

Article Information

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Proposed amendments to the Australian Consumer Law to address unfair trading practices

The Australian government proposes to make changes to the Australian Consumer Law ('ACL') to seek to further protect consumers from unfair trading practices. In November 2024 the government released the [Unfair Trading Practices Consultation on the Design of Proposed General and Specific Prohibitions](#) ('the Consultation').^[1] This insight highlights the key takeaways from the Consultation and sets out the government proposals that seek to prohibit unfair trading practices.

The Consultation

The ACL sets minimum standards for businesses to trade fairly and has multiple provisions that aim to protect consumers from unfair trading practices. However, under the existing law businesses can still adopt questionable tactics in order to draw in consumers. In November 2024, the government released the Consultation which proposed ACL amendments seeking to address unfair trading practices through the introduction of a general prohibition, and specific prohibitions that aimed to effectively address the unfair practices identified as "grey areas". The submission period to provide feedback on the proposals ended on 13 December 2024 and the government is now preparing a Decision Regulation Impact Statement that will outline the evidence gathered and the preferred policy approach.

Background

The Consultation sought to address the potential gaps or "grey areas" in the ACL that inadequately protect consumers from unfair trading practices that can cause them harm. More gaps are developing as online marketplaces and associated technologies become more complex and sophisticated, and the opportunities to engage in questionable conduct have increased. While the ACL already provides a range of protections, these are falling short when it comes to emerging forms of misconduct such as "dark patterns" which businesses are adopting to manipulate consumers.

The identified "grey areas"

The Consultation addressed multiple grey areas that were identified in consultation as potential unfair trading practices impacting consumers. These include:

- *'Conduct that distorts, manipulates or undermines consumer choice, without necessarily being misleading or deceptive, such as practices that create an undue sense of urgency or scarcity.'*
- *Subscription related practices, including practices which make it difficult for consumers to cancel a subscription.'*
- *Pricing-related practices, including drip pricing, dynamic pricing and hidden fees.'*
- *Post-sale practices, including imposing unreasonable barriers to accessing customer support.'*

The proposed general prohibition

The Consultation proposed a general prohibition on unfair trading practices that will capture a business's conduct where it:

1. *'unreasonably distorts or manipulates, or is likely to unreasonably distort or manipulate, the economic decision-making or behaviour of a consumer, and*
2. *causes, or is likely to cause, material detriment (financial or otherwise) to the consumer.'*

('the proposed general prohibition')

A third limb was proposed which the Consultation seeks feedback on. This third limb would include a "legitimate interest" element drawing from the unfair contract terms provision of the ACL which finds that a contract is unfair if *'it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term'*.^[2]

When determining if conduct meets the test for the above limbs, it was proposed that the ACL should have a non-exhaustive list of examples of conduct which would be referred to as the "grey list". Again drawing from stakeholder feedback, the following examples were specified:

- *'the omission of material information,*
- *the provision of material information to a consumer in an unclear, unintelligible, ambiguous or untimely manner, including the provision of information in a manner that overwhelms, or is likely to overwhelm, a consumer,*
- *impeding the ability of a consumer to exercise their contractual or other legal rights, or*
- *use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision.'*

What are "dark patterns"

Consumers make a significant amount of their purchases online through digital shopfronts and product and service listings. Businesses customise these channels to influence the shopping experience. Dark patterns are seen when these businesses design their website or app in a way that "tricks" the user to do something they do not intend to do. The Consultation paper stated that:

'[t]he central characteristics of dark patterns are that they distort, impair, subvert, or otherwise manipulate consumer decisions and actions, undermining autonomy. They can influence consumer choice by exploiting cognitive and behavioural biases or by exploiting how people learn or solve problems.'

Businesses can collect a user's personal information and use it to tailor the user experience and unfairly influence decision making. This can also lead to the user agreeing to more privacy intrusive practices without fully comprehending what they are agreeing to.

At Appendix B of the Consultation, seven key types of dark patterns are identified. These are:

1. Force action - where the user is forced to do something in order to access a specific function. This could include being forced to register/create an account or being forced to disclose more personal information than necessary.
2. Interface interference - a tactic used to try and trick the user into taking an action favourable to the business unintentionally. This could include having pre-selected check boxes where users opt into receiving promotional emails from that business or using confusing language that may exploit a consumer.
3. Nagging - where the user is repeatedly asked to do something that would be favourable to the business such as turning on push notifications or signing up to a premium subscription.
4. Obstruction - a tactic used to make an interaction more difficult. Examples can include making it easy and straightforward to sign up to a service, but complicated and difficult to cancel the service.
5. Sneaking - used to hide, disguise or delay the divulging of information that would be relevant to a consumer's decision. Usually, this is around the cost of a product or service and often seeks to exploit limited attention and default bias. Examples can include where an additional item ends up in the consumer's cart when making an online purchase or where there are additional hidden costs that the user is not made aware of until the final stages of the purchase process.
6. Social proof - attempts to trigger a decision based on observations of other consumer's behaviour to exploit social proof bias. This can include where the user receives a notification about another consumer's activities or testimonials about a recent purchase.
7. Urgency - utilises time restraints to attempt to pressure a consumer into making a purchase. Businesses may have a countdown timer or low stock notification to make users feel rushed/impulsive when making a purchase.

The focus areas and what is proposed

Through previous consultations, the government identified five focus areas:

1. Subscription-related practices – the Consultation proposed the introduction of ACL provisions that will require businesses to meet certain requirements when offering a subscription contract. Examples include the requirement that cancelling a subscription should be as easy as signing up.
2. Drip pricing – this occurs when a business advertises at a certain price and, as the consumer progresses through the purchase process, various fees are added to the total. The Consultation proposes that the advertised price must disclose the minimum quantifiable price.
3. Dynamic pricing – this occurs where the price of a product or service is increased during the purchasing process. An example could be when a consumer is waiting in a queue to purchase concert tickets and by the time they enter the site, the price has risen. The Consultation sought feedback on the current ACL protections in place that prohibit misleading and deceptive conduct and bait advertising, and whether these are sufficient to protect consumers against dynamic pricing.
4. Online account requirement – online purchases often require the user to create an account and provide personal information in order to proceed with the purchase. This often leads to the consumer receiving unwanted marketing materials. The Consultation proposes that the business must make a mandatory ‘guest’ check out option.
5. Barriers to accessing customer support – the Consultation seeks feedback as to whether consumers would consider the proposed general prohibition on unfair trading practices sufficient to protect consumers from the harm that can arise from businesses failing to provide consumers with adequate customer service support.

Extension to business-to-business dealings

The proposed general prohibition would initially be introduced in a business-to-consumer format. Feedback from stakeholders revealed that small businesses often face similar issues of unfair trading that consumers encounter due to bargaining power imbalances. The Consultation seeks feedback as to when the proposed general prohibition should be extended to business-to-business dealings in order to offer more protection for small businesses.

Alignment with financial services law

Previous consultations have identified feedback from stakeholders favouring extending the unfair trading practices prohibitions to financial services to ensure alignment between the ACL and financial services law. At this stage, due to the complexity of such an alignment, the government proposes wait until the changes have been made to the ACL before carefully considering the necessary changes required to implement such an alignment.

Key takeaways for businesses

The Decision Regulation Impact Statement, when released, will reveal the outcome from the consultation period and the proposed amendments to the ACL. Further protections for consumers from unfair trading practices could be introduced as a result of these proposals. In anticipation of such changes, businesses should undertake the necessary reviews to ensure they are prepared. This includes making sure their displayed prices are clear and accurate, making any subscription services easily cancellable, offering “guest” check-out options, ensuring there are minimal barriers for consumers to contact your business for customer support and reviewing your online store front to ensure you aren’t manipulating consumers with dark patterns.

[1] Australian Government, *Unfair Trading Practices Consultation on the Design of Proposed General and Specific Prohibitions* (Consultation Paper, November 2024).

[2] *Competition and Consumer Act 2010* (Cth) sch 2, s 24(1)(b).