

29 November 2023

Director
Consumer Policy and Product Safety Unit
Market Conduct and Digital Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir

**Submission regarding Treasury's Unfair Trading Practices
Consultation Regulatory Impact Statement (Consultation Paper)**

Introduction

I welcome the opportunity to make a submission on the Consultation Paper.

My background is I am a lawyer of more than 40 years' PQE with a LLM from Sydney University and have lectured and written on consumer law (especially as it relates to the financial services sector). Currently, I am employed by a large financial services organisation having previously been the General Counsel or Head of Legal of several other financial services organisations and companies.

I make this submission in my personal capacity. The views I express do not necessarily reflect the views of my employer or the views of any trade or industry organisation to which my employer may belong.

Summary

With respect, I do not believe that the Consultation Paper makes a compelling case to introduce a free standing unfair trading prohibition under the Australian Consumer Law (ACL) whether that be in the form of Option 2, Option 3 or Option 4. To the extent that the Consultation Paper identifies practices that may be perceived to be 'unfair', those practices should be able to be addressed by the current law or addressed by targeted reform coupled with a consumer right to seek redress by means other than commencing superior court litigation.

The current law

The Consultation Paper provides examples of potentially unfair trading practices¹. Many or all of those examples should be caught by the current law for misleading or deceptive conduct under s18 of the ACL, a false or misleading representation under s29 of the ACL, an unfair contract term under the ACL or potentially statutory unconscionable conduct under ss21 and 22 of the ACL. Depending on the particular practice, it could also be caught by the other unfair practices provisions of Part 3-1 of Chapter 3 of the ACL.

The Consultation Paper goes on to outline limitations in the current law to deal with ‘unfair trading practices’². To some extent, the characterisation of these limitations convey an impression that the current law is inadequate to provide protection to Australian consumers and small business. With respect, I disagree.

Section 18 of the ACL is a very powerful tool to assist the ACCC to stamp out poor practice by businesses (large or small) in relation to advertising and other conduct that may attract the operation of the section. The ACCC has a strong track record in achieving successful prosecutions that should serve as a warning to all enterprises to behave appropriately. In addition, section 18 is frequently pleaded in commercial disputes between parties regarding what was, or was not, said or done in a given transaction.

The fact that the ACCC (and other regulators such as ASIC) may not have a perfect track record in bringing prosecutions is not an indication that the law is inadequate. The jurisprudence in this field has evolved over nearly 50 years and has demonstrated to be an important consumer protection.

The complaint that the unfair contract terms (UCT) regime has not stopped large business from imposing unfair contract terms upon small businesses in standard form contracts needs to be assessed in light of the new penalty regime that commenced on 9 November 2023. The ACCC has indicated that the absence of substantial penalties did not see any marked improvement in behaviour with the introduction of the UCT regime in 2011 (for consumers) and 2016 (for small business)³. If the ACCC takes action in the near future and seeks large penalties that will send a signal to business to improve their contracts if they have not done so already. At best, the new UCT penalty regime should be allowed time to work before assessing whether more protection is needed.

With statutory unconscionability it is unsurprising that it will not necessarily respond in situations that may be characterised as ‘unfair’ as the conduct “proscribed by [section 21 of the ACL] is conduct so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience”⁴. The concept of ‘unfairness’ requires a much lower standard than ‘unconscionable conduct’ and has been

¹ Consultation Paper, page 9

² Consultation Paper, pp 11 – 18

³ ‘ACCC poised for \$50m blitz on unfair contracts’ AFR 26/11/23 [ACCC poised for \\$50m blitz on unfair contracts \(afr.com\)](https://www.afr.com/news/accc-poised-for-50m-blitz-on-unfair-contracts-20231126) viewed 27 November 2023

⁴ *ASIC v Kobelt* (2019) 368 ALR 1; [2019] HCA 18 at [92] per Gageler J

described as a “less morally freighted term”⁵. Only the most egregious cases of unfairness are likely to be caught and even then minds can differ on the outcome of any given fact pattern as was evidenced in *ASIC v Kobelt*⁶. As Justice Gageler concluded, “it is unsatisfactory but unsurprising to me that the Court should find itself closely divided on the resolution of the appeal”⁷.

Such dissatisfaction⁸ should not of itself be a justification for the introduction of a prohibition on ‘unfairness’ in commercial practices. The risk of creating commercial uncertainty may stifle innovation or some service providers may seek to charge or increase prices in circumstances where the perceived ‘consumer detriment’ is exaggerated so that consumers end up paying more for services than they otherwise should (e.g. social media platforms may insist on paying for access to what is now a ‘free’ service).

The proposed solutions

Option 2

Whilst this option is the least intrusive, it still presents issues. Simply amending sections 21 and/or 22 of the ACL may not achieve the desired outcome. Leaving the standard as ‘conduct that is, in all the circumstances, unconscionable’ and adding further factors for a court to consider may not necessarily capture all cases of perceived ‘unfairness’ as the conduct still needs to meet the hurdle of being unconscionable.. This is because of the origins of the statutory standard derives from the equitable standard but is separate. As Justice Gageler (as his Honour then was) pointed out: “[the] Commonwealth Parliament’s appropriation in [s21 of the ACL] of the terminology of the courts administering equity in the expression of the normative standard ... serves to signify the gravity of the conduct necessary to be found by a court in order to be satisfied of a breach of that standard”⁹.

Adding the concept of unfairness to section 21 is likely to be confusing as the standards of behaviour required to trigger the prohibition are different. It would fall to a court to interpret what standard was to be applied to a given set of circumstances and that would only emerge over time.

The suggestion that unconscionable conduct be extended to situations which are ‘likely to be unconscionable’¹⁰ is unhelpful. As the consequences for breach can be severe¹¹ the mere likelihood that consumer harm might occur should not be a trigger for a civil penalty offence. The penalty should only apply if unconscionable conduct is established. It should be noted there is no civil penalty offence attaching to a breach of s18 of the ACL. It is a civil penalty offence to breach any of the provisions of s29 of the ACL but those offences relate solely to misrepresentations about certain matters and not the mere likelihood of a misrepresentation.

⁵ *ASIC v Kobelt* (2019) 368 ALR 1; [2019] HCA 18 at [119] per Keane J

⁶ *ASIC v Kobelt* (2019) 368 ALR 1; [2019] HCA 18

⁷ *ASIC v Kobelt* (2019) 368 ALR 1; [2019] HCA 18 at [95]

⁸ See also Beach J’s remarks in *ACCC v Medibank* [2018] FCAFC 235 at [353]

⁹ *ASIC v Kobelt* (2019) 368 ALR 1; [2019] HCA 18 at [88]

¹⁰ Consultation Paper, p 25

¹¹ See: s224 of the ACL

Option 3

Creating a new general prohibition without considering what else may need to be reformed or repealed is an unhelpful way to promote better behaviour and yet have Australia remain a competitive economy. Many of the overseas examples of ‘unfair practices’ legislation overlap with current Australian law and the consequences for breach are considerably different.

If the Federal Government resolved to press ahead with a broad prohibition then it is better that the current statutory prohibition on unconscionable conduct be repealed and a new ‘unfair conduct’ modelled on ss21 and 22 of the ACL be enacted in its place. The current s20 of the ACL could remain making it a civil penalty offence to act unconscionably within the meaning of the unwritten law and any aggrieved party could avail themselves of the various remedies provided for under the ACL. A suggested form of wording for a proposed ss21 and 22 is attached¹².

Because the civil penalty regime is potentially very harsh and instances of breach of the prohibition can be isolated as well as systemic, there may be issues with the civil penalty regime and how it is to be enforced. Whilst it would be a matter of statutory construction as to how the civil penalty regime is to operate, it may be that the maximum penalty should be imposed without considerations of proportionality¹³. Therefore, in isolated (as opposed to systemic) cases of unfairness a high penalty could be imposed and the court may be limited in how much it could be reduced. A different penalty regime may need to be considered for isolated cases.

Finally, with an open textured approach to what is unfair, regard needs to be had as to who may fall foul of the provision. The Consultation Paper suggest that reform is necessary in part to protect small business yet small business itself could well be the main perpetrators of ‘unfair practices’ even if unwittingly so. Small business are not well equipped in terms of legal and compliance resources to address issues as to ‘norms of conduct’ where even judges might reach differing conclusions on the same set of facts¹⁴.

Option 4

Like Option 3 there is much overlap with current Australian law. In some jurisdictions many of the items on the ‘blacklist’ are similar or identical to many of the unfair practices identified in the ACL. Tinkering with the words will only add uncertainty. Again, small business may struggle with compliance.

Option 4 is likely to be less helpful than Option 3 as it will create greater uncertainty with existing obligations and any change in words to adopt wording from other jurisdictions will need to await judicial interpretation.

¹² A position advocated by the former President of the Victorian Court of Appeal in a speech: C Maxwell, ‘Equity and Good Conscience: the Judge as Moral Arbiter and the regulation of Modern Commerce’ 14/8/2019 www.supremecourt.vic.gov.au/speeches viewed 28 November 2023

¹³ *Australian Building and Construction Commissioner v Pattinson* [2021] HCA 13

¹⁴ See: Hon T F Bathurst, ‘Law as a reflection of the “Moral Conscience” of Society’ Opening of Law Term Address 5/2/2020 at www.supremecourt.nsw.gov.au/speeches pp17ff (viewed 28 November 2023)

Defining unfairness

The Consultation Paper asks how people think ‘unfair’ should be defined¹⁵. However, if the Federal Government is determined to introduce such a prohibition no definition should be given unless the Parliament makes clear what particular practices should be banned and why. Providing a definition to what is otherwise an ‘open textured’ and value laden term is unlikely to address all of the concerns of Parliament. Inevitably that will lead to complaint that certain practices or industries are overlooked which will in turn lead to calls for ever more prescriptive legislation.

Leaving it as ‘unfair in all the circumstances’ is the best way to describe it. Industry will find that an uncomfortable state of affairs but that is to be preferred over any adaptation from other jurisdictions as that will only lead to more definitions and explanatory provisions and in all likelihood carve outs and exceptions demanded for by industry.

The ACL and the ASIC Act

As a general rule consumer protection provisions found in the ACL are replicated in the ASIC Act with some modification to deal with financial services. The financial services industry is already required to conduct itself ‘efficiently, honestly and fairly’ when providing financial services¹⁶ or engaging in credit activities¹⁷ and many of its other obligations are designed to achieve fairness.

A subsequent consultation on the ASIC Act¹⁸ is likely to demonstrate that the financial services industry would be resistant to further regulation on unfairness and if adopted, the likely outcome might be as one judge describes the misleading and deceptive conduct provisions applicable to financial services as ‘wading through legislative porridge’¹⁹. That is a situation best avoided.

A potential way forward

Rather than amend the ACL for an economy wide solution, the Government could consider a more targeted response. Many of the instances given relate to the digital platform sector. Some of the practices identified may be dealt with separately under other inquiries such as the ACCC Digital Platforms Inquiry.

Alternatively, if the main concern is with digital platforms and similar players, imposing a mandatory code of practice may be a simpler and better way to improve performance. Coupled with that should be a simple and cheap method of redress by consumers and small business such as exists under the AFCA regime in the financial services industry. This would

¹⁵ Consultation Paper, p6

¹⁶ Section 912A(1)(a) of the *Corporations Act 2001*

¹⁷ Section 47(1)(a) of the *National Consumer Credit Protection Act 2009*

¹⁸ Consultation Paper, p 4

¹⁹ *Wingecarribee Shire Council v Lehman Brothers Australia Ltd* [2012] FCA 1028 at [947] per Rares J

be a better way for consumers and small business to receive redress rather than engaging in expensive superior court litigation. The main advantages would be timing and cost.

If you have any questions, please feel free to contact me as above.

Yours faithfully

R P Rogerson (sgd)

Part 2-2—Unconscionable and unfair conduct

20 Unconscionable conduct within the meaning of the unwritten law

- (1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

- (2) This section does not apply to conduct that is prohibited by section 21.

21 Un~~conscionable~~ unfair conduct in connection with goods or services

- (1) A person must not, in trade or commerce, in connection with:
 - (a) the supply or possible supply of goods or services to a person; or
 - (b) the acquisition or possible acquisition of goods or services from a person;engage in conduct that is, in all the circumstances, ~~unconscionable~~ unfair.
- (2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:
 - (a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or
 - (b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.
- (3) For the purpose of determining whether a person has contravened subsection (1):
 - (a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - (b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.
- (4) It is the intention of the Parliament that:
 - (a) ~~this section is not limited by the unwritten law relating to unconscionable conduct; and~~
 - (b) ~~this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and~~
 - (c) in considering whether conduct to which a contract relates is ~~unfair~~ unconscionable, a court's consideration of the contract may include consideration of:
 - (i) the terms of the contract; and
 - (ii) the manner in which and the extent to which the contract is

carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

22 Matters the court may have regard to for the purposes of section 21

- (1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the **supplier**) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the **customer**), the court may have regard to:
 - (a) the relative strengths of the bargaining positions of the supplier and the customer; and

- (b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
 - (c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
 - (e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and
 - (f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and
 - (g) the requirements of any applicable industry code; and
 - (h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and
 - (i) the extent to which the supplier unreasonably failed to disclose to the customer:
 - (i) any intended conduct of the supplier that might affect the interests of the customer; and
 - (ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and
 - (j) if there is a contract between the supplier and the customer for the supply of the goods or services:
 - (i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and
 - (ii) the terms and conditions of the contract; and
 - (iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and
 - (iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and
 - (k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and
 - (l) the extent to which the supplier and the customer acted in good faith.
- (2) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the **acquirer**) has contravened section 21 in connection with the acquisition or possible acquisition of goods or services from a person (the **supplier**), the court may have regard to:
- (a) the relative strengths of the bargaining positions of the acquirer and the supplier; and
 - (b) whether, as a result of conduct engaged in by the acquirer, the supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and
 - (c) whether the supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the

- acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and
- (e) the amount for which, and the circumstances in which, the supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and
 - (f) the extent to which the acquirer's conduct towards the supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like suppliers; and
 - (g) the requirements of any applicable industry code; and
 - (h) the requirements of any other industry code, if the supplier acted on the reasonable belief that the acquirer would comply with that code; and
 - (i) the extent to which the acquirer unreasonably failed to disclose to the supplier:
 - (i) any intended conduct of the acquirer that might affect the interests of the supplier; and
 - (ii) any risks to the supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the supplier); and
 - (j) if there is a contract between the acquirer and the supplier for the acquisition of the goods or services:
 - (i) the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the supplier; and
 - (ii) the terms and conditions of the contract; and
 - (iii) the conduct of the acquirer and the supplier in complying with the terms and conditions of the contract; and
 - (iv) any conduct that the acquirer or the supplier engaged in, in connection with their commercial relationship, after they entered into the contract; and
 - (k) without limiting paragraph (j), whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the supplier for the acquisition of the goods or services; and
 - (l) the extent to which the acquirer and the supplier acted in good faith.

22A Presumptions relating to whether representations are misleading

Section 4 applies for the purposes of sections 21 and 22 in the same way as it applies for the purposes of Division 1 of Part 3-1.