



17 December 2024

Director
Consumer Policy Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

BY EMAIL to consumerlaw@treasury.gov.au

Dear Director

Subject: Submission on Unfair Trading Practices – Consultation on the Design of Proposed General and Specific Prohibitions

I welcome Treasury's supplementary consultation paper, Unfair Trading Practices – Consultation on the Design of Proposed General and Specific Prohibitions (November 2024) (**UTP Consultation Paper**). I support the inclusion of a general prohibition on unfair trading practices (**UTP Prohibition**), noting this would be a fourth general or "safety net" provision in Australia's general consumer protection law (the others being the prohibition on misleading conduct, the prohibition on unconscionable conduct and the unfair contract terms regime).¹

This brief submission, which I make on my own behalf, concerns the formulation of the proposed UTP Prohibition. The key point it makes is that, if it is desired to have a formulation specific to Australia's general consumer protection regime, as set out in the *Competition and Consumer Act 2010* (Cth), sch 2, and the application acts of the States and Territories (**Australian Consumer Law**),² then the formulation proposed under "Proposed Formulation of UTP Prohibition" below should be considered. Alternatively, if it is desired to take advantage of the already existing *acquis* on the unfair commercial practices in art 5 of the European Union's Unfair Commercial Practices Directive (Directive 2005/29/EC as amended) (**UCPD**), then the UTP Prohibition should more faithfully reflect that art 5. This submission does not address the specific prohibitions canvassed in the UTP Consultation Paper. This submission effectively addresses questions 1, 2, 4, 5, 10 and 13 of the Focus Questions – General Prohibition (UTP Consultation Paper, p 17).

Formulation of UTP Prohibition in UTP Consultation Paper

The formulation of the UTP Prohibition in the UTP Consultation Paper is as follows (UTP Consultation Paper, p 12):

a general prohibition on unfair trading practices [will] capture a business's conduct where it:

¹ Jeannie Marie Paterson, *Corones' Australian Consumer Law* (Thomson Reuters Australia, Ltd, 5th ed, 2023) [3.10].

² *Ibid* [1.150]-[1.280].



- *unreasonably distorts or manipulates, or is likely to unreasonably distort or manipulate, the economic decision-making or behaviour of a consumer, and*
- *causes, or is likely to cause, material detriment (financial or otherwise) to the consumer.*

There are some issues with this proposed formulation, as follows:

1. Query the inclusion of the words “or manipulates” in the formulation. There is no such wording in the comparable provision of the UCPD (art 5), and it is apt to lead to uncertainty. By way of illustrative comparison, the appropriate test of “misleading or deceptive” initially caused uncertainty. Still today, identifying the relevant section of the public in relation to whom the impugned conduct is to be assessed ‘is often a contested issue’.³
2. Query the inclusion of the words “decision-making or”. There is no such wording in the comparable provision of the UCPD (art 5), and it is apt to lead to uncertainty.
3. Query the inclusion of the word “unreasonably”. I understand the intention is to ensure that only unreasonable conduct will breach the UTP Prohibition, thus allowing businesses to lawfully engage in ‘common-place and legitimate marketing tactics’ (UTP Consultation Paper, p 13). I understand a further intention is to ensure the UTP Prohibition captures conduct that would breach requirements of professional diligence (a concept in the UCPD) or of good faith (UTP Consultation Paper, pp 13-14). However, I consider that the notion of “unreasonableness” is unnecessarily vague in the context of the Australian Consumer Law, making it difficult for businesses, but especially difficult for consumers, to determine when conduct breaches the proposed UTP Prohibition. By way of illustrative comparison, I consider that the references to ‘reasonable consumer’ in the important consumer guarantee as to acceptable quality (Australian Consumer Law, s 54) and in the definitions of ‘major failure’ (Australian Consumer Law, s 260 and s 268) are generative of uncertainty for consumers, effectively acting as a barrier to protection of consumers.
4. Query the necessity of requiring a consumer to prove ‘material detriment’. By way of comparison, there is no need to prove material detriment under the prohibition on misleading conduct (Australian Consumer Law, s 18). This means that, in some respects, it will be more difficult to make out a claim under the proposed UTP Prohibition than under the existing law. That does not make sense for the proposed UTP Prohibition, which is intended to set a standard for business practices and act as a safety net (UTP Consultation Paper, p 11). Further, in the strict legal sense, “material” means “relevant”. “Material”, in the sense of meaning “significant”, while common, is not strictly correct, but rather, ‘the victim of lawyers’ SLIPSHOD EXTENSION’.⁴

Further, the proposed UTP Prohibition contains concepts that will need to be worked out by courts with currently less than optimal guidance. In addition to those uncertain concepts identified above, the proposed UTP Prohibition does not clarify what meaning of “consumer” is to be used or what “distort” means (although

³ Russell Miller, *Miller’s Australian Competition and Consumer Law Annotated* (Thomson Reuters) [ACL.18.290]; see also the discussion in *Societe Civile et Agricole du Vieux Chateau Certan v Kreglinger (Australia) Pty Ltd* FCA [2024] 248, [398] to [437] (Beach J).

⁴ Bryan A Garner, *A Dictionary of Modern Legal Usage* (Oxford University Press, 2nd ed, 2001) 551.



reference is made in the UTP Consultation Paper to the UCPD, which defines the phrase, 'to materially distort the economic behaviour of consumers' (UCPD, art 2(e)).

Proposed Formulation of UTP Prohibition

From the circumstance that a unique formulation was proposed for the UTP Prohibition, it appears to be a desideratum to have a formulation specific to Australia's general consumer protection regime set out in the Australian Consumer Law. There is merit in such a tailored approach. If such an approach is favoured by Treasury and the Consumer Affairs Ministers, I propose the following formulation for the UTP Prohibition:

- (1) A person must not, in trade or commerce, engage in conduct that distorts the economic behaviour of a consumer.
- (2) Sub-section (1) does not apply if the person establishes that the conduct meets the standard of professional diligence.
- (3) Sub-section (1) does not apply if the person is liable in respect of the same conduct under a separate provision of this Schedule.
- (4) In this section:
 - (a) **conduct that distorts the economic behaviour of a consumer** means:
 - (i) conduct that causes, or is likely to cause, a consumer:
 - (A) to enter into a transaction that they otherwise would not have entered into; or
 - (B) not to enter into a transaction that they otherwise would have entered into; or
 - (ii) conduct that causes, or is likely to cause, a consumer to suffer a significant detriment that they would not have otherwise suffered;
 - (b) **consumer** means an individual acquiring goods, services or an interest in land wholly or predominantly for personal, domestic or household use or consumption;
 - (c) **significant detriment** includes a financial loss, a not insubstantial loss of time, a not insubstantial psychological harm, a not insubstantial loss of autonomy;
 - (d) **standard of professional diligence** means the standard of special skill and care which a person may reasonably be expected to exercise towards consumers, commensurate with honest market practice or the general principle of good faith in the person's field of activity.
- (5) In assessing whether a person has engaged in conduct of the kind described in sub-section (1), a consumer in the position of the consumer or consumers affected by the conduct is to be considered.

I consider it appropriate that the same remedies that apply in respect of the general prohibition on misleading conduct (Australian Consumer Law, s 18) apply in respect of the UTP Prohibition.

My reasons for proposing this amended formulation are:

1. The general prohibition in sub-section 1 is simple and short (19 words long), and echoes the language of the familiar general prohibition on misleading conduct (Australian Consumer Law, s 18).
2. It avoids the uncertainty generated by the inclusion of the words "or manipulates" and "decision-making or". It simply deletes these words.
3. It avoids the uncertainty generated by the inclusion of the word "unreasonably". The view may be taken that it is not necessary to include a qualification of "unreasonableness" or "against the requirements of professional diligence" or "not in good faith". By way of comparison, the general



prohibition on misleading conduct (Australian Consumer Law, s 18) does not have such a qualification (perhaps partially explicable on the basis that, originally, breach of its predecessor provision (*Trade Practices Act 1974* (Cth), s 52) gave rise to an injunction only).⁵

Nonetheless, there is merit in seeking to take account of the interests of businesses in engaging in 'legitimate marketing tactics' (UTP Consultation Paper, p 13). This may well help achieve a balanced provision that meets the object of the legislation of which the Australian Consumer Law forms a part, namely, 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection' (*Competition and Consumer Act 2010* (Cth), s 2). However, for a provision like the UTP Prohibition, which is intended to enhance consumer protection, the emphasis must be on 'fair trading' and 'consumer protection', rather than on 'competition'. Accordingly, I consider that this intention is far more appropriately achieved by a *defence*, rather than an additional element that the consumer must prove.

Thus, sub-section 2 provides a defendant with a defence to a claim that they have breached the UTP Prohibition. The sub-section borrows the wording on 'professional diligence' from the UCPD, art 2(h), on which there is a well-developed jurisprudence that can be drawn upon in Australia. However, rather than requiring the consumer to prove the impugned conduct was 'contrary to the requirements of professional diligence', as under the UCPD (art 5(2)(a)), or to prove unreasonableness, as under the proposed UTP Prohibition in the UTP Consultation Paper, the onus is on the defendant to establish the defence that their conduct met the professional diligence standard. I consider that this approach is superior to the UCPD's approach because it better strikes a balance between the interests of consumers and of businesses in a law designed to protect consumers from unfair trading practices. Further, defendant businesses will be in a much better position than consumers to provide evidence of relevant standards and practices in their field of activity. I also consider this approach superior to the approach of 'only capturing conduct where it is not reasonably necessary to protect the business's legitimate interests' (UTP Consultation Paper, p 17).

4. The proposed UTP Prohibition in the UTP Consultation Paper does not adequately address the issue of scope and potential interplay with other laws (which is a complicated matter for the UCPD). If the provision is truly intended to serve as a safety net designed to 'provide sufficient certainty as to its application while avoiding regulatory overreach or unintended consequences (including undermining established ACL provisions)' (UTP Consultation Paper, p 11), then it seems appropriate to include a provision that the UTP Prohibition only applies if the person is not liable in respect of the same conduct under a separate provision of the ACL. This has been done in sub-section (3).
5. Rather than requiring 'material detriment' as an element of a cause of action under the provision, with its uncertainty of meaning, I propose having two alternative elements of the general prohibition by defining 'conduct that distorts the economic behaviour of a consumer' as set out above.

The first of the two elements is 'conduct that causes, or is likely to cause, a consumer (A) to enter into a transaction that they otherwise would not have entered into, or (B) not to enter into a transaction that they otherwise would have entered into'. This draws on and refines the "transactional decision" test in the UCPD, art 2(k).

⁵ Explanatory Memorandum, Trade Practices Bill 1974 (Cth) 15; Commonwealth, *Parliamentary Debates - Second Reading Speech for Trade Practices Bill*, House of Representatives, 16 July 1974, 231 (Kep Enderby, Minister for Manufacturing Industry).



The second of the two elements is 'conduct that causes, or is likely to cause, a consumer to suffer a significant detriment that they would not have otherwise suffered'. The word "significant" is used, rather than "material", because it is technically precise. An inclusive definition of 'significant detriment' is provided to enhance certainty.

This approach seeks to balance the aims of certainty, of capturing only sufficiently serious conduct and of ensuring a sufficiently wide scope of operation for the prohibition.

6. The meaning of "consumer" in the Australian Consumer Law is a challenging area, given the multiple definitions of "consumer"—an instance of "legislative blancmange".⁶ The proposed amended formulation defines "consumer" per the definition of "consumer" in the unfair contract terms regime of the Australian Consumer Law (see s 23(3) defining a 'consumer contract'). There are two reasons for this. First, there is existing jurisprudence that can be drawn on. Secondly, this definition most closely aligns with the understanding of "consumer" held by non-lawyers and actual consumers, which is far more helpful than a '[l]egislative phone [book]', which is 'not user friendly for anyone'.⁷
7. This proposed formulation gives guidance to the person who must apply the UTP Prohibition. Sub-section 5 provides that, in assessing whether a person has breached the UTP Prohibition, a consumer in the position of the consumer or consumers affected by the conduct is to be considered.

In the alternative, a more faithful adoption of UCPD, art 5 would provide more certainty and protection for consumers than the UTP Prohibition proposed in the UTP Consultation Paper. Article 5 of the UCPD 'functions as a "safety net" to make sure that any unfair practice which is not caught by other provisions of the UCPD (i.e. that is neither misleading, aggressive or listed in Annex I) can still be penalised'.⁸ There is a considerable *acquis*, including case law, on this article that can be drawn upon by Australian decision-makers in determining and applying a UTP Prohibition in the Australian context.

If I can be of further assistance, or you would like me to elaborate upon the above, please do let me know.

Yours sincerely

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⁶ Justice Steven Rares, 'Striking the Modern Balance Between Freedom of Contract and Consumer Rights' (2013) <<https://www.fedcourt.gov.au/digital-law-library/judges-speeches/speeches-former-judges/justice-raises/raises-j-20130702>>.

⁷ Ibid.

⁸ 'Commission Notice – Guidance on the Interpretation and Application of Directive 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market' (29 December 2021) 64 *Official Journal of the European Union* C 526/8 <[https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XC1229\(05\)](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XC1229(05))>.