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Dear Sir/Madam

## **Response to Unfair trading practices - Consultation Regulation Impact Statement**

### **Overview**

The Victorian Automotive Chamber of Commerce (VACC) welcomes the opportunity to provide feedback to Treasury on their 'Protecting consumers from unfair trading practices' Consultation Regulation Impact Statement (Consultation RIS), which aims to address currently unregulated unfair trading practices, and possible reforms to the Australian Consumer Law (ACL).

VACC thanks Treasury for the roundtable discussion with the Department to discuss the nature of unfair trading practices in Australia, and specifically within the automotive industry. VACC provides this response on behalf of its members who represent all sectors of the automotive retail sector.

VACC provides feedback to the consultation and direction to Treasury on the proposed "reform policy options" within the Consultation RIS, which the VACC believes will provide the most relevant, effective, and suited needs of the retail motor car industry in addition to other businesses.

VACC considers that such reforms will better promote community understanding, lead to greater certainty in commerce and the introduction of an 'unfair trading prohibition', and a change to the current prohibition on 'unconscionable conduct' is necessary despite the statutory prohibition evolving from its equitable origins.

Should you require any additional information or clarification of any points contained within, please contact Kathy Zdravovski, Industry Policy Advisor at 650 Victoria Street North Melbourne Vic 3051  
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### **About VACC**

The Victorian Automotive Chamber of Commerce (VACC) is Victoria's peak automotive industry association, representing the interests of more than 5,000 members in over 20 retail automotive sectors that employ over 50,000 Victorians. VACC members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialists, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture), tyre dealers and automotive dismantlers and recyclers.

VACC is also an active member of the Motor Trades Association of Australia (MTAA) and contributes significantly to the national policy debate through Australia's peak national automotive association.

### **Limitations of existing protections in Australian law**

The Consultation RIS confines its attention to a possible unfair trading prohibition under the ACL. The ACL is Australia's national consumer protection regime, found in schedule 2 of the *Competition and Consumer Act 2010* (Cth) ('CCA')<sup>1</sup>.

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<sup>1</sup> *Competition and Consumer Act 2010* (Cth) s 2 ('CCA').

While the ACL does not itself contain express objectives, the CCA aims to enhance welfare of Australians through the promotion of 'fair trading and provision for consumer protection'. However, unfair trading practices, also known as 'unfair business practices' or 'unfair commercial practices', are particular types of commercial conduct, which are not covered by existing provisions of the ACL (such as misleading or deceptive or unconscionable conduct), but nevertheless can result in significant consumer and small business harm. Extending any potential unfair trading prohibitions to small businesses recognises that small businesses can often face the same challenges as consumers when it comes to experiences of unfair trading.

VACC is cognisant that due to the current definition and limitation on what is a "small business" many of VACC's larger business members may not be afforded the same rights, as a "small business". A small business is one who employs fewer than 100 persons or has a turnover for the last income year of less than \$10 million. For instance, a franchise car or truck dealership will invariably employ less than 100 people yet have turnover more than \$10 million, given that the price point for new cars or trucks it does not take much to arrive at the \$10 million threshold. In addition, a tyre retailer may also employ less than 100 people but have a turnover more than \$10 million. VACC strongly advocates, amongst other changes, that any potential unfair trading prohibitions are extended to ALL businesses, not just "small business" within the current definition. This change recognises that all businesses can often face the same challenges when it comes to experiences of unfair trading.

### **Limitations of Statutory Unconscionable Conduct.**

VACC proposes that in addressing current unregulated unfair trading practices under the ACL, Treasury should, in addition, address unconscionable conduct, a current prohibition, however, arguably in its current form, an incomplete mechanism for dealing with unfair business practices.

VACC acknowledges there is a 'gap' in the law, and that the statutory prohibition fails to serve its purpose as a safety net provision. (Currently, the courts *may* consider the factors and elements listed in section 22 of the ACL, *may* is not good enough.) Gageler J in *Kobelt* highlighted the issue with precision, stating that '[u]nconscionable is an obscure English word which centuries of use by courts administering equity have transformed it into a legal term of art'.<sup>2</sup>

The difficulties faced by the courts in instances of 'maybe' considering elements of the ACL in establishing a coherent understanding of unconscionable conduct have led to a situation where the statutory provision fails to achieve its equitable doctrine goals. Incidents of unconscionable conduct are the most appalling breaches of the ACL, yet the most difficult to prosecute or enforce, and currently create confusion as to the rights and obligations of consumers and businesses.

As a result, if Treasury should choose to replace the prohibition on unconscionable conduct with a prohibition on conduct which is, in all the circumstances, *unfair, only*, while this appears to be a small shift in terminology, VACC cautions in doing so. It seems best to broaden the scope of section 21 and 22 of the ACL to consider a range of misleading, harsh, oppressive or predatory conduct depending on how unfair conduct is defined. Extending the prohibition to capture unfair conduct within section 21(3) or section 22 as a factor or element that "must" be assessed not "may" in determining whether conduct is unconscionable in connection with supply or acquisition of goods or services is a better option, as it will be further explained below.

### **Policy Options as proposed by the Consultation RIS**

These policy options are expected to affect businesses (large and small), consumers and consumer law regulators, together with Commonwealth, state, and territory governments.

#### **Option 1 – Status Quo**

VACC is strongly opposed to Option 1 – Status quo as outlined in the Consultation RIS. If unfair trading practices not covered by existing laws continue, consumers and businesses will continue to bear the financial and non-financial costs as a result of these practices, with no effective options for redress. As outlined on page 9 of the Consultation RIS, potential unfair trading practices currently falling outside the ACL cause harm, target vulnerable groups/businesses, are seen as predatory or aggressive business conduct and misleading omissions and hidden information, to mention a few. Additionally, amendments to statutory unconscionable conduct are required, as will be outlined below.

#### **Option 2 – Amend statutory unconscionable conduct.**

This policy option would retain the core prohibition on unconscionable conduct contained in section 21 of the ACL but would propose to extend the prohibition to capture unfair conduct within subsection 21(3) or section 22 as a factor or element that must be assessed in determining whether conduct is unconscionable in connection with the supply or acquisition of goods or services. (Currently, the courts *may* consider the factors and elements listed in section 22.)

This policy option would seek to broaden the scope of sections 21 and 22 of the ACL to consider a range of misleading, harsh, oppressive, or predatory conduct depending on how unfair conduct is defined.

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<sup>2</sup> *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 36.

VACC agrees this policy option will maintain section 20 of the ACL that is confined within the parameters of the unwritten law developed under equity. Judges are well-equipped to determine whether conduct is, in all the circumstances, unfair.

As mentioned in the Consultation RIS, although tempting, creating a deliberate and explicit delineation from the unwritten meaning of unconscionability within equity law, may seem more attractive for both consumers and businesses, however, this thought of intentionally lowering the threshold when alleging a breach of section 21 of the ACL can cause unintended issues and judicial shortcomings, in effect making the allegation of unconscionable conduct more difficult than it currently is.

### **Why is this change required and why VACC support Option 2.**

The ACL currently provides no definition of 'unconscionable'. The prohibition in section 21(1) is supported by a number of interpretative principles in section 21(4), importantly that section 21(1) is 'not limited by the unwritten law relating to unconscionable conduct'.<sup>3</sup>

Further, section 22 contains a list of factors for a court to consider in determining whether conduct in trade or commerce is, in all the circumstances, unconscionable.<sup>4</sup> These factors provide guidance to the court, but are neither conclusive nor exhaustive, a point often restated by the bench.<sup>5</sup> Hence the need to expand section 21(3) or section 22 of the ACL, as stated above.

Commissioner Hayne, at the outset of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, mentioned that fairness 'may lie at, or at least close to, the heart of community standards and expectations about dealings with consumers'.<sup>6</sup> The proposed change in language should have a positive impact through the promotion of better community understanding of the limitations on business practices by both businesses and consumers. The Royal Commission revealed consistent and systemic engagement in unfair practices by some of our largest financial institutions.<sup>7</sup> Competition policy and consumer policy cannot be assessed in separate vacuums; they are intrinsically linked.<sup>8</sup>

If a business is liable to be penalised for engaging in conduct which is, in all the circumstances, unconscionable, they ought to be able to readily ascertain whether their conduct is unconscionable. For example, a business who is planning a new marketing campaign and business strategy. The lay reading of 'misleading or deceptive conduct' allows the trader to at least make a cursory judgment as to whether their marketing materials are likely to breach section 18 of the ACL.

The natural meaning of 'misleading' is unlikely to deviate far from that accepted by the courts in section 18 jurisprudence.<sup>9</sup> However, that same business will likely run into issues when they start to assess whether their strategy is 'in all the circumstances, unconscionable'. One may argue that the ordinary meaning of the term indeed connotes notions of fairness, which is not enough to establish unconscionability.<sup>10</sup> The statutory provisions should not seek to protect consumers solely because they provide an avenue for redress; they should promote fair trading by guiding business practices. An objective of the ACL is to 'influence the conduct of traders in the market'.<sup>11</sup> Expanding the scope of statutory unconscionable conduct to capture a broader range of 'harmful conduct' or 'unfair conduct' would provide consumers and businesses with greater protection against unfair trading practices.

Simply, creating a delineation from the current meaning of the statutory prohibition on unconscionable conduct may not promote better community understanding nor help influence business practices, or even lower the threshold required when alleging unconscionable conduct. Despite concerns that 'fairness' is too vague to adjudicate, judges are well-equipped to determine whether conduct is, in all the circumstances, unfair, especially in the realm of unconscionable conduct if changes are made as identified above.

### **Option 3 – Introduce a general prohibition on unfair trading practices.**

VACC does not support a general prohibition on unfair trading practices *only*. It goes to reason VACC prefer Option 4. A general prohibition does not allow for the identification of industries, which require specific prohibitions not just general prohibitions, for example the financial services sector. The financial services sector (for example general insurers) may require specific prohibitions, not only general prohibitions, as their failings were noted by the Hayne Royal Commission and various Productivity Commission reports in the motor vehicle insurance and smash repair sector.

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<sup>3</sup> ACL s 21(4)(a).

<sup>4</sup> Ibid s 22.

<sup>5</sup> See, eg, *Kobelt* (2019) 267 CLR 1, 14–15 [6] (Kiefel CJ and Bell J).

<sup>6</sup> Transcript of Proceedings, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Commissioner Hayne, 12 February 2018) 8.

<sup>7</sup> *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 1 February 2019) ('*Royal Commission Final Report*').

<sup>8</sup> Organisation for Economic Co-operation and Development, 'The Interface between Competition and Consumer Policies' (2010) 11(1) *OECD Journal of Competition Law and Policy* 136.

<sup>9</sup> *Demagogue Pty Ltd v Ramensky* [1992] FCA 557; (1992) 39 FCR 31.

<sup>10</sup> *Kobelt* (2019) 267 CLR 1, 48 [118] (Keane J).

<sup>11</sup> Bant and Paterson (n 2) 100.

VACC advises if a general prohibition on unfair trading practices is preferred, then it should align with the approach to unfair contract terms and include civil penalties for a breach.

**Option 4 – Introduce a combination of general and specific prohibitions on unfair trading practices.**

Option 2 and Option 4 are favourable together not individually, as each target two distinct areas of the law.

Option 4 provides a combined approach of the benefits of targeting specific practices and within various industries, while also retaining the benefits of a more general prohibition. Consumers and businesses would be clearly protected against the list of prohibited practices but would also have protection against unidentified or emerging unfair trading practices from the broader principles-based prohibition.

Breaches of a combined general and specific prohibition would likely attract civil penalties. The operation of this option could be similar to the structure of existing provisions in the ACL. For example, the ACL provides a broad principles-based prohibition against misleading or deceptive conduct, and it also contains a separate prohibition on making certain false or misleading representations about goods or services.

A combined prohibition on unfair trading practices may better meet community expectations for protecting consumers and small businesses under the ACL.

One may argue that businesses may be uncertain about what is unfair, which may create an overly cautious commercial environment with potential impacts on business confidence and innovation. The use of a specific list of prohibited practices, however, could provide useful guidance to businesses and be easier to enforce. This option would provide the highest level of protection to consumers and small businesses from unfair trading practices.

A combined approach would bring Australia in line with other international jurisdictions and prominent trading partners. For example, the European Union (EU) and United Kingdom (UK).

**Summary**

Businesses can often face the same challenges as consumers when it comes to experiences of unfair trading. For instance, exploiting bargaining power imbalances in supply chain arrangements, including unilaterally varying supply terms at short notice. Unfair trading practices that will be prohibited will fall outside the recent Unfair Contract Terms Legislation. Therefore, VACC reiterates our support for Option 2 and Option 4, and recommend Treasury take these options forward as they develop the Decision RIS, anticipated for 2024. VACC maintains the following.

**Change the existing "unconscionable conduct" law to capture unfair conduct.**

This policy option would seek to broaden the scope of sections 21 and 22 of the ACL to consider a range of misleading, harsh, oppressive, or predatory conduct depending on how unfair conduct is defined.

**Introduce a combination of general and specific prohibitions on unfair trading practices.**

This is the most comprehensive policy approach outlined by Treasury. In addition to the general ban on unfair trading practices, this approach would involve prohibiting a specific list of types of conduct. Singapore, the EU, and the UK have all imposed a set of specific bans as well as a general prohibition.

The preferred policy options aim to balance the need to address unfair trading practices. More work is required to refine and assess the options, and VACC encourage continued stakeholder engagement before and after the Decision RIS is released.

Yours sincerely

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