

## Episode Summary

**Episode number:** 101  
**Episode name:** A Thief in the Night: Unmasking and Regulating Dark Patterns  
**Guest(s):** Shaun Temby

**What area(s) of law does this episode consider?** Dark patterns and unfair trading practices.

**Why is this topic relevant?** In our digital economy, personal data holds immense value for various legitimate - and illegitimate - reasons. However, the acquisition of data isn't solely about personal privacy; consumer protection is also a key legal issue.

Dark patterns are strategies used in websites and apps to nudge users into unintended actions like surrendering personal data. In Australia, there's a notable gap between tightly regulated conduct and actions that might appear unfair to consumers. In comparable jurisdictions, this gap is sometimes filled by a flexible unfair trading practices framework.

**What legislation is considered in this episode?** *Privacy Act 1988* (Cth)

*Competition and Consumer Act 2010* (Cth)

**What are the main points?**

- Dark patterns are a type of deceptive online design or user interface that is intentionally implemented to manipulate user behavior.
- However, delineating practices that are truly unfair or "dark", and those that are simply part of conventional business practices like behavioural economics nudges or conversion optimisation is really difficult.
- There is ambiguity around the extent to which consumers are protected against these dark patterns under Australian law.
- Under current law, practices that are misleading or deceptive are unlawful, but softer techniques that provoke apprehension or uncertainty in consumers are not covered under current protections.
- It's possible that the introduction of an unfair trading practice prohibition would help tackle the issue of dark patterns.
- Unfair trading practices prohibitions are in place in other jurisdictions, however, it is generally new territory because it's only now that many of these practices are impacting huge numbers of consumers.
- Global approaches to unfair trading practices are a hodgepodge of otherwise broad-based regulation through to specific protections for marginalised or vulnerable communities.

- The UK has recently recommended a fairness in design policy directed at digital platforms and digital marketplaces.
- In Shaun's view this is the way to go in Australia. We should be looking at industry specific legislation such as codes of conduct - breach of which does give rise to penalties.
- Consumer protection is an area of the law and practice that is attractive to many people coming out of law school for that precise reason that practitioners are looking to protect people from behavior that is inherently wrong.
- If you're still studying, do hard corporate and commercial units at university because you need a really broad based understanding of how businesses work and how business regulation works to be a successful commercial litigator.
- Do some time in a commercial team before moving to a litigation team. Understanding how a deal is constructed assists with resolving disputes when things go wrong.

**What are the practical takeaways?**

**Show notes**

ACCC, *Digital platforms inquiry 2017-19* ([link](#))

ACCC, *Digital platforms services inquiry 2020-25* ([link](#))

S Temby & J Vasquez, *Regulating the web – is the Australian Consumer Law 'fit for purpose'?* ([link](#))