷
- wrongly accepting payment in various circumstances⁶⁸
- unsolicited sending out of credit or debit cards⁶⁹
- asserting payment for unsolicited goods or services⁷⁰
- pyramid schemes,⁷¹ and
- referral selling.⁷²

⁶⁴ *ACCC v McCaskey* [2000] FCA 1037.

⁶⁵ *ASIC v Select AFSL Pty Ltd (No 2)* [2013] FCA 350.

⁶⁶ Section 35, ACL.

⁶⁷ Section 32, ACL.

⁶⁸ Section 36, ACL.

⁶⁹ Section 39, ACL.

⁷⁰ Section 40, ACL.

⁷¹ Section 44, ACL.

⁷² Section 49, ACL.

Nearly all these provisions were included in the *Trade Practices Act 1974* when it was enacted, and consequently respond to specific concerns with various unfair business practices as they existed in the 1970s and 1980s. It should be noted that these specific provisions have rarely been added to since, nor have they been used in recent years.

Business practices have adapted significantly since those earlier times, with the development of e-commerce and digital platforms, as well as new technologies. As noted in the Consultation RIS, this has led to greater complexity, with enhanced roles for intermediaries as well as requiring consumers to deal with multiple parties and different types of commercial relationships. As described further in Section 4 (below), this creates an urgent need to update the consumer law, including specific prohibitions, to account for the changed (and changing) nature of modern commerce.

3. Economic and social benefits of addressing unfair trade practices

The Consultation RIS describes the emergence of unfair trade practices and new types of consumer harm, that can be addressed through a prohibition on unfair trade practices. It also describes how unfair trade practices can distort competition, which relies on consumers being able to make free and informed choices about the products and services that best suit their needs. This section builds on that analysis.

Consumer protection has traditionally sought to ensure consumers have sufficient information and are not misled, can trust businesses and make informed choices. Confident consumers are in turn, believed to be instrumental in maintaining a healthy competitive process whereby businesses that best satisfy consumer needs can thrive. Regrettably, this has led to a limited focus of consumer protection law centring around ensuring effective disclosure, for example, through prohibiting misleading conduct.

3.1 Traditional economic view alone is not fit-for-purpose

While a traditional economic view can lead to broader provision of information for consumers, lessons from psychology and behavioural economics about consumer decision-making can help build a more holistic approach to consumer protection. Consumers cannot simply process information and make the optimal choice, as the body of evidence shows they are subject to many biases in decision-making. These may include the following:

- Inertia – this can be due to a preference for inaction, or the tendency to follow ‘the path of least resistance’.
- Loss aversion – people are more sensitive to losses than gains, so may be afraid to act in case they incur losses.
- Anchoring or default bias – consumers start from a reference point and then make insufficient adjustments as further information is considered.
- Endowment effect – consumers place a higher value on something they own, or imagine they own, and therefore demand more to give up an object than they would be willing to pay to acquire it.
- Over-confidence – people are likely to overestimate their future usage or overestimate their ability to predict their future usage.
- Hyperbolic discounting – people tend to put too much weight on the prospect of an immediate reward.

The exploitation of these biases, particularly through marketing and selling practices, can result in the manipulation of consumer choices despite information being provided. The reality is that consumers are not robots with optimal information processing powers.

Falling short of manipulation, the following is an outline of some market factors that can also disadvantage consumers in their relationships with businesses, as well as diminish consumer confidence:

- **Information overload** — in the modern information-rich world, consumers are regularly overwhelmed by the sheer volume of information available. This can lead to confusion and uncertainty rather than confidence.
- **Complexity of products and choices** — many consumer markets, including financial services, telecommunications, and utilities, involve inherent complexity. Products and choices can have different inclusions and allowances, making it difficult for people to fully understand their options, compare, and make choices.
- **Barriers to accessing services** — the service sector has become more important in the Australian economy, and many products now contain a service element through subscription pricing models.

Barriers to accessing services, including customer service or support, particularly affects those experiencing vulnerability, and has become a focus of regulators.⁷³

Due to these factors, as well as behavioural biases, confidence is not merely a function of consumer information provision. Different types of interventions, such as a focus on fair conduct, and ensuring businesses meet consumers' reasonable expectations, are therefore required to promote consumer confidence.

A further problem with the traditional economic view of consumer protection relies on the “*fallacy of trust in markets' concept*”.⁷⁴ Trust is difficult to define, but includes the idea of benevolence—that is, consumers will trust when they can believe a supplier will act in ways beneficial to them.

The reality is, however, that consumers regularly experience and see many reasons not to trust suppliers. Treasury's Australian Consumer Law survey found that six in ten consumers experienced a consumer problem over a two-year period, and 49% were dissatisfied with the response from the business.⁷⁵ Many more, if not all consumers may witness poor treatment of others experiencing problems, either through the experiences of family or friends, or through the media, all of which may lead to consumer distrust.

Siciliani et al argue that, rather than promoting trust, what consumers 'really need is simply not to distrust service providers in general'.⁷⁶ They argue that if distrust is embedded, it can exacerbate consumer inertia and disengagement. When distrust is embedded across multiple providers, then consumers may be particularly prone to simply 'giving up'. Interestingly, distrust can often be observed to be embedded in the consumer advice provided by government and industry sponsored consumer education, for example, via messages to 'read the fine print'.

A failure to intervene in the face of significant distrust will not only harm individual consumers but also negatively impact market effectiveness and healthy competition that drives positive consumer outcomes. If businesses are not incentivised to provide superior customer care and service, consumers may be less likely to play their part in 'activating' competition.

A common response to market distrust is for policymakers and governments to impose intrusive types of intervention. These might include specific and detailed rules (such as licensing rules), and pricing limits or caps. There is arguably a higher risk that these types of interventions may have an unintended consequence, as the competitive process is essentially overruled.

We argue that **a prohibition on unfair business practices, by contrast, can help set a standard that meets consumer and community expectations.** If enforced, such a prohibition could decrease the likelihood of embedded consumer distrust. It could also increase consumers' confidence in their choices, and knowledge that their choices promote competitive outcomes. It will also mean the need for specific interventions are less pressing. Below in Section 5 we identify some specific and detailed rules which have been enacted, that might not have been required should we have had a prohibition on unfair trade practices.

⁷³ Essential Services Commission, *Getting to fair: breaking down barriers to essential services*, August 2021, <https://www.esc.vic.gov.au/other-work/regulating-consumer-vulnerability-mind>.

⁷⁴ Paolo Siciliani, Christine Riefa, and Harriet Gamper, *Consumer Theories of Harm: An economic approach to consumer law enforcement and policy making*, Hart Publishing, 2019, page 92-96.

⁷⁵ Treasury, Australian Consumer Law Survey 2016, <https://consumer.gov.au/consultations-and-reviews/australian-consumer-survey>, page 38, 47.

⁷⁶ Siciliani et al, above, p 95.

3.2 Consumers can't always vote with their feet

Some argue that consumer learning after suboptimal experiences is a market expectation. In economics, a 'moral hazard' argument may be: a high standard of consumer protection might discourage consumers to be informed and circumspect, thus facilitating unfair treatment. Further, alternative 'fairer' suppliers will always exist, to fill gaps, receive consumer loyalty, and will ultimately be the businesses that thrive. However, many consumers who are victim to the types of unfair practices identified in Table 1 may not even realise they are a victim. The harm is far more nuanced compared to, for example, clear and upfront exploitative pricing (which may encourage people to shop around). The unfair practices we are concerned about are subtle, and often hidden.

Even if some consumers recognise that they have been treated unfairly, and therefore make different choices in the future, this may not necessarily help others by incentivising providers to act more fairly. The use of technology and individualised offers enables businesses to be highly targeted in their approaches.

3.3 Unfair practices compound inequity

Further, where sophisticated consumers benefit from the fact that naïve customers are exploited (as might be the case in relation to loyalty penalties), the impact of unfair practices may compound the inequity. If enacted and enforced, an unfair trade practices provision could contribute to economic transactions being conducted in a way that is equitable, particularly for those experiencing vulnerability who are unable to protect their own interests.

Consumer law was developed on the premise that there was an imbalance between consumers and businesses, contributing to consumer vulnerability in the marketplace. However, a focus on information asymmetries in its development has resulted in the position that consumers need to be active and engage with information. Rather than telling people to 'shop around', there is a need to make vulnerability a core value of consumer protection to promote inclusion and fairness.⁷⁷

More broadly, beyond consumer law where transactions are conducted fairly, a sense of social cohesion and shared values within a society can develop. Ultimately, when individuals believe that they are being treated fairly in economic interactions, it contributes to a more harmonious social environment. This aligns with the Federal Government's recent commitment to wellbeing as an economic goal⁷⁸—social cohesion being a key aspect of wellbeing.

⁷⁷ See Chritine Riefa and Harriet Gamper, 'Economic theory and consumer vulnerability: exploring an uneasy relationship', in *Vulnerable Consumers and the Law* (ed. Chritine Riefa and Séverine Sainer), Routledge, 2021.

⁷⁸ Australian Treasury, *Measuring what matters statement*, <https://treasury.gov.au/publication/p2023-mwm>, July 2023.

4. Design of a prohibition on unfair trade practices

The Consultation RIS makes some general comments about the definition of ‘*unfair*’ for purposes of a prohibition on unfair trade practices. It does not; however, propose any specific test or definition. This section proposes a definition of ‘unfairness’ and responds to some of the other models from overseas jurisdictions.

To address the broad array of harmful practices of concern, the new prohibition should be drawn broadly, enabling it to be responsive to conduct and practices that exist today, as well as those that may develop over time.

We propose that the general prohibition should be as follows:

A person must not, in trade or commerce, engage in conduct or practices that are or are likely to be unfair.

Below are some fundamental principles that should inform the development of a test for unfairness:

1. The definition should promote the National Consumer Policy Objectives, particularly to enable confident participation of consumers in markets and foster effective competition.⁷⁹
2. The definition should respond to gaps in Australia’s existing consumer protection laws.
3. The definition should build upon existing norms, so as to promote greater certainty.

This prohibition should be accompanied by a definition of ‘conduct or practices that are unfair or likely to be unfair’, as including conduct or practices that:

- unreasonably distort or undermine the autonomy and economic choices of consumers
- take unreasonable advantage of consumers’ lack of understanding, consumers’ ability to protect their own interests, or consumers’ reasonable reliance on the trader
- omit, hide, or provide unclear, unintelligible, ambiguous, or untimely material information, or
- unreasonably inhibit access to or enjoyment of a good or service already purchased.

For reasons discussed above, we strongly recommend that a key goal of the new prohibition should be to enable the law to respond to consumer vulnerability.⁸⁰ As such, we recommend that the prohibition should be further accompanied by a guiding principle that requires consideration of the vulnerability of consumers, such as whether the conduct or practice causes, exploits or exacerbates consumer vulnerability.

4.1 Broad prohibition

The broad prohibition draws on United States law, and section 5 of the *Federal Trade Commission Act*. It sets a broad standard in the headline provision. Our proposed prohibition is limited to conduct in ‘trade or commerce’ but is not otherwise limited. In this way, it aligns with the prohibition on misleading or deceptive conduct, and sets a simple moral standard, leaving it to the courts to uphold that standard and regulators to provide guidance.

Unlike statutory unconscionable conduct, we do not consider the prohibition should be limited to conduct in connection with “*the supply or acquisition (or likely supply or acquisition) of goods or services to a person*”. This is because unfair trade practices can be practices that harm consumers as a whole, or harm a cohort of consumers (rather than a single person), and may not always relate to supplying or acquiring

⁷⁹ Intergovernmental Agreement for the Australian Consumer Law, Clause E, <https://federation.gov.au/about/agreements/intergovernmental-agreement-australian-consumer-law>, 2 July 2009.

⁸⁰ This aligns with consumer law objectives, see Intergovernmental Agreement for the Consumer Law, Clause D(4).

goods or services. For example, certain unfair data practices may involve the collection and use of data from consumers who are merely searching for goods or services, and may not even acquire these.

We also propose that the prohibition should cover both conduct and practices. This responds to the existing provisions which prohibit ‘conduct’, and perhaps do not allow for sufficient consideration of broader **business practices or systems**. ‘Conduct’ can invite a focus on a specific transaction, while ‘business practices or systems’ can address a particular business model or systemic issues.

4.2 Definition of unfair practices

Our proposed definition is inclusive; it is not designed to be an exhaustive definition. However, drawing on the laws of other jurisdictions and the Australian experience, we consider it is helpful to articulate what is included in conduct or practices that are unfair, to help guide businesses, regulators, and courts. Following, we discuss the application of four limbs.

Limb 1: Unreasonably distort or undermine the autonomy and economic choices of consumers

This draws on the European Union approach to unfair practices but addresses some of the criticism of those provisions. The following table sets out how this limb addresses the principles proposed above.

Promote NCP objective	This limb focusses on conduct or practices which ‘unreasonably distort or undermine the autonomy and economic choices of consumers’ promotes the National Consumer Policy Objective. For consumers to confidently participate in markets and for their choices to foster effective competition, their free choice and autonomy should be respected.
Respond to ACL gaps	This limb would address gaps caused by the interpretation applied to statutory unconscionable conduct. The current focus of inquiry is on the conduct of the wrongdoer and whether it is outside of the norms of acceptable commercial practice. Rather than a focus on the conduct of the wrongdoer, which as described above is a limitation of the prohibition on unconscionable conduct, this limb would promote a focus on the conditions for consumers to have autonomy in the marketplace and be able to make choices freely, that align with their needs and preferences.
Build upon existing norms	The words are drawn from the EU’s Directive on Unfair Commercial Practices, which refers to practices which ‘materially distort or is likely to materially distort the economic behaviour of the average member of a group it is directed towards’. It avoids; however, reference to the ‘average consumer’ which has set a high standard of expected behaviour for consumers. ⁸¹ The reality is that there is no ‘reasonable’ or ‘average’ consumer, and consumers are heterogenous, and experience and engage with information and the marketplace in varying ways. ⁸² An ‘average consumer’ standard also disadvantages consumers experiencing vulnerability, noting that a key objective of consumer policy in Australia is to meet the needs of consumers who are most vulnerable, or at the greatest disadvantage. ⁸³
Other comments	The use of ‘unreasonably’ draws in an objective standard, supports a common-sense approach, and enables a balance to be applied to recognise reasonable

⁸¹ Various cases of the EU Court of Justice define the average consumer as someone who is not easily misled, ‘reasonably well-informed and reasonably observant and circumspect’: *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfert* [1998] ECR I-4657 para 37.

⁸² CPRC, How Australia can stop unfair business practices, 2022, at <https://cprc.org.au/stopping-unfair-practices>, page 9.

⁸³ Intergovernmental Agreement for the Australian Consumer Law, Clause F(4).

conduct or practices that might merely seek to persuade rather than manipulate.

Limb 2: Take unreasonable advantage of consumers’ lack of understanding or ability to protect their own interests, or consumers’ reasonable reliance on the trader

This limb draws on the United States approach to abusive practices, interpreted to prohibit ‘leveraging certain circumstances to take unreasonable advantage’.⁸⁴ The following table sets out how this limb addresses the principles proposed above.

Promote NCP objective	This limb focuses on business conduct or practices that unreasonably place an organisation’s interests ahead of consumer interest in defined circumstances. The provision would promote the NCP objective by supporting consumer empowerment and protection. It would also help ensure consumer protection ‘meets the needs of consumers who are most vulnerable or at the greatest disadvantage’, by prohibiting product/service design, conduct and practices that take unreasonable advantage of consumers’ marketplace vulnerability.
Respond to ACL gaps	<p>This limb would address gaps caused by the interpretation applied to the prohibition on unconscionable conduct. While equitable unconscionable conduct is designed to prohibit exploitation of some vulnerability or disadvantage, the case law interpretation requires a high bar, meaning that it is not meeting consumer or community expectations. Furthermore, the focus has typically been on particular types of vulnerability or special disadvantage (i.e., something that ‘seriously affects the ability of the innocent party to make a judgment as to his [or her] own best interests’⁸⁵), rather than marketplace or situational vulnerability which is a broader concept, applicable to many Australians when adopting this non-traditional definition.</p> <p>This limb would also respond to businesses that exploit First Nations Australians through design of marketing and products that take unreasonable advantage of cultural norms; for example, businesses which have promoted funeral plans or book-up credit services, for which courts have failed to find in breach of existing consumer protections.</p>
Build upon existing norms	The words are drawn from the prohibition of abusive practices in the US Consumer Financial Protection Act (Dodd-Frank Wall Street Reform Act). ⁸⁶ The US Consumer Financial Protection Bureau has said this provision covers conduct that a) sets people up to fail (i.e. setting up payment arrangements that consumers cannot afford to repay), b) leverages circumstances where people have no choice to deal with a specific provider (i.e., the context of debt collection, or credit reporting, or similar), and c) leverages consumer reliance on a business (i.e. where the business has promoted itself as having some expertise or defined role, e.g. switching sites or intermediaries).
Other comments	The reference to taking ‘unreasonable’ advantage draws on an objective standard, supports a common-sense approach, and enables a balance to be applied to recognise that not every business is in a fiduciary relationship with a consumer. What is <u>unreasonable</u> would depend on the nature of the product, service, business, consumer and context.

⁸⁴ Consumer Finance Protection Bureau, Policy Statement on Abusive Acts or Practices, April 2023, <https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/>

⁸⁵ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 and 462.

⁸⁶ See sections 1031(d) and section 1036.

Limb 3: Omit, hide, or provide unclear, unintelligible, ambiguous or untimely material information

This limb draws on the United Kingdom approach to unfair practices. The following table sets out how this limb addresses the principles proposed above.

Promote NCP objective	Omitting, hiding, or providing unclear material information can similarly distort consumer decision-making. This limb promotes the National Consumer Policy Objective, recognising that consumers require material information in a way that is accessible and understandable to confidently participate in consumer markets, and for their choices to foster effective competition.
Respond to ACL gaps	This limb would address gaps caused by the interpretation applied to misleading and deceptive conduct; in particular, the problem of misleading silence or omissions (described above).
Build upon existing norms	The words are drawn from section 6 of the UK’s Consumer Protection from Unfair Trading Regulations. This has been utilised by UK’s Competition and Markets Authority to address greenwashing and misleading omissions, with the Green Claims Code stating ‘consumers can be misled where claims do not say anything about environmental impacts’. ⁸⁷
Other comments	The reference to ‘material’ information draws on an objective standard, supports a common-sense approach, and enables a balance to be applied to recognise it would be unreasonable for a business to provide every aspect of information a consumer may desire. What constitutes <u>material</u> would depend on the nature of the product, service, business, and context.

Limb 4: Unreasonably inhibit access to or enjoyment of goods or services

This limb enables a particular focus on conduct or practices that occur following the purchase of a product or service, including customer service and after-sales support. The unfair practices listed in the third category (post-sale practices) in Table 1 would be addressed by this limb.

Promote NCP objective	Ensuring consumers can reasonably access and enjoy the goods and services they have purchased supports the National Consumer Policy Objective of promoting consumer confidence, as consumers can know they will be supported through after-sales care.
Respond to ACL gaps	The existing ACL does not specifically regulate post-sale standards of conduct. While the other general prohibitions can be relevant, practices such as designing customer service systems which impose unreasonable barriers to access to support or a consumer remedy are unlikely to be addressed by existing prohibitions.
Build upon existing norms	The Singapore prohibition on unfair practice makes it clear that an unfair practice can occur after a transaction. ⁸⁸ The new Consumer Duty that applies to financial services in the UK includes a principle of ‘consumer support’, including that consumers must be able to use their product as reasonably intended and

⁸⁷ CMA, Green Claims Code, <https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services>

⁸⁸ Section 5(1), Consumer Protection (Fair Trading) Act 2023 (Singapore).

	that consumers do not face unreasonable barriers during the lifecycle of the product (such as enquiries, transfer, complaining, cancelling). ⁸⁹ In the Australian context, the fairness test in the rules of AFCA recognise the context of fair treatment, fair service, and fair remediation. ⁹⁰
Other comments	The reference to ‘unreasonably inhibit’ draws on an objective standard, supports a common-sense approach, and enables balance to be applied that might recognise unreasonable expectations placed on businesses to provide support (i.e. where support is outside their control).

Consumer vulnerability

A substantial benefit of a new prohibition on unfair trading is that it should enable consumer law to respond more effectively to consumer vulnerability. As noted above, there is a need to make vulnerability a core value of consumer protection law to promote inclusion and fairness.

Consumer vulnerability arises when a consumer experiences, or is at risk of experiencing barriers to accessing or engaging with trade or commerce. As a result of these barriers, a consumer can experience economic and/or social exclusion or harm. Barriers can include:

- event and circumstance-based factors such as illness, job loss, financial stress, family violence, death of a loved one, ageing and disability, low education, literacy and language barriers, natural disaster, or a global pandemic
- systemic factors, such as the digital divide, regional limitations, low and adequate rates of income support, racism and colonisation, and
- market-based factors, such as complex product or pricing, marketing practices, or service system design.

Including a guiding principle provision, that would require consideration of consumer vulnerability when determining whether conduct or practices were unfair, would enhance the effectiveness of a prohibition on unfair trade practices and promote inclusion. While it would not be mandatory for consumer vulnerability to be present to declare conduct or practices to be unfair, this consideration would ensure regulators and courts have a clear focus on consumer vulnerability and also encourage the design of remedies that promote inclusion.

4.3 Factors that should not be part of the fairness test

The Consultation RIS mentions two principles that may be relevant in determining whether a practice is unfair, that is, it:

1. Is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the conduct; and
2. Would cause detriment (whether financial or otherwise) to a party if it were to continue.

The Consultation RIS also references the EU and UK prohibition that references ‘the average consumer’, in determining whether conduct is unfair. **We do not support the prohibition adopting such principles.**

⁸⁹ FCA, Principal 2A.6 Consumer Duty, <https://www.handbook.fca.org.uk/handbook/PRIN/2A/6.html>.

⁹⁰ AFCA, Fairness Jurisdiction Project, <https://www.afca.org.au/news/latest-news/afca-publishes-fairness-jurisdiction-project-outcomes-report>.

Legitimate business interest is an unnecessary consideration

There are several reasons why it is unnecessary to consider legitimate business interests in the definition of unfair. Each are discussed in detail below.

- **The use of terms ‘unreasonable’ and ‘material’ negates the need to reference ‘legitimate business interests’.** We can ensure that there are balancing factors through use of terms like ‘unreasonable’ and ‘material’ in the definition. Such terms draw in an objective standard and promote a common-sense approach, enabling a balance to be applied to consider what is reasonable in the circumstances, including relevant business factors. On this basis, a specific reference to ‘legitimate business interests’ is unnecessary.
- **The use of ‘legitimate business interests’ places the focus on the wrongdoer instead of the impact to the consumer.** This reference is used in the existing statutory prohibition on unconscionable conduct and has not supported a lower threshold of misconduct for that provision. Section 22 of the ACL sets out the matters the court may regard for the purposes of considering statutory unconscionable conduct. Sub-section (b) says one matter is ‘whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not *reasonably necessary for the protection of the legitimate interests of the supplier*’. As described above, judicial consideration of this provision has focused inquiry on the wrongdoer rather than the effect of conduct on consumer choice or access. This has led to a lack of prohibiting conduct that is unfair to consumers.
- **The use of the term ‘legitimate interests’ in the unfair contract provision is different to using it in a general prohibition.** The unfair contract term provisions are designed to address the fair allocation of rights, obligations, and risks in the contractual bargain, recognising that the efficiency of modern-day commerce is supported by standard-form contracts which consumers have no ability to negotiate. The provisions help ensure terms and conditions strike a fair balance of both parties, so the legitimate interests of the supplier are relevant. An unfair trade practices prohibition is different in that it responds to more nuanced and subtle forms of business practices that unreasonably limit consumer choice or access to products and services.
- **Systemic and industry-wide business practices that should be considered unfair may be seen as ‘legitimate’ given the need to consider ‘broad business practices in the relevant industry’ and ‘standard industry practices’.** Existing case law suggests that there are substantial risks with adopting a ‘legitimate interests’ test, as this would likely lead to a reading down of fairness, or the adoption of a threshold which would fail to meet community expectations. For example, in *Jetstar v Free*⁹¹, a case relating to unfair contract terms, the Supreme Court of Victoria stated that “*the broad business practices in the relevant industry*” are relevant to considering legitimate interests. This would suggest that existing ‘standard industry practices’ such as subscription traps could not be assessed for unfairness, as they might be seen to be ‘legitimate’. Many of the unfair practices in Table 1 are those which occur across many providers in an industry and are not ‘one-off’.

Similarly, the High Court in *Paciocco v ANZ*⁹², in assessing the unfairness of credit card late payment fees, held that ANZ had a ‘legitimate interest’ in the performance of a contract justified the fees. The court focused squarely on the banking business model to understand ANZ’s legitimate interests, and there was little consideration of the impact of the fee on customers. Moreover, the court was largely uncritical in

⁹¹ [2008] VSC 539.

⁹² [2016] HCA 28.

accepting ANZ's evidence about its costs to justify the fee, and considered a broad range of costs which were not directly attributable to the late payment.

Any test of substantial harm or detriment will be ineffective and unhelpful

A requirement that an alleged unfair practice causes detriment seems reasonable but is perhaps unnecessary.⁹³ After all, the purpose of the reform is to address harm or detriment suffered by consumers. Our greater concern is the approach taken by some jurisdictions, like the United States, which defines an unfair practice as one which causes or is likely to cause 'substantial injury'.

A requirement that harms or detriment be 'substantial', 'significant' or similar will impede the effectiveness of unfair trade practices reform. Such an approach fails to recognise the reality of consumer behaviour. The examples of manipulative patterns in websites (such as those in Table 1) may struggle to reach the standard of 'substantial' detriment. For example, 'obstruction' (also known as the 'roach motel' or 'Hotel California' technique⁹⁴) is a central claim in the Federal Trade Commission case against Amazon, that is, design elements that involve intentionally complicating a process (such as cancellation) through unnecessary steps to dissuade consumers from action. CPRC research into unfair practices also identified that harm is not always tangible (such as linked to financial loss) but can also manifest as negatively impacting emotional wellbeing.⁹⁴

The notion of average consumer limits consumer protection

Both the European Union and United Kingdom refer to the concept of the 'average consumer', particularly in determining whether conduct impedes or distorts a consumer choice.

The use of an 'average' or 'reasonable' consumer in the test of unfairness will severely limit its usefulness, particularly in responding to consumer vulnerabilities. This is because consumers are heterogeneous and experience and engage in varying ways. Furthermore, as humans we experience 'bounded rationality' and there are biases which we are all subject to.⁹⁵

Australia's consumer policy framework has a specific objective 'to meet the needs of those consumers who are most vulnerable or are at greatest disadvantage'.⁹⁶ It is important therefore that a test for unfairness meets the needs of those experiencing vulnerability. This could include people for whom English is not their first language, people with disability, older people, people with poor literacy or lower levels of education, people on lower income, and those that are vulnerable to a particular market tactic or practice.

Fundamentally, the use of an 'average' or 'reasonable' consumer would imply a high standard to evaluate whether conduct or practice is unfair. As stated by Professor Lauren Willis, 'a judge reviewing a document after the fact and knowing what she is looking for may decide whether a consumer ought to have noticed disclosure and ought to have understood it, rather than deciding whether real consumers did notice and understand it'.⁹⁷ The same will be true for considering whether conduct or business practice was unfair.

⁹³ In the UK unfair terms decision of *Director General of Fair Trading v First National Bank*, Lord Steyn stated that the element of detriment did not 'add much' to the formulation of identifying an unfair term [2002] 1 AC 481, 499.

⁹⁴ CPRC, How Australia can stop unfair business practices, 2022, at <https://cprc.org.au/stopping-unfair-practices>, page 9.

⁹⁵ See, e.g., Case Sunstein & Richard Thaler, *Nudge*, Yale University Press, 2008.

⁹⁶ Intergovernmental Agreement for the Australian Consumer Law, Clause F.

⁹⁷ Lauren Willis, 'Performance-based Consumer Law', (2015) 82 *U. Chicago L. Rev.* 1309, p 1350, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2485667.

Recommendation 1:

In developing the design of an unfair trading prohibition (including the definition of 'unfair'), ACL Ministers should adopt the following principles:

- The provision should promote the National Consumer Policy Objectives, particularly to enable confident participation of consumers in markets and to foster effective competition.
- The provision should respond to gaps in Australia's existing consumer protection laws.
- The provision should build upon existing norms and laws internationally, so as to promote greater certainty in scope.

Recommendation 2:

An unfair trading prohibition should be drawn broadly, enabling it to be responsive to conduct and practices that exist today and those that may develop over time, as follows: *"A person must not, in trade or commerce, engage in conduct or practices that are, or are likely to be, unfair"*.

Recommendation 3:

An unfair trading prohibition should be accompanied by a definition of 'unfair', that includes conduct or practices that:

- unreasonably distort or undermine the autonomy and economic choices of consumers
- take unreasonable advantage of a lack of consumer understanding or ability to protect their own interests, or consumers' reasonable reliance on the trader
- omit, hide, or provide unclear, unintelligible, ambiguous, or untimely material information, or
- unreasonably inhibit access to, or enjoyment of, a good or service already purchased.

Recommendation 4:

An unfair trading prohibition should be further accompanied by a guiding principle that requires consideration of consumer vulnerability, such as whether the conduct or practice causes or exacerbates consumer vulnerability.

Recommendation 5:

An unfair trading prohibition should not adopt principles relating to the supplier's 'legitimate interests', the 'average' consumer, or a 'substantial' harm or detriment test.

5. Our preferred option and response to other options

We recommend Option 4, being a combination of general and specific prohibitions on unfair trading practices, as the policy option that delivers the greatest net benefit. The following section explains why by assessing each option, in reverse order (representing most to least preferred).

5.1 Option 4 – our preferred option

Creating certainty

As stated by the Consultation RIS, Option 4 would ensure consumer protection from the widest range of both current and emerging unfair trade practices. It would also contribute to public benefit through clearly capturing specific unfair practices that are widespread today through a 'blacklist', while also enabling effective responses to future unfair practices through the general prohibition. Option 4 would additionally have the greatest opportunity to promote consumer confidence and foster more effective competition, as it would create certainty for business, particularly during the period of transition to the new law. As the Consultation RIS states, the specific list would also provide useful guidance to industry.

Insignificant or non-existent costs to implement

The suggested costs associated with Option 4 would likely be insignificant or non-existent.

First, if Option 4 is implemented alongside the accompanying definition we propose, the potential cost listed in the Consultation RIS relating to business confidence and innovation would be substantially lessened. This is because there would be a clear test as to what is unfair, and regulatory guidance could help with business confidence. In relation to the prohibition on unfair contract terms, courts have emphasised that the test is clear—it is not to be *“glossed over with moralistic sentiment”* or *“other feel good factors or niceties in order to remedy any perceived disparity between the parties”*.⁹⁸ Similarly, a clear test of unfairness, accompanied by specific practices would provide guardrails to business and promote innovation in a way that contributes to positive consumer outcomes.

Second, the Consultation RIS suggests that government and regulators may incur greater costs through increased enforcement and administration. In response, we argue that regulators are already incurring costs responding to complaints about unfair conduct and investigating whether it breaches the law. Sometimes these concerns progress to enforcement action but result in court losses (see cases above). In practice, the reform may make administration of the law and enforcement less costly as investigations and actions may be more straightforward where the practice is more clearly defined and prohibited. Ultimately, we would expect more efficient outcomes, in lieu of matters being defended.

Third, the Consultation RIS also suggests costs relating to business training and compliance, as well as regulatory guidance and education measures, would be incurred as part of Option 4. Outside of Option 1 (no change), these costs are likely to be similar across each of the options, with option four potentially being less costly for businesses due to its overarching clarity, specificity and lack of ambiguity.

Regulators to have the power to set and amend the blacklist

The benefits of this Option would also be greatly enhanced if the regulator was afforded the power to set the specific list of unfair terms. This would promote public benefits by:

⁹⁸ *Dialogue Consulting Pty Ltd v Instagram Inc* [2020] FCA 1846 at [322].

- enabling a quick and efficient response to unfair trade practices of specific concern (as noted above, the existing specific unfair trade practices provisions in the ACL have not been substantively updated since the 1970s)
- enabling the list to be managed and updated by the regulator in response to the evolution and change of e-commerce and modern business practices over time
- recognising the specialist expertise and knowledge that the regulator holds, and that it is closer to market participants (regulators also have formal consultative and feedback procedures to enable input from consumer interests), and
- ensuring that decision-making is in line with policy principles (i.e., specified prohibitions would be found to be caught by the general prohibition), making the decision for a practice to be listed to be less likely to be influenced by industry lobbying and vested interests.

It would also be important that the development of the blacklist of specified unfair practices was subject to public consultation. If the regulator was able to specify the blacklist, adding to such a list could be the outcome of a super complaint made by a designated consumer organisation.⁹⁹

5.2 Option 3

Option 3 would achieve many of the benefits accomplished by Option 4, but it would miss the opportunity to deliver benefits associated with supporting industry and community certainty. An accompanying list of specific unfair trade practices would give greater confidence about what is caught by the general prohibition.

This option, however, if designed as we suggest above with an accompanying definition, would provide a level of certainty. This is because our proposed definition provides clarity about the types of practices that would be considered unfair. Businesses could simply test their conduct or practices against the four limbs to aid compliance. Certainty would also be supported by the regulator issuing guidance about the prohibition.

As mentioned earlier in this submission, another benefit associated with a general prohibition on unfair trading is that it may obviate the need for a patchwork of specific and potentially costlier rules to address particular issues. There are a range of recent reforms that could be superseded by a general prohibition, including:

- The extension of credit licensing to debt management companies—in 2019, regulatory changes resulted in debt management being defined as a ‘credit activity’, thus requiring a new class of business to obtain an Australian Credit Licence.¹⁰⁰ This was precipitated by the Federal Court decision of *Wade v J Daniels & Associates* which found a particular debt management arrangement was not unconscionable, and therefore the provider was not required to deliver good outcomes for the customer. This might be contrasted with the new licensing requirements (particularly the requirement to provide services efficiently, honestly, and fairly), which ASIC states require that “services provide tangible benefits for consumers’ and ‘tailored to the needs of consumers experiencing vulnerability’”. Should there have been a general unfair trade practices prohibition, this expectation could have been set without resorting to licensing, avoiding the additional costs associated with a regulator having to oversee the licensing scheme and business compliance.
- The regulation of gift cards—in 2018, new specific provisions were added to the ACL regulating gift cards, including minimum expiry dates, disclosure requirements and a ban on post-purchase fees.¹⁰¹

⁹⁹ The 2023 Federal Budget proposed that the ACCC will establish a super-complaints function, a mechanism for consumer advocacy groups to more quickly raise a systemic issue with the regulator.

¹⁰⁰ See ASIC Information Sheet 254, available at: <https://asic.gov.au/for-finance-professionals/credit-licensees/applying-for-and-managing-your-credit-licence/debt-management-services-applying-for-a-credit-licence-or-variation/>

¹⁰¹ See Division 3A, Part 3-2 of the ACL.

This followed substantial public concern about the fairness of gift cards, including a report by the Commonwealth Consumer Affairs Advisory Council. This might be contrasted with regulatory action taken in overseas jurisdictions. For example, the US FTC has used its prohibition on unfair trade practices to address poor disclosure and unfair fees with gift cards.¹⁰² Should there have been a general unfair trade practices provision, specific rules may not have been required.

5.3 Option 2

Option 2, retaining the core prohibition of ‘unconscionable’ conduct rather than ‘unfair’ conduct, is likely to involve substantial cost without achieving public benefits.

As discussed earlier, there have been past efforts to expand the scope of unconscionable conduct, initially by enacting a statutory prohibition alongside the prohibition on unconscionable conduct within the ‘meaning of the unwritten law’. There was then further reform to provide legislative guidance about the extent of the provision, including that it ‘is not limited to the unwritten law’, can ‘apply to a system of conduct or a pattern of behaviour’, and ‘can extend beyond the formation of the contract to both its terms and the way it is carried out’.¹⁰³

Despite these efforts, the law has not adapted to the relevant community expectation. In his dissenting judgment in *Kobelt*, Edelman J set out this legislative history and said that it “clearly demonstrates that although Parliament’s proscriptions against unconscionable conduct initially built upon the equitable foundations of that concept, over the last two decades Parliament has repeatedly amended the statutory proscription against unconscionable conduct **in continued efforts to require courts to take a less restrictive approach shorn from either equitable preconditions imposed in the twentieth century, by which equity had raised the bar of moral disapprobation**”.¹⁰⁴

Given that history, little should be expected to change should Option 2 be adopted. We posit that a key problem is that the word ‘unconscionable’ invites courts to consider antiquated equitable concepts, **rather than a standard that meets modern community expectations.**

Should the statutory unconscionable prohibition be changed so that the word ‘unconscionable’ is revised to ‘unfair’, this would be an improvement in that it would encourage businesses and courts to consider that a different standard is expected. However, the benefits of a new stand-alone provision with the accompanying definition we propose would not be achieved. Specifically, this approach would risk the focus of inquiry remaining on the moral conduct of the business, rather than if **consumers are provided with the conditions to make effective and free choices, as well as able to access and enjoy products and services.**

A further issue with this approach is that we may lose the benefit associated with the existing jurisprudence relating to unconscionable conduct. While the provision has not met community needs and expectations when it comes to fair business conduct, this does not mean that there is no benefit associated with the provision. For example, where conduct is both unfair and unconscionable, this could lead to a greater penalty to recognise opprobrium associated with such conduct.

5.4 Option 1

Option 1 is in fact the costliest of the options presented, as it fails to remedy the costs of unfair trade practices on consumers, competitive processes, the economy, and society more broadly (outlined below):

¹⁰² FTC, Complaint against Kmart Corporation, available at: <https://www.ftc.gov/legal-library/browse/cases-proceedings/062-3088-kmart-corporation-kmart-services-corporation-kmart-promotions-llc-matter>; FTC, Complaint against Darden Restaurants, available at: <https://www.ftc.gov/legal-library/browse/cases-proceedings/062-3112-darden-restaurants-inc-gmri-inc-darden-gc-corp-matter>.

¹⁰³ Competition and Consumer Legislation Amendment Act 2011 (Cth), Sch 2, s 4.

¹⁰⁴ *ASIC v Kobelt* [2019] HCA 18 at [295].

- **Financial loss**—consumers manipulated into making unintended purchases, unnecessarily incurring significant expenses post-sale, or struggling to cancel subscriptions can impose significant financial harm. Unfair pricing strategies, such as personalised pricing ‘optimisation’ transfers financial costs from consumers to traders. Inadequately addressing unfair business practices will also continue to widen societal inequities, particular for cohorts who are disproportionately targeted and most financially impacted by such practices.
- **Time loss**—manipulative designs, making actions difficult (such as cancellation or even seeking a repair) or ‘sludge’¹⁰⁵ (excessive or unjustified frictions) can cost consumers. Imposing unreasonable time loss on consumers is a significant economic cost. A report by ACCAN has developed a calculation to ‘cost’ loss of time, and we consider that this should be considered as part of the RIS process.¹⁰⁶
- **Privacy loss**—unfair practices mean that people do not often know that their private or personal data is being used without their permission. A 2022 study on the experience of n=70,000 users found that unfair practices like manipulative design can cause substantial privacy loss—by simply changing the default option (opted into cookies versus opted out), resulted in 95% of users not signing-up to additional cookies, meaning when given a meaningful choice, many will opt to protect their personal data.¹⁰⁷
- **Psychological harms**—unfair trade practices, particularly manipulative design, can exacerbate distrust and disengagement, and have negative impacts on emotional wellbeing. A CPRC survey of n=2,000 people found 40% experienced frustration, and 28% felt manipulated when a website or app used such a practice.¹⁰⁸
- **Competition and marketplace harms**—for effective and healthy competition, consumers need to be free to act on the information they are given in the marketplace, and make decisions based on their preferences, needs and financial resources. Where unfair practices inhibit these choices, or place unreasonable barriers on access to or enjoyment of products or services, competition will be less effective.

The Consultation RIS suggests that the status quo provides certainty of consumers and businesses. We do not think that any certainty outweighs the costs listed above. Moreover, we question the certainty provided by existing protections and standards. For example, there have been varying interpretations of the prohibition on unconscionable conduct among superior courts, which has countered certainty.

Recommendation 6:

An unfair trading practices prohibition should adopt the model proposed by Option 4 in the Consultation RIS, incorporating a general prohibition together with a ‘blacklist’ of specified unfair trade practices.

Recommendation 7:

The ‘blacklist’ of unfair trade practices should be specified and managed by the regulator, and subject to public consultation.

¹⁰⁵ Cass R. Sunstien, ‘Sludge Audits’, Harvard Public Law Working Paper No 19-21, April 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3379367.

¹⁰⁶ ACCAN, ‘Still Waiting .. the cost of customer service’, December 2020, <https://accan.org.au/media-centre/media-releases/hot-issues/1825-still-waiting-the-cost-of-customer-service>.

¹⁰⁷ ICPEN, SERNAC research: 95% of users rejected additional cookies with designs that promote privacy, <https://icpen.org/news/1238>.

¹⁰⁸ CPRC, Duped by Design, 2022, <https://cprc.org.au/dupedbydesign/>.

6. Financial services and unfair practices

The Consultation RIS states that it confines its attention to an unfair trading prohibition under the ACL and does not consider the extension of the reform to financial services in the *Australian Securities and Investments Commission Act 2001* (Cth). Instead, this is to be considered through a separate regulation impact assessment process.

This approach should not be taken; rather, the proposed unfair trading prohibition should apply to all products and services, including financial services. The following sets out the reasons why it is essential for an unfair trading prohibition to apply economy-wide, and for there not to be carve-outs for particular sectors.

Initially, when the ACL was first implemented, it was on the basis that its provisions be reflected in the *ASIC Act* for financial services. In the Second Reading Speech enacting the ACL, the Minister stated that the Bill “amends the consumer protection provisions of the *ASIC Act* to maintain consistency with the ACL concerning consumer protection for financial services.”¹⁰⁹ The approach was designed to deliver on a policy objective of a ‘seamless national economy’, reducing regulatory complexity for business.

The benefit of this approach was confirmed when the ACL was reviewed in 2017. The Final Report of the ACL review found that “a key strength of the ACL is its generic nature, applying across all sectors of the economy. This includes the conduct of financial service providers (through mirrored protections in the *ASIC Act*)”.¹¹⁰

Key risks associated with the approach proposed by Treasury (that is, to have a separate regulatory impact assessment process) is that there will be delays as well as the potential for ongoing misalignment between the basic consumer protection standards applying to financial services compared to other areas of economic activity.

A recent reform process resulted in misalignment between the penalties that can be applied for the consumer protections in the ACL compared to the mirror provisions in the *ASIC Act*.¹¹¹ This means that an energy company, telecommunication provider or retailer can be penalised up to five times more than a bank or insurer for contravention of the same law. We argue that this does not meet community expectations, nor is it good policy. While the Federal Government indicated that there would be further public consultation to address this inconsistency, it has been more than twelve months since this commitment was made.¹¹²

This experience suggests that any further reform process may be delayed even, substantially so, particularly given the reform will be subject to the lobbying by vested interests in the financial sector.

A second reason that a carve-out for financial services is the wrong approach is that it will distort business choices and activities. Experience suggests that some businesses will design their contracts and arrangements to effectively fit within certain legislative or regulatory definitions, to evade specific requirements.¹¹³ An unfair trading prohibition applying to business activity other than financial services may

¹⁰⁹ Minister on Deregulation and Minister for Competition Policy and Consumer Affairs, Second Reading Speech, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010.

¹¹⁰ CAANZ, Final Report, Review of the ACL, page 72, <https://consumer.gov.au/consultations-and-reviews/australian-consumer-law-review>.

¹¹¹ The *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* increased penalties for corporations breaching the ACL from \$10m to \$50m, but did not apply this to the equivalent provisions of the *ASIC Act*.

¹¹² The Hon Dr Andrew Leigh MP and The Hon Stephen Jones MP, More competition and better prices, 28 September 2022, <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/media-releases/more-competition-and-better-prices>.

¹¹³ See, e.g., Ali et al, ‘Consumer Leases and Consumer Protection: Regulatory Arbitrage and Consumer Harm’, 2013, *Australian Business Law Review*, vol 41, No 5 pp-240-269.

risk incentivising enterprising or opportunistic businesses to escape the new requirement. This could create an environment where consumers are unclear of their rights and what they should expect of business conduct.

A particular issue in this regard relates to *unregulated* financial or credit products and services. By unregulated, we mean providers that are not required to obtain an Australian Credit Licence or an Australian Financial Services Licence. The current regulatory regime for credit and financial services is very complex, and it results in uneven licensing coverage. For example, there are a variety of credit products that do not require a licence; these include, ‘buy now pay later’, wage advance products, and other types of fringe lending schemes.¹¹⁴ There are also various exemptions from licensing requirements, such as the ‘incidental product exclusion’ in section 763E of the *Corporations Act 2001* (Cth).

Consumer advocates have previously argued that these loopholes and complexities allow regulatory arbitrage.¹¹⁵ Should financial services receive an exemption from the unfair trading prohibition, there may be greater incentives for business structures to consider themselves an unregulated financial services provider. Moreover, businesses that evade licensing and regulatory oversight have commonly created substantial consumer risk; and they may be the businesses that take advantage of carve-out of unfair trade practices for financial services.

Licensed credit and financial services providers are required to meet a general obligation to ‘do all things necessary to ensure that financial services/credit activities covered/authorised by the licence are provided/engaged in efficiently, honestly, and fairly’.¹¹⁶ It has been suggested that this ‘free-floating norm or duty’ applies in an infinite variety of circumstances, including business models, sales techniques, marketing, risk management, and communications with customers.¹¹⁷

This obligation, particularly the reference to fairness, may be argued to require a similar standard or set a similar norms to that of an unfair trade practices prohibition. However, a close analysis suggests that there are significant differences which, unless the proposed carve-out is remedied, will mean that there are inconsistent and insufficient standards applying to financial services:

- **The courts have largely interpreted the obligation as composite, rather than considering it to impose three standalone norms relating to efficiency, honesty, and fairness.** Perhaps the most significant appellate discussion of this provision was the case of *ASIC v Westpac Securities Administration Ltd*.¹¹⁸ In that decision, Allsop CJ described the provision as follows: “*the rule in the section is directed to a social and commercial norm, expressed as an abstraction*”.¹¹⁹ This suggests that it operates together as one norm. Similar suggestions were made in the decision of *Story v National Companies and Securities Commission*.¹²⁰ This might suggest that the norms need to be traded off against each other, potentially dulling the consumer benefits associated with a fairness norm. We note that the Australian Law Reform Commission has made proposals to separately articulate each of the individual terms, however this has not passed into law.¹²¹

¹¹⁴ There are various other types of providers that don’t have a licence, such as providers that lend for rental bonds or provide loans against the security of rental income.

¹¹⁵ See, e.g., Joint Consumer Submission, *ALRC Report 137 Inquiry into Financial Services Legislation*, response to Interim Report A, November 2022.

¹¹⁶ Section 912A(1), *Corporations Act 2001* (Cth); section 47(1)(a), *National Consumer Credit Protection Act 2009* (Cth).

¹¹⁷ Leif Gamertsfelder, ‘Efficiently, honestly and fairly: A norm that applies in an infinite variety of circumstances’ (2021) 50 *Australian Bar Review* 345.

¹¹⁸ [2019] FCAFC 187.

¹¹⁹ At [173].

¹²⁰ *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661.

¹²¹ Australian Law Reform Commission, Report 137, *Financial Services Legislation*, Interim Report A, Proposal A20, page 510, November 2021, <https://www.alrc.gov.au/publication/fsl-report-137/>.

- **The provision has been described as “a forward-looking obligation”.** In *ASIC v Commonwealth Bank of Australia*,¹²² Downes J stated that the obligation is concerned with “*the taking of steps to achieve compliance with the statutory norm before any specific instance of non-compliance has arisen*”. In that case, failures of the bank in applying fee waivers to account-holders who were entitled to them did not demonstrate a breach of the obligation. This suggests that the provision is process-driven, and requires licensees to have reasonable processes to provide services efficiently, honestly and fairly; it will not respond when there has been unfair conduct or practices. This would mean the obligation fails to meet the community expectation.
- **Fairness is weighed as an equal assessment between parties, reducing emphasis on consumer protection.** The recent case law has also suggested that fairness, in the context of the obligation to provide services efficiently, honestly, and fairly, requires an equal assessment of the interests of both parties, rather than an emphasis on the interests of consumers or whether the conduct or practices create the conditions for consumers to exercise choice effectively. In *ASIC v AGM Markets Pty Ltd (in liq) (No 3)*,¹²³ Beach J stated: “*Fairness is to be judged having regard to the interests of both parties. Other statutory provisions may be designed to tilt the scales, but not s 912A(1)(a) and the statutory composite norm it enshrines. Disproportionate emphasis should not be given to what is the third part of a composite phrase in a manner which creates unsatisfactory asymmetry in favour of those with whom the licensee deals. This section is not a back door into an ‘act in the [best] interests of’ obligation.*” This suggests that the provision imposes a different standard to that which we might expect from a prohibition on unfair trade practices. The focus appears to be on balancing the legitimate interests of the organisation compared to the interests of consumers, therefore maintaining the status quo and the existing power disparity between financial service providers and consumers. As outlined in section 4.3 above, we recommend that a prohibition on unfair trade practices should not incorporate the concept of ‘legitimate business interests’.

A further limitation of the obligation to provide services efficiently, honestly, and fairly is that it applies to ‘financial services covered by the licence’ and ‘credit activities authorised by the licence’. This might leave room for business practices that are outside the scope or are not authorised by the licence; it is arguable that such practices are not required to meet the obligation at all.

For these reasons, we consider a carve-out for financial services would be inappropriate. It would result in very different consumer outcomes across different types of firms, for no good policy reason.

Recommendation 8:

An unfair trade practices prohibition should be economy-wide, and there should not be a carve-out for financial services. The reform should apply to both the *Australian Consumer Law* and the *Australian Securities and Investments Commission Act*, and there is no need for a separate policy development process for financial services.

¹²² [2022] FCA 1422 at [156].

¹²³ [2020] FCA 208.

7. Ensuring compliance: remedies and penalties

The Consultation RIS asks whether civil penalties should be attached to a general prohibition on unfair trade practices. We consider that the full range of remedies and sanctions should be available for breach of the prohibition on unfair trade practices. A recent survey of CHOICE supporters confirmed that 99.19% of respondents think businesses should be penalised for acting unfairly towards consumers.¹²⁴

Civil penalties are especially important. Civil penalties are intended to ensure there is a public deterrence associated with particular contravening conduct, and this is the reason why civil penalties must be set at a level so as not to be a 'cost of doing business'.

The ultimate goal of an unfair trading prohibition should be to deter businesses from engaging in unfair practices, without engagement from a regulator. This goal cannot be achieved without a realistic threat of consequence such as the availability of significant civil penalties.

Where consumer protection rules or standards have been implemented without civil penalties and other remedies attached, there have been problems with compliance, and it has often been left to the regulator to take costly administrative or less effective action. For example:

- Civil penalties have not been available for unfair contract terms (such penalties will apply from November 2023). The ACCC has reported that this meant it effectively served as a 'compliance officer' for business, as organisations often did not change standard form terms until engagement with the regulator.¹²⁵ Even where ACCC took action against a particular business, this did not change the practices of businesses in the same industry, demonstrating that general deterrence is not achieved without the availability of a civil penalty.¹²⁶
- Until 2019, civil penalties were not available for financial services or credit licensing obligations such as the obligation to provide services efficiently, honestly, and fairly. Prior to this, ASIC only had administrative penalties and was limited in its ability to ensure organisations met the required obligations. Barriers to enforcement was a problem recognised by the Royal Commission into Misconduct in the Banking, Finance and Superannuation Industry.
- Civil penalties are still not available for non-compliance with consumer guarantee provisions in the ACL. Consumer advocates have previously argued that businesses are incentivised not to provide people with a timely refund, repair, or replacement, as they know there are no meaningful penalties for inaction.¹²⁷ To be responsive to consumer harm, ACL regulators have commonly resorted to arguing that businesses have misled consumers about their refund rights. However, this is a costly and circuitous route to ensure compliance. As described earlier in this submission, the prohibition on misleading conduct has not meant that businesses must inform consumers about their refund rights.

The prohibition on misleading and deceptive conduct in section 18 of the ACL does not attract a civil penalty. However, this is in the context of a range of other ACL provisions that make specific types of misleading representations or conduct an offence and subject to civil penalties.¹²⁸ Moreover, consumer

¹²⁴ CHOICE supporter survey, November 2023, n=4,930.

¹²⁵ ACCC, Submission to Review of Unfair Contract Term Protections for Small Business, 2018.

¹²⁶ ACCC refers to the example of taking action in relation to unfair terms in waste management small business contracts. Despite court action against one provider, ACCC had to take additional action against other providers to get similar changes to contract terms.

¹²⁷ Joint Consumer Submission, Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law, February 2022, available at: <https://consumeraction.org.au/improving-the-effectiveness-of-the-consumer-guarantee-and-supplier-indemnification-provisions-under-the-australian-consumer-law/>; Consumer Policy Research Centre, (2023), Detours and roadblocks: The consumer experience of faulty cars in Victoria, available at: <https://cprc.org.au/detours-and-roadblocks/>

¹²⁸ See sections 29, 30, 31, 33 and 34 of the ACL.

groups have argued that the lack of a civil penalty for misleading and deceptive conduct is a gap, and means that some types of misleading conduct can exist without penalty.¹²⁹

In addition to attracting a civil penalty, consideration should be given to whether contravening the prohibition on unfair trade practices should be an offence provision. At the very least, this should be the case for the specific unfair trade practices on a 'blacklist'. We note that many of the other ACL provisions are offence provisions, including specified false and misleading representations as well as conduct that is coercive or harassing.¹³⁰ The Guide to Framing Commonwealth Offences confirms that it is appropriate to use offence provisions where the relevant conduct involves, or has the potential to cause, considerable harm to society or individuals.¹³¹

Finally, it is essential that the range of other ACL remedies are available for breach of a prohibition on unfair trade practices. These include injunctions¹³², and damages^{133,134} which are remedies available to the regulator as well as the person affected. It is essential that people affected can take action, either on their own or as part of a group action. This contributes to efficiency, corporate accountability, and access to justice. The regulator should also be able to seek other remedies such as infringement^{135,136} as well as non-punitive orders like community service or benefit orders^{137,138} and disqualification.¹³⁹ This will deliver a flexible regulatory toolkit and enable the regulator the variety of tools necessary to ensure compliance.

Recommendation 9:

The full range of penalties and remedies, including civil penalties and actions for damages and compensation, should be available for breach of an unfair trade practices prohibition.

8. Concluding remarks

The call for an economy-wide prohibition on unfair trade practices in Australia emerges from a recognition that current consumer laws inadequately address the breadth of harmful practices prevalent in both online and offline commerce. Traditional consumer protection measures fail to account for the intricate psychological biases influencing consumer decision-making, leading to consumer manipulation and distrust. To bridge this gap, the proposed prohibition aims to address and resolve a wide range of practices that distort consumer autonomy, exploit cognitive vulnerabilities, manipulate information, or obstruct post-sales experiences. Among the options presented by the Consultation RIS, this submission advocates for Option 4, which would not only provide comprehensive protection against existing and evolving unfair trade practices but would also offer businesses certainty through a clearly delineated list of proscribed actions.

Beyond the immediate consumer benefits, the proposed prohibition could be instrumental in promoting equitable economic transactions and advancing the Federal Government's commitment to fostering a healthy marketplace and community wellbeing. The complexity of many unfair practices often remains unnoticed by consumers, rendering it challenging to detect victimisation, and even if identified, changes in consumer behaviour may not suffice to compel providers to act equitably. This can exacerbate competition concerns, by affording businesses that engage in unfair practices an advantage over those that do not.

¹²⁹ CALC, FCA and EJA, Submission to the Robodebt Royal Commission, December 2022, available at: <https://consumeraction.org.au/refer-debt-collection-misconduct-to-the-acc/>

¹³⁰ See Part 4-1, of the ACL.

¹³¹ Attorney-General Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, Page 12.

¹³² Section 232, ACL.

¹³³ Section 236, ACL.

¹³⁴ Section 237-8, ACL.

¹³⁵ Under section 134 of the Competition and Consumer Act 2010, the ACCC can issue an infringement notice as an alternative to taking civil penalty proceedings under section 224 of the ACL. There are similar arrangements for other ACL regulators in their ACL application legislation.

¹³⁶ Section 239, ACL.

¹³⁷ Section 246, ACL.

¹³⁸ Section 247, ACL.

¹³⁹ Section 248, ACL.

Enforcing a provision against unfair trade practices will offer significant advantages to vulnerable individuals, facilitating more equitable economic transactions and contributing to the development of a more cohesive social environment aligned with the Federal Government's agendas of effective competition and community wellbeing.

Appendix I: Consumer Action Law Centre case studies

Marketing and selling

Unfair practice relating to omitting/circumventing disclosure of material information.

Air conditioning service provider case study

Jane* and her husband are elderly pensioners who had an issue with their air conditioning unit and contacted a plumbing and electrical repair company. They sent a person around who said they would need to send another person around as the issue wasn't readily identifiable. Jane's husband was asked to tap on an iPad that was quickly placed in front of him which he thought was just to confirm that the repairer had attended, and that he had paid the call-out fee of \$100.

Afterwards someone else came around and had a better look at it, cleaned the filters with a hose, but also noted that there was an issue with the panel and suggested Jane replace the whole unit. Jane couldn't afford this.

Afterwards, Jane was told she would need to pay the repairer over \$1,000 for their services. She said she never agreed to this but was told that it was part of the terms and condition that her husband had signed. She was then sent an invoice for over \$1,900.

Consumer Action Law Centre has received a number of calls about this same operator engaging in similar conduct of doing limited work and charging high fees.

**Not her real name*

Product/service design and pricing

Unfair practices in telecommunications relating to:

- harmful payment requirements imposed for essential services, and
- additional charges and practices causing customer confusion, complaint fatigue and financial hardship.

Telecommunications case study 1

Sue* is unemployed and receives the disability support pension as her only form of income. She was originally signed up to an expensive Optus “all-in-one bundle” phone plan that she could not afford which included the mobile phone device, a tablet and a smart watch. After seeking legal advice, Sue used the financial hardship policy to remove the watch and tablet from her plan, handing back the devices to Optus to have the outstanding fees waived. When Sue spoke to Optus about dropping down to a cheaper plan, Optus said they could only make changes if she agreed to pay Optus via direct debit. Sue requested she be placed on a prepaid plan, however, she was told she would need to pay over \$800 to buy her mobile phone device before they would switch her plan to a prepaid service. This was unachievable for Sue and she felt she had no other choice but to switch plans. Sue also asked Optus if it was willing to adjust the direct debit dates to work better with her Centrelink payments, but Optus said couldn't do this in their system.

She soon realised that the direct debit payment arrangements were not suitable as they did not align with her Centrelink payment cycle. As a result, Sue started to miss payments to Optus and when the payments did align, multiple months' payment came out at once. This caused significant financial hardship and did not leave enough money to pay for food. Sue was constantly fearful of suspension and disconnection action and felt she had no choice but to take out smaller expensive credit and buy now pay later loans to pay for her essential living expenses which have now increased her financial hardship.

By the time she obtained legal assistance, she was stressed and anxious about communicating with Optus and managing this situation. Sue was struggling with the need to switch to a prepaid service but could not afford a phone debt of approximately \$800. Optus eventually said the only way they could assist was to arrange for Sue to buy out the device plan. They agreed to reduce the debt by 50% and put the remaining \$400 on a payment plan, on the condition that Sue agreed to convert to pre-paid. Sue accepted this offer and was placed on a payment plan of approximately \$130 per month for three months, however, Sue continued to have issues with Optus not honouring the direct debit schedule and she was re-issued an invoice for the \$800 debt. Finally, after Sue contacted Optus once more about the issue, Optus eventually agreed to a full waiver of the \$800 invoice and advised she could keep the device.

**Not her real name*

Telecommunications case study 2

Alan* contacted the National Debt Helpline in May 2023 after leaving an abusive relationship. He has been struggling to meet his basic living expenses for several years on his modest income and has been overwhelmed by numerous debt matters, including a number of phone debts. Alan's financial situation has only further deteriorated due to the domestic violence, which saw him paying for several Optus services and devices for himself and his ex-partner through accounts placed under his name.

Alan states that approximately two years ago, he was caught unaware when Optus changed one of his accounts to direct debit. He says that he'd been an Optus customer for many years prior to this and had always paid his bills through other payment methods. As the direct debit dates didn't align with his income payments, he began to default on his account and was disconnected by Optus on approximately four occasions. As a result, he incurred additional Optus fees and charges, including multiple \$15 late payment charges. These charges compounded his financial hardship, making it difficult for him to pay for food and rent. He states he was even forced to change banks to stop Optus automatically direct debiting his account when he had insufficient funds.

After Alan left the abusive relationship, he arranged for Optus to transfer his ex-partner's phone plan out of his name. He also asked Optus if he could consolidate his two existing accounts into one to try to save money and to access cheaper plans. However, Optus said this was not possible unless he agreed to place all his accounts onto direct debit payments as it was required under their new terms and conditions.

In addition, Alan states Optus has on a number of occasions charged him two months' payment upfront, including after the most recent changes to his account when his ex-partner's phone was transferred. Alan says he has never understood or had it properly explained why these extra charges are required and on no occasion has Optus agreed to refund him for the extra months' payment. He states Optus simply says it's a necessary 'pro-rata' charge and 'that's the way it is', which has left him confused and unsure about his rights.

Alan says his interactions with Optus over the years have been very stressful. He commented about his frustration with the Optus complaints process, including unresolved complaints often being met with Optus just opening another complaint loop, which has forced him to lodge several complaints with the Telecommunications Ombudsman.

**Not his real name*

Artificial structures

Unfair practices relating to extended warranty/car dealer relationship and selling practices.

Extended warranty/used car dealer transactions case study

Jay* is a low income earner who requires an interpreter to communicate in English.

Jay purchased a car for over \$20,000 from a used car dealer who also arranged finance for the car totalling more than \$50,000 and an extended warranty at an extra cost of \$2,000. The terms and conditions of the warranty were not explained to Jay at the time of purchase, including significant limitations on warranty coverage.

Jay says he was told by the car dealer to attend the dealership to sign the finance paperwork which he didn't understand as he was not given access to an interpreter and was shocked when he was approved for a loan.

Jay wasn't allowed to inspect the vehicle before purchase either as he was told another vehicle was 'blocking it'. Within two weeks of collecting the car, it started to experience engine and other mechanical problems that needed repair. Jay is without a car which was taken back by the dealer and the loan repayments have already been making it difficult for him to pay other bills.

Jay states the dealer refused to repair the car despite Jay's rights under the consumer guarantee provisions of the Australian Consumer Law. Jay states that the dealer has told him the repairs needs to be addressed through the extended warranty even though the warranty's terms and conditions contain significant exclusions that limit repair claims and would only cover a fraction of the car repair cost.

The terms and conditions of the warranty state that it is provided by the car dealership, not the warranty provider that assesses and administers claims under the warranty. Although the warranty provider is a member of the free external dispute resolution body, the Australian Financial Complaints Authority (AFCA), the car dealership is not. Consumer Action Law Centre has experienced difficulty getting AFCA to accept complaints against warranty providers in these circumstances. This limits the ability of people like Jay to enforce their rights under the warranty and seek refunds of warranty premiums due to unfair sales practices.

**Not his real name*

Post-sale practices

Unfair practices relating to being forced to incur unreasonably high additional expenses, delays, dispute resolution processes and practices causing customer confusion, complaint fatigue and financial hardship.

Travel agency case study

Timothy* is on a temporary visa and currently unemployed but managed to save up to purchase a return plane ticket to Europe and back in order to make it in time for his sister's wedding overseas. He booked the return plane ticket via the on-line website of a popular travel agency.

When he was completing the on-line booking, Timothy failed to notice that the online application form autofill entered his name only as 'Tim', but otherwise allowed the transaction to easily go ahead and charged him just over \$1,500 for the flights.

When Timothy attended the airport the day of the outbound flight, the airline provider refused to allow him to check-in as his first name on the ticket did not match his passport. They told him there was nothing they could do and advised him to immediately contact the travel agency who would be able to arrange for his name to be corrected to enable him to board the flight.

Despite arriving at the airport to check-in 4 hours early, Timothy spent almost the entire time on the phone with the travel agency who initially claimed there was nothing they could do, and Timothy would just have to buy a new ticket and forgo his previous return ticket in full if he wanted to travel that day. After an airline representative intervened on the phone to try assist Timothy negotiate with the travel agency, the travel agency offered a partial credit after deducting approximately \$700 for a 'no show' and additional booking fee. Timothy felt he had little choice but to agree to this to have the chance to get any form of credit. He was then forced to purchase an expensive one-way ticket for a separate flight later that day that cost significantly more than the initial total return ticket to make his sister's wedding after he was forced to miss his initial flight.

Timothy was advised by the travel agency that he would also need to book a separate return flight though them back to Australia if he wanted to make use of the credit, but would need to book it in the name of 'Tim' for the credit to be valid. They told him that he could contact them from overseas to arrange for his name to be changed back to Timothy on his return ticket before he was due to fly back to Australia.

Timothy followed the travel agency's instructions and contacted them from Europe to arrange for his name to be changed back to Timothy on his return ticket, but they refused and said that they wouldn't be able to do it. Timothy was then forced to engage in weeks of back-and-forth email correspondence and make numerous international telephone calls to the travel agency to try sort out the issue. Each time he was forced explain his situation from the start all over again and deal with a different representative who all seemed to be completely unaware of previous discussions. He was also regularly put on hold for long stretches of time and given contradictory verbal and written advice by the travel agency on multiple occasions.

Finally, the day before his return flight back to Australia, the travel agency agreed to correct his name on the ticket. In total, Timothy was forced to spend over \$7,000 to resolve the matter and found himself approximately \$5,000 out of pocket after the credit was applied (due to the cost of the two extra flights and incurring over \$1,000 in overseas phone call charges in order to deal with the travel agency). Timothy's financial loss was in addition to the stress of the hours he was forced to spend on

the telephone and corresponding, not to mention the significant loss of enjoyment of his trip, to get the travel agency to agree to rectify the name error. This is despite the initial booking application having no safeguards to prevent such a simple, but costly, oversight and chain of events from occurring in the first place.

**Not his real name*