

# **DARK PATTERNS AND UNFAIR TRADING PRACTICES: REVIEW, ANALYSIS, DRAFT LEGISLATION**

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## **I Executive summary**

1. This paper discusses:

- (a) threats to consumers, competitors and others arising from 'state-of-the-artful' unfair trading practices in internet marketing ('dark patterns') and modern commerce generally (Part II);
- (b) limits of existing prohibitions relating to consumer protection and competition as means of guarding against the threats that arise (Part III);
- (c) comparative approaches to the prohibition and prevention of dark patterns and other unfair trading practices (Part IV);
- (d) recommendations for strengthening the law against the threats of dark patterns and unfair trading practices (Part V); and
- (e) proposed draft legislation (Part VI).

2. A 'dark pattern' is an online user interface designed to fool or manipulate users in ways that undermine or impair their choice. An 'unfair trading practice' is any form of conduct in trade that has the effect or likely effect of working unfairly to the disadvantage of a consumer, customer, supplier or competitor. Unfair trading practices take many forms. They include dark patterns, misleading or deceptive conduct, unconscionable conduct, unfair contract terms, and misrepresenting the availability of consumer guarantees. They also include practices that impede competition, such as excluding app developers from access to a digital platform, and algorithmic coordination by a competitor of prices or other market conduct.

3. Dark patterns and other unfair trading practices are prevalent in modern commerce and are widely recognised as threats. Little research appears to have been done on them in Pacific Island countries. However, there are many reasons to believe that dark patterns and other emergent unfair practices are a threat or potential threat in Pacific Island countries. Six reasons are as follows:

First, the internet is an international medium of business. Unfair practices hatched in one part of the world are likely to have impacts in other jurisdictions.

Secondly, multinational companies operate in Pacific Island jurisdictions and are likely to follow business practices used in other jurisdictions.

Thirdly, local businesses are likely to copy business practices used overseas.

Fourthly, business advisers in Pacific Island countries, as elsewhere, are likely to be well aware of the boundaries of the law and advise their clients accordingly.

Fifthly, enforcement agencies in the Pacific Islands, including the Australian Competition and Consumer Commission and the Fijian Competition and Consumer Commission, have expressed concern about the danger of dark practices in their countries.<sup>1</sup>

Sixthly, dark patterns and other unfair practices go hand in hand with the power and influence of digital platforms in all countries around the world today. That power and influence (sometimes described as 'techno-feudalism'<sup>2</sup> and 'surveillance capitalism'<sup>3</sup>) has developed partly because of inadequate legal control over the conduct of digital platforms.

4. Existing prohibitions relating to consumer protection and competition are limited in their capacity to cover and prevent the use of dark patterns and other emergent unfair trading practices. Part III discusses the limits of existing prohibitions against the following types of conduct or practices:

*Prohibitions relating to consumer protection*

- (a) misleading or deceptive conduct;
- (b) unconscionability;
- (c) unfair contracts;
- (d) other consumer protection prohibitions (eg against bait advertising).

*Prohibitions relating to competition*

- (e) misuse of market power;
- (f) exclusive dealing;
- (g) agreements substantially lessening competition; and
- (h) cartel conduct.

5. Part IV outlines comparative approaches to the prohibition or regulation of dark patterns and other unfair trading practices. The approaches outlined are those taken in the following jurisdictions:

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<sup>1</sup> Eg 'Calls for a digital 'dark pattern' crackdown intensify as ACCC chair slams subscription lock-in tricks, Smart Company, 11 April 2023; Australian Broadcasting Corporation, 'Fiji's consumer protection enforcement agency warns of "dark patterns" aimed at deceiving you online', 13 June 2023, at: <https://www.abc.net.au/pacific/programs/pacificbeat/fccc-in-fiji-warns-of-dark-patterns-deceiving-people/102471870>.

<sup>2</sup> Y Varoufakis, *Technofeudalism: What Killed Capitalism* (Vintage, 2024).

<sup>3</sup> S Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books, 2018).

- A Australia;
- B New Zealand;
- C USA;
- D EU;
- E UK;
- F Canada; and
- G Singapore.

These comparative approaches vary considerably in their fitness for the purpose of addressing dark patterns and other emergent unfair trading practices. None provide an off-the-shelf model ready for easy adoption in Pacific Island countries or elsewhere. Some approaches suggested to date in Australia are instructive but legislative development is tortoise-paced.<sup>4</sup> Others (New Zealand, Canada and Singapore) are outmoded.<sup>5</sup>

6. Part V recommends ways of strengthening prohibitions against the threats of dark patterns and unfair trading practices. The recommendations essentially are as follows:
  - (1) change is required given that existing prohibitions are incapable of meeting the threats created by dark patterns and other emergent unfair trading practices;
  - (2) greater change is required than merely tinkering with a prohibition against unconscionable conduct;
  - (3) a general prohibition against unfair trading practices relating to consumer protection is advisable, together with additional specific statutory prohibitions;
  - (4) a general prohibition against unfair trading practices relating to competition is inadvisable, but additional specific statutory prohibitions are advisable; and
  - (5) additional enforcement powers, including additional powers of investigation, need to be considered.
7. Part VI sets out proposed draft legislation, with explanatory notes. The legislation proposed is based partly on recent European and UK legislation.
8. The scope of this paper is limited to dark patterns and other unfair trade practices in the context of general consumer protection and competition legislation.<sup>6</sup> The use of dark patterns and other underhand techniques in the context of consumer credit is beyond

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<sup>4</sup> One ominous sign of slow pace: Government's response to the ACCC Digital Platform Service's Inquiry, 8 December 2023. See also the consultation in Treasury, Consultation on Regulatory Impact Statement, *Protecting consumers from unfair trade practices*, November 2023. That consultation is very preliminary; a legislative package for public consultation has yet to emerge.

<sup>5</sup> See Part IVF, Part IVG below.

<sup>6</sup> Eg Fijian Competition and Consumer Commission Act 2010; Independent Consumer and Competition Commission Act 2002 (PNG); Competition and Consumer Act 2016 (Samoa).

scope.<sup>7</sup> Digital abuses relating to privacy,<sup>8</sup> gambling, online safety,<sup>9</sup> cybersecurity, cybercrime,<sup>10</sup> and national security are also beyond scope. The industrial property concept of 'unfair competition' is not addressed. Nor are insurance contracts.

9. Enforcement strategy is a large and important closely related subject. This paper is limited to the initial task of ensuring that an effective statutory framework is in place.

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<sup>7</sup> Consumer credit is an important site of dark patterns that need to be addressed; see eg Consumer Advocates, 'Make unfair illegal', Submission from consumer advocates on Treasury's Consultation on Regulatory Impact Statement, *Protecting consumers from unfair trade practices*, November 2023, Section 6; Financial Rights Legal Centre, 'Make unfair illegal in financial services', Submission on Treasury's Consultation on Regulatory Impact Statement, *Protecting consumers from unfair trade practices*, November 2023.

<sup>8</sup> See K Kemp, 'Concealed data practices and competition law: Why privacy matters' (2020) 16 *European Competition Journal*, 634, at: <https://doi.org/10.1080/17441056.2020.1839228>.

<sup>9</sup> See eg Online Safety Act 2021 (Cth).

<sup>10</sup> See P Grabosky, *Cybercrime* (OUP, 2015).