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# How Australia can stop unfair business practices

*A comparative analysis of unfair trading  
laws in international jurisdictions*



The Consumer Policy Research Centre (CPRC) is an independent, not-for-profit consumer think-tank. CPRC receives funding for our work from the Victorian Government.

CPRC aims to create fairer, safer and inclusive markets by undertaking research and working with leading regulators, policymakers, businesses, academics and community advocates.

### Acknowledgements

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### Statement of Recognition

CPRC acknowledges 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.

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# Introduction

Australians don't have legal protections against unfair business practices. This means that business models that manipulate or take advantage of consumers, especially practices that are standard across an industry, are allowed to thrive.

Unfair trading laws aren't a new idea. They've been proposed by many experts, advocates, and regulators in Australia. The call for an unfair trading law in Australia has become more urgent as court rulings about "unconscionable" business practices have demonstrated that this protection in the Australian Consumer Law only applies in the most extreme circumstances. On the international stage, Australia currently stands out by its absence of an unfair trading law when measured against comparative jurisdictions.

The Consumer Policy Research Centre's (CPRC) research shows that there are gaps in our consumer protection regime. Our research into dark patterns (also known as deceptive and manipulative online design) found that eight out of the ten dark patterns commonly found in Australia are unfair and cause consumer harm but are unlikely to be captured by current legal protections. The research also found 83% of Australians have experienced negative consequences as a result of a website or app using design features aimed at influencing their behaviour.<sup>1</sup> Australians have lost money, lost control of their data or have been manipulated by a business to make a choice that was not in their interest.

This report explores laws that ban or restrict unfair practices across Europe, United States, United Kingdom and Singapore and the lessons that Australia can learn from them. It then outlines the elements that Australia could consider when implementing an effective unfair trading prohibition.

Getting the structure right for a general restriction on unfair trading will deter businesses from poor practices. Some overseas models have good scope and flexibility but have failed to boost the capacity of its regulators or establish penalties that are commensurate with the harms caused to consumers.

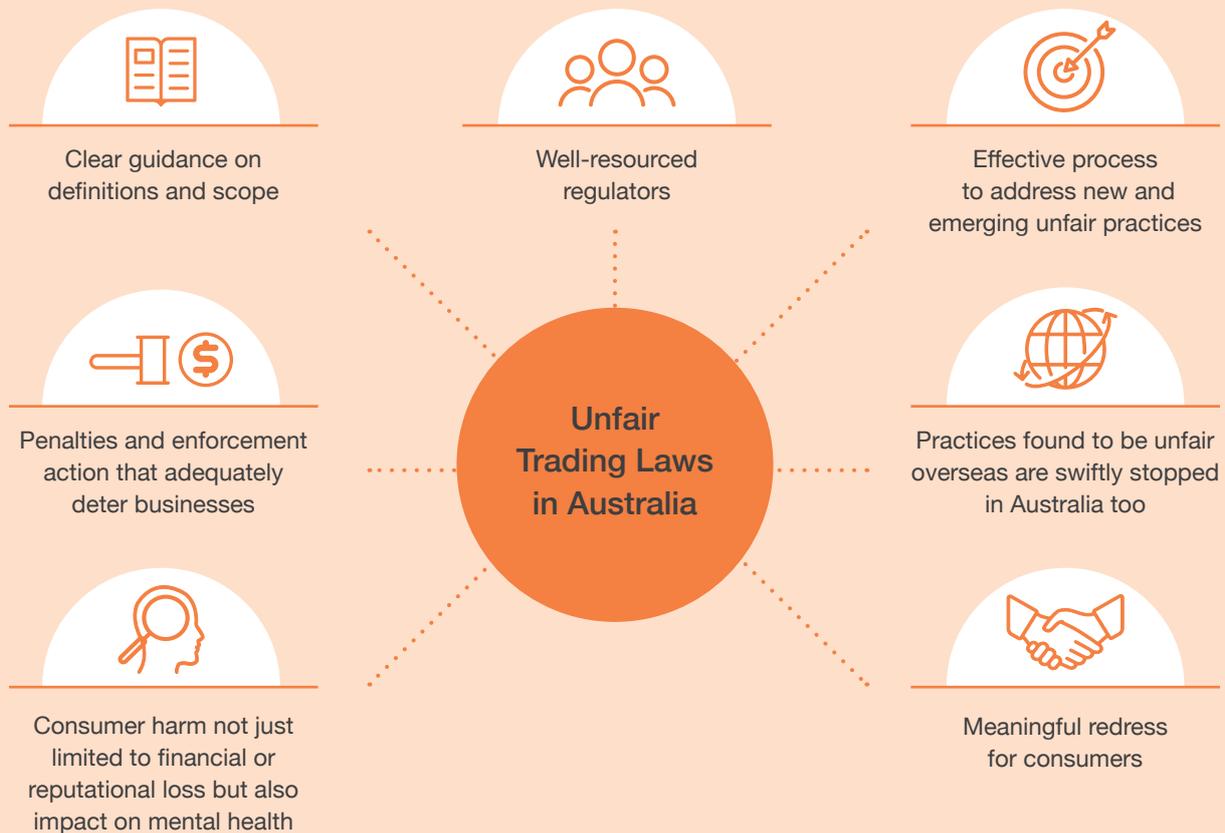
## Key lessons Australia can learn from international approaches:

1. Understand who the law protects
2. Harm is more than just losing money
3. Account for new and emerging issues
4. Clarity and flexibility are key
5. Poorly resourced regulators mean delayed outcomes for consumers
6. Inadequate penalties and consumer redress stifle widespread change
7. Inconsistency across the same jurisdiction creates regulatory arbitrage
8. Unfair trading laws don't replace existing protections; they complement them.

Australia has a real opportunity to not only learn from international approaches but to build on them to ensure consumers are better protected from unfair practices. A strong unfair trading law in Australia should be broad, capture emerging and existing consumer harm and overseen by well-resourced regulators.

This is an exciting and imperative moment in Australia's consumer law history. Together, we have the opportunity to shape how Australian consumers today, and in the future, can be adequately protected and empowered to confidently participate in and reap the benefits of a fair, safe and inclusive market.

# Measures to effectively stop unfair business practices in Australia



# Why does Australia need a law to stop unfair business practices?

Many groups in Australia have called for a new law to stop unfair business practices. An unfair trading prohibition was a key recommendation by the Australian Competition and Consumer Commission (ACCC) via its Digital Platforms Services Inquiry.

In its 2019 report, the ACCC identified a number of examples of unfair conduct and concluded that many were not effectively deterred under Australia's current laws.<sup>2</sup> The Consumer Action Legal Centre has also highlighted a range of business models that take advantage of consumers, especially those experiencing vulnerability.<sup>3</sup> Academics have also explored a prohibition on unfair trading, recognising it as a more effective protection, given the uncertainty surrounding the definition of unconscionable conduct.<sup>4</sup>

CPRC's research has identified several unfair practices, especially within the digital economy, which are currently not adequately captured by current protections. These include:

- inducing consumer consent or agreement to data collection through concealed data practices
- using opaque data-driven targeting and interface design strategies to undermine consumer autonomy
- adopting data practices that, by design or indifference, lead to or increase risks of consumer vulnerabilities being exploited.<sup>5</sup>

The growth of the digital economy and consumers' heightened reliance and participation within it has exacerbated the gaps in our current consumer protections. Amazon's cancellation practices demonstrate that some consumer harms are not captured by current consumer laws.

Amazon has amended its cancellation process for Prime customers in Europe. In January 2021, 16 consumer organisations across the European Union and the United States filed complaints against Amazon for using dark patterns to discourage consumers from cancelling their Prime subscriptions.<sup>6</sup> In July 2022, the European Commission confirmed that Amazon had breached the Unfair Commercial Practices Directive. Amazon agreed to change its cancellation practices to no more than a simple two-step process.<sup>7</sup> Despite Amazon being a global organisation, this change has not transferred to Australia.

In September 2022, we investigated the cancellation process for Prime via Amazon Australia (Figure 1).

The Amazon Prime cancellation process in Australia involves navigating multiple screens before arriving at the final screen where the cancellation can be processed and confirmed. Instead of a clear option to end membership immediately (as offered now to European consumers), Australians must navigate through four options, three of which are to continue either indefinitely or for a specific period. Upon further review of Amazon's other subscription products and services, we found cancellation processes for both Audible and Amazon Music Unlimited were even lengthier and more complex for consumers to unsubscribe from.

Amazon's cancellation processes are unfair – they needlessly extend the cancellation process and manipulate customer decisions. Yet Amazon's practices aren't likely captured by the current Australian Consumer Law. Amazon isn't misleading customers; this isn't an unfair contract term, doesn't relate to the consumer guarantees and is unlikely to fall under the protections against unconscionable conduct, especially as poor cancellation processes are a common industry practice.

Without a prohibition on unfair trading, Australian consumers will continue experiencing harm from such unfair practices. Our research into dark patterns revealed that 76% of Australians have experienced difficulty cancelling an online subscription. Such dark patterns can impact financial wellbeing with one in five (20%) Australians reporting spending more than they intended when they came across these types of manipulative designs.<sup>8</sup>

It is examples such as these and seeing the shift that is taking place internationally that has taken us from merely asking the question of whether a general prohibition on unfair practices is needed to what it can actually look like in Australia.



Figure 1:  
Cancellation  
process for  
Amazon Prime  
in Australia

██████, on average you have saved **\$10.62/month** in delivery fees since January 2021 by being a Prime member. Are you sure you want to end your Prime membership?



Your Prime Benefits Includes:

- FREE Delivery on millions of eligible items
- Free streaming of movies, and TV series with Prime Video
- Exclusive access to shopping deals
- Listen to 2 million songs with Amazon Music, Free access to 1,000 e-books with Prime Reading, perks for gamers with Prime Gaming, and more.

[See all benefits >](#)

[Remind Me Later](#)   [Continue to Cancel](#)   [Keep My Membership](#)

Keep my benefits and remind me 3 days before my membership renews

[Amazon Prime Terms and Conditions](#)

██████, before you go, consider switching to annual payments



Keep Prime for just **\$59/year**

Enjoy all the benefits of Prime with the convenience of monthly payments. You will be refunded \$6.99 for your current plan.

[Switch to annual payments >](#)

By clicking "Switch to annual payments", your default payment card or another available payment card on file will be charged \$59/year. Your Prime membership will continue until cancelled.

[Remind Me Later](#)   [End Membership](#)   [Keep My Membership](#)

Keep my benefits and remind me 3 days before my membership renews

[Amazon Prime Terms and Conditions](#)

**Confirm membership cancellation**

**End on 1 October 2022**  
Your benefits will continue until 1 October 2022, after which your card will not be charged. [End on 1 October 2022](#)

OR

**End Now**  
You will lose access to benefits and will be refunded \$6.99. [End Now](#)

You could also consider the following:

**Remind Me Later**  
Keep my benefits and remind me 3 days before my membership renews. [Remind Me Later](#)

**Keep My Membership**  
You will continue enjoying all the benefits of Prime. View everything included in Prime. [Keep My Membership](#)

[Amazon Prime Terms and Conditions](#)

 ████████   **Last Payment**  
1 September 2022  
You are no longer a Prime member. [View all printable receipts](#)

**Cancellation confirmed**  
Your membership has been cancelled. You may rejoin Prime at any time.

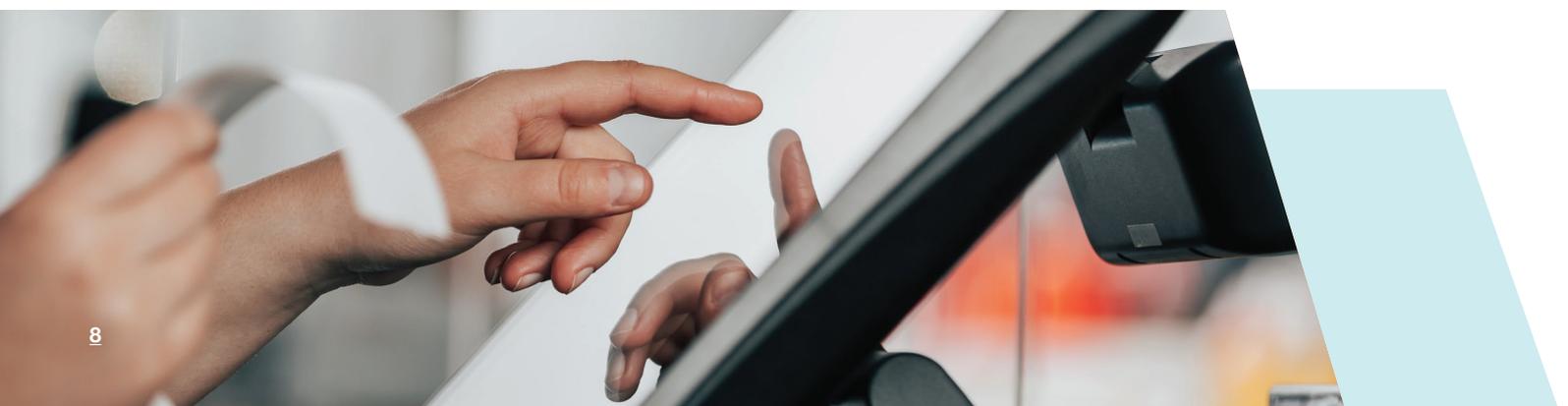
**Important Message**  
You are currently not a member of Amazon Prime. [Click here to sign up.](#)

## Understanding unfairness – lessons learnt internationally

The definition of unfair practices varies across jurisdictions – each having its own nuances to capture the concept of unfair (Table 1).

Jurisdiction	High-level definition
United States	<i>An act or practice may be found to be unfair where it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.<sup>9</sup></i>
Europe	<i>A commercial practice shall be unfair if:</i>  <i>(a) it is contrary to the requirements of professional diligence, and</i> <i>(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.<sup>10</sup></i>
United Kingdom	<i>A commercial practice is unfair if—</i> <i>(a) it contravenes the requirements of professional diligence; and</i> <i>(b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.<sup>11</sup></i>
Singapore	<i>It is an unfair practice for a supplier, in relation to a consumer transaction —</i> <i>(a) to do or say anything, or omit to do or say anything, if as a result a consumer might reasonably be deceived or misled;</i> <i>(b) to make a false claim;</i> <i>(c) to take advantage of a consumer if the supplier knows or ought reasonably to know that the consumer —</i> <i>(i) is not in a position to protect his or her own interests; or</i> <i>(ii) is not reasonably able to understand the character, nature, language or effect of the transaction or any matter related to the transaction; or</i> <i>(d) without limiting paragraphs (a), (b) and (c), to do anything specified in the Second Schedule.<sup>12</sup></i>

Table 1: High level definitions of unfair in general prohibitions across United States, Europe, United Kingdom and Singapore.



## Here are the eight lessons learnt from international approaches to implementing unfair trading laws.

### 1. Understand who the law protects

The United Kingdom and Europe currently both use the same definition of unfair practices. Both make reference to an “average consumer” which in the Directive is referred to as someone, “*who is reasonably well informed and reasonably observant and circumspect*”.<sup>13</sup>

This approach leaves it to courts to define what an “average consumer” is and what they are expected to do, leaving significant risk of inconsistent interpretation and judgement about “ideal” consumer behaviours. This has been the case where court cases presented by the United Kingdom’s former Office of Fair Trading, have raised questions of whether certain behaviours such as checking for alternative options for goods and services or accessing information that is available but not provided directly to the consumer are all within the realms of an average consumer taking “*reasonable care*”.<sup>14</sup> The concept of an average consumer is even less fit for purpose online where there is inherent information asymmetry and higher risk of consumers being placed in vulnerable situations.<sup>15</sup> The concept of the “average consumer” risks putting the onus on consumers to show that they’ve taken reasonable steps to protect themselves rather than requiring businesses to show that they haven’t caused harm. In some circumstances, the notion of the “average consumer” can be broadened in Europe and the United Kingdom when unfair practices are directed towards those experiencing vulnerability.<sup>16</sup> In discussions with CPRC, consumer groups in Europe have noted the importance of clarity to avoid misinterpretations.

By contrast, the United States’ definition has no assumptions about average consumer behaviour, instead focusing on the injury caused to the consumer. This approach allows for courts and regulators to consider where greater harm has been caused because of business practices that target people experiencing vulnerability. While its scope may be limited, the Singaporean definition also does not focus on an “average consumer” and notes that unfair business practices can involve businesses that take advantage of consumers, who are “*not in a position to protect his or her own interests*”.

Models that have the capacity to effectively focus beyond the “average consumer” can provide stronger protections against unfair business practices.

### 2. Harm is more than just losing money

In the United States, harm is referred to as “causing substantial injury”. Injury under Section 5 is understood to mean financial or reputational loss but may not capture impact on emotional wellbeing.<sup>17</sup>

CPRC’s interview with a United States’ consumer representative also confirmed this but noted that there may be appetite for regulators to consider cases where consumers have experienced significant emotional harm. One such example is the case of DesignerWear. This company installed tracking software on rent-to-own computers, enabling rented computers to be disabled if a consumer breaches contract terms with their rental provider such as late payments. A specific feature, called Detective Mode, within the software also enabled for the webcam of the rented computers to be turned on remotely without the consumers’ knowledge or consent. The submission to court by the Federal Trade Commission (FTC) noted the following:

*“When activated, Detective Mode can also cause a computer’s webcam to surreptitiously photograph not only the computer user, but also anyone else within view of the camera. In numerous instances, Detective Mode webcam activations have taken pictures of children, individuals not fully clothed, and couples engaged in sexual activities.”*<sup>18</sup>

In this case, emotional harm experienced by consumers was specifically considered as part of the FTC’s investigation.

Australia needs to consider how it should capture harms to mental health or emotional harm when defining what is unfair. According to the Australian Bureau of Statistics, over two in five Australians have experienced mental health issues at some time in their life with anxiety being the most common.<sup>19</sup> In CPRC’s research into dark patterns, in addition to financial loss and loss of control over personal information, consumers also reported experiencing negative impacts on their emotional wellbeing with over 40% reporting they felt manipulated.<sup>20</sup> Laws need to be adequate enough to enable regulators to consider mental health as part of the spectrum of harms unfair business practices can cause.

### 3. Account for new and emerging issues

One aspect that is common in definitions across the United States, Europe and the United Kingdom is the notion of “likelihood”. Instead of waiting for demonstrable harm to have taken place before enforcement can occur, it enables regulators to pursue investigations prior to consumers experiencing widespread harm.

Traditional enforcement models often take place post harm and CPRC has previously advocated for more proactive surveillance and enforcement to take place to ensure consumers are adequately protected within the digital economy.<sup>21</sup> The use of such terminology is one way to ensure enforcement is more forward-looking.

### 4. Clarity and flexibility are key

Some jurisdictions include supplementary documentation to clarify what practices are considered unfair. The European Directive includes an Annex blacklisting specific activities. The Directive is complemented by guidance (known as a Commission Notice) on interpreting and applying the directive on business-to-consumer practices.<sup>22</sup> The last iteration of the guidance came into effect in May 2022 and covers a range of issues that are reflective of emerging practices within the digital economy. While previously heavily geared towards misleading and deceptive practices, guidance now includes obligations on online platforms and marketplaces, influencer marketing, data-driven personalisation and dark patterns.<sup>23</sup> However, not all forms of dark patterns may be captured. The European Consumer Organisation, BEUC, has recommended dark patterns such as confirmshaming to be added to the Annex.<sup>24</sup> Confirmshaming is a practice that’s aimed at making consumers feel guilty or foolish for selecting specific options, in turn steering them towards the business’s preferred option.<sup>25</sup>

Similarly, in Singapore and the United States, a Schedule under their respective Acts outlines specific practices that are deemed unfair. While currently many of the practices in the Singaporean Schedule are covered by Australia’s misleading and deceptive conduct laws or via unconscionable conduct, it has been reported that Singapore is currently considering widening the scope of the Schedule to include practices such as dark patterns.<sup>26</sup>

Flexibility ensures that unfair trading laws are not stagnant and can adequately protect consumers from current and emerging harms.

When developing an unfair trading prohibition in Australia, lawmakers will need to consider whether specific unfair practices are codified into legislation or whether regulators can take a leadership role in establishing parameters of unfair practices. The benefit of regulators leading the process to restrict certain practices ensures consumer harm is dealt with quickly before it is widespread.

However, regulators must be well-resourced to proactively investigate and have adequate powers to spotlight and take action against unfair practices.

### 5. Poorly resourced regulators mean delayed outcomes for consumers

Views of consumer representatives in the United States and Europe confirmed that resource-constrained regulators are ultimately limited in their capacity to investigate potential breaches. Lack of resources can also severely impact a regulator’s capacity and capability to undertake proactive surveillance and enforcement. So even though many of the definitions include “likelihood” of harm occurring, often cases that are investigated are those where harm (often widespread) has already occurred, or a direct complaint has been made to regulators.

For example, the Amazon Prime subscription issue mentioned earlier in this report was a complaint filed by consumer groups in January 2021, yet it was almost 18 months before changes to Amazon’s practices were announced.

A further example is the current complaint about WhatsApp in Europe. In July 2021, BEUC, in partnership with eight consumer groups, filed a complaint against WhatsApp’s new privacy policy. The complaint alleged that WhatsApp breached the Unfair Commercial Practices Directive by:

- pushing persistent, recurrent and intrusive notifications to users to accept WhatsApp’s policy updates
- not being transparent about the new terms and failing to explain in plain and clear language the nature of the changes
- continuing to push users to accept a privacy policy which is currently under scrutiny by the European Data Protection Authorities.<sup>27</sup>

Up until now, the only action that seems to have taken place in this matter is the European Commission writing to WhatsApp in January 2022 to request clarification on how its new privacy policy meets the EU consumer protection requirements and to clarify how personal data is exchanged with the parent company, Meta.<sup>28</sup> Over a year has passed but the practices noted in the complaint are still operating, not only in Europe but worldwide.

Australia needs well-resourced regulators with a diverse workforce and skillset to uncover unfair practices (especially those in the digital economy) that are currently obfuscated but have the potential to cause significant harm to consumers.

## 6. Inadequate penalties and consumer redress stifle widespread change

One of the major issues raised by consumer representatives in the United States and Europe was the lack of adequate penalties relating to unfair trading prohibitions.

In Europe, the Directive sets out criteria that member countries should consider when enforcing penalties with a broad reference to fines being at least 4% of annual turnover in specific circumstances.<sup>29</sup> However, not all breaches result in penalties. Although the European Commission confirmed that Amazon's Prime subscription cancellation process was a breach of the Unfair Commercial Practices Directive, Amazon did not incur any financial penalties. There has also been no public declaration by other similar businesses that they too will change their subscription processes and nor has Amazon committed to making those same changes outside of Europe.

In the United States, while penalties exist, the FTC is unable to seek penalties for "first-time" breaches. Further to this, often cases close with a settlement so it can be difficult to envisage how far penalties could go as very few make it to court proceedings.<sup>30</sup> Similar to other jurisdictions, the United Kingdom's range of enforcement options can include compliance advice, warning letters, undertakings and criminal prosecution.<sup>31</sup> While Australia has a strong set of penalties under its consumer law, ensuring they are applied across unfair business practices will be imperative to holding businesses accountable.

In terms of consumer redress, there do not seem to be adequate mechanisms to support consumers impacted by unfair business practices in accessing redress. Views of consumer groups in Europe confirm that there is a lack of collective redress available to consumers after businesses have been found to breach the Unfair Commercial Practices Directive.

## 7. Inconsistency across the same jurisdiction creates regulatory arbitrage

Within both the United States and Europe, unfair practices are enforced inconsistently.

In Europe, as the prohibition is a Directive not a regulation, it is up to each member country to decide how the law is implemented within its country. Similarly, in the United States, while the FTC can investigate unfair practices or privacy breaches and sue under its statute, so can each of the states individually. Approximately half of the states have

their own unfairness authority with variations to Section 5 of the Federal Trade Commission Act.

In both jurisdictions, if a specific member country or a state takes action against a business, that business can choose to either comply only within the subset of the jurisdiction or broaden its adjusted practice across the entire jurisdiction. For example, in 2019, Microsoft announced that it would apply compliance to the new strengthened protections posed by the California Consumer Privacy Act for all its services across the United States.<sup>32</sup> However, this approach by businesses is likely to be the exception than the rule. In the case of Sephora USA Inc which reached a settlement for breaching the California Consumer Privacy Act in August 2022, it is yet not clear and not guaranteed whether changes made for Sephora customers in California will also apply across the United States.<sup>33</sup>

## 8. Unfair trading laws don't replace existing protections; they complement them

For unfair trading laws to be effective, their expectations need to be clear. A general law on unfair practices should not be designed to replace current laws but to broaden the current remit and enable regulators to test and assess new and emerging practices under a principle-based approach. It needs to operate as a stop-gap not a catch-all.

A general prohibition on unfair practices can set in place expectations on businesses to review their practices through a more holistic lens and be mindful of how new business practices can impact consumer wellbeing.

Similar to other jurisdictions, the prohibition needs to effectively interplay with Australia's laws surrounding privacy, consumer guarantees, competition and unfair contract terms. For example, the case against the DesignerWare discussed previously is one where FTC approached the issue as a 'stop-gap' as there were no contract terms between the consumer and the software company. Applying the unfair contract term legislation would not have sufficed but having access to a prohibition on unfair business practices enabled FTC to take action. An unfair trading prohibition creates the space to investigate not just direct business to consumer practices but also those business practices that may indirectly harm consumers that may not necessarily be direct customers.

# Key considerations for stopping unfair business practices in Australia

Based on the analysis above, there are specific features that lawmakers will need to consider when developing unfair trading laws in Australia.



## Clear guidance on definitions and scope

The term unfair will need to be broad enough to be applied principally but have enough markers for regulators to effectively enforce against it.

The law should be designed in a way that captures unfair practices that can affect any consumer, especially people experiencing disadvantage or any form of vulnerability.



## Meaningful redress for consumers

Mechanisms must be in place for individuals to access redress from the harms they've experienced from unfair practices.

Regulators, by default, should consider redress as part of their enforcement initiatives.



## Well-resourced regulators

With a new prohibition must come new power and adequate resources for regulators to effectively investigate and enforce. Regulators should have the capacity to proactively assess and test the potential impact of an unfair practice before harm, especially widespread harm, has taken place.



## Practices found to be unfair overseas are swiftly stopped in Australia too

New laws should establish a mechanism to allow regulators to insist that practices found to be unfair by a business in other jurisdictions can be quickly addressed by the business in Australia too. As an example, such an approach would mean that Amazon's two-step cancellation process which currently has been implemented in Europe could then also be expected to be implemented in Australia.



## Effective process to address new and emerging unfair practices

A general prohibition needs to have provisions in place that allows it to evolve over time and for regulators to specifically blacklist certain unfair practices as they emerge.

Laws should allow regulators to look at existing and emerging unfair practices, ensuring that practices likely to cause harm are stopped early.



## Consumer harm not just limited to financial or reputational loss but also impact on mental health

Impact on mental health should be considered when assessing the spectrum of harms caused by unfair business practices. Regulators should have the ability to take into account unfair practices that impact consumer wellbeing.



## Penalties and enforcement action that adequately deter businesses

Businesses must be held accountable for their actions. An unfair trading prohibition must allow for penalties, fines and other enforcement actions that adequately deter businesses from engaging or continuing in unfair business practices.

## Notes on methodology

This research involved a desktop review of various legislation and regulatory approaches to unfair trading laws internationally and analysis of specific cases and commentary on unfair practices. It was further enhanced by discussions with international consumer groups and their first-hand experience of the practicalities and challenges of a general prohibition.

We thank consumer representatives from Consumer Reports, the Norwegian Consumer Council and the European Consumer Organisation, BEUC, for their generous time and invaluable insights to help us shape this report.



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# Endnotes

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