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

Submission by

Professor Bryan Horrigan[1]

(Immediate Past Executive Dean and Current Member, Faculty of Law, Monash University)

December 2024

Scope of This Submission: This Submission mainly concerns the proposed general prohibition. It provides a global answer to the questions asked in 'Focus Questions – General Prohibition'. In particular, it addresses generally Questions 1, 2, 4, 5, 6, 9, 11, 13, and 35 listed under 'Focus Questions – General Prohibition' in the Supplementary Consultation paper. It documents and amplifies points made by the author[2] at one of Treasury's public consultation seminars. It also picks up on and amplifies other discussion at that seminar, from the author's standpoint. For ease of reference, where appropriate its comments appear under the same heading used in the November 2024 Consultation Paper.

Background Expertise

As summarised in the author's earlier submission for the original Consultation, and summarised for ease of reference here, the author's academic expertise, practical experience, and governmental inquiry involvement of relevance to this Supplementary Consultation is as follows.

As a legal academic, the author has published scholarship in the field of unconscionable business conduct, contractual good faith, and the relationship between them. As a legal practitioner and then long-standing consultant for an international commercial law firm, the author provided advice and training for commercial clients and lawyers on the law and practice surrounding unconscionable business conduct, contractual good faith, and the relationship between them. As an academic, the author has also made various public submissions in those fields of law, including for the recent ALRC inquiry into corporations and financial services laws.

Based upon his dual academic expertise and practical experience, the Australian Government appointed the author to a three-member Expert Panel in 2009-2010, examining potential reform of statutory unconscionability. The Australian Government accepted all of the Expert Panel's recommendations and enacted them into the current law. The test cases winding their way through various courts in recent times about aspects of statutory unconscionability involve interpretation and application of the law as informed by the legislative amendments resulting from the Expert Panel's work. Obviously, the author no longer speaks as a member of that Expert Panel, but only in his individual academic capacity.

Executive Summary:

1. In its currently proposed form, the general prohibition on unfair trade practices risks some points of regulatory overlap with statutory unconscionability, for which a number of legislative drafting solutions could be considered to minimise or avoid the problem of unintended regulatory overlap, and to supplement the mechanisms outlined in the Consultation Paper, as suggested in this Submission;

[1] Email:

[2] In the interest of full transparency, the author of this Submissions discloses that he was one of three (3) members of the expert panel appointed by the Australian Government whose recommendations were fully accepted and resulted in changes to statutory unconscionability in the Australian Consumer Law (ACL) and the ASIC Act.

2. A number of additional legislative drafting devices are also available to minimise or avoid new unfair trade practices laws trespassing upon standard and acceptable business practices, as outlined in this Submission;
3. In terms of the two (2) alternatives posed in Question 4 of the Consultation Paper, the author supports the second alternative, for reasons given in this Submission;
4. In terms of Question 6 in the Consultation Paper, the author suggests that the proposed 'grey list' of non-exhaustive indicators of indicative unfair trade practices is balanced and supplemented by an equivalent non-exhaustive list of indicative business practices that are not unfair trade practices;
5. In terms of Question 9 in the Consultation Paper, there is a role and need for additional regulatory guidance from the ACCC and ASIC (if the new laws are extended to financial services) for enhanced consumer, business, and lawyerly understanding and guidance, as occurs currently for statutory unconscionability and other prohibitions for consumer and small business protection;
6. In terms of Question 11, the author supports a phased approach, with a one-year or two-year transition period for businesses to get their houses in order under new unfair trade practices laws; and
7. In terms of Question 35, the author supports the staged approach of unfair trade practices laws applying initially to business-to-consumer (B2C) dealings only, for the reasons outlined in the Consultation Paper and additionally outlined in this Submission.

'The Problem': The Consultation Paper's proposed general prohibition starts from the twin positions that:

(1) A general prohibition is needed to address unfair trade practices that do not rise to the level of unconscionable conduct under statutory unconscionability; and
(2) Even where unfair trade practices are prohibited by the Australian Consumer Law (ACL), ancillary aspects of relevant business conduct might not be covered by the prohibition.

A related and additional problem lies in the proliferation and overlap of prohibitions from two or more different sources of law – on unfair contract terms, unconscionable business conduct, and now unfair trade practices. Overlap in prohibitions for consumer protection is acceptable where it is necessary and justified, and where the use of similar terms and concepts in elements of a prohibition and any exclusions from its coverage create a body of precedent and judicial guidance that is applicable across statutory regimes. The same goes for divergence in prohibitions under equivalent provisions in different legislation. Overlap in prohibitions for consumer protection are not justifiable where it unnecessarily creates uncertainty, ambiguity, or incoherence in the law, or simply results in multiple prohibitions applying and being pleaded, without any additional or exacerbating fault being present.

The Consultation Paper displays an awareness of the adverse effects of potential regulatory overlap in the use across different prohibitions of open-textured, principles-based, and context-dependent notions such as unfairness, unreasonableness, and unconscionability:[3]

> Unfairness is also relevant to unconscionable conduct, with the court able to have regard to whether any undue influence or pressure was exerted on, or any 'unfair tactics' used against, the customer in determining if conduct is unconscionable.

Considered simply at the conceptual level, there is a real risk, which is still capable of being avoided or neutralised. The risk is that the proposed general prohibition will add to the length and complexity of pleadings, submissions, and judgments, where the same set of facts are duplicated and argued for each

[3] The Treasury, *Unfair Trading Practices: Consultation on the Design of Proposed General and Specific Prohibitions*, November 2024, 11-12.

prohibition. If so, that would undermine the stated policy rationale that a new prohibition is needed (ie on unfair trade practices), to cover what is not covered in other prohibitions (eg unconscionable conduct).

Even if the stated policy rationale is that no overlap of such prohibitions is intended or even possible, it is inevitable that the real risk of potential regulatory overlap needs attention one way or another, possibly in the drafting of the general prohibition. Consider five (5) potential overlaps, simply as examples. First, statutory unconscionability explicitly makes 'unfair tactics' part of an indicator of unconscionable conduct. The relationship between 'unfair tactics' and 'unfair trade practices' remains untested. It is likely that some 'unfair tactics' could amount to 'unfair trade practices' and vice versa, and even more likely that both will be pleaded in the alternative until clarity and determinacy is achieved, legislatively or judicially.

Secondly, at least some 'dark patterns' and other unfair trade practices could also implicate 'situational' forms of special disadvantage, under both the general law of unconscionable conduct and statutory unconscionability. An asymmetry of information can put a consumer at a 'situational' disadvantage, and prevent them from having information to assess properly what is in their best interests in the consumer transaction.

Thirdly, where a business treats a consumer or group of consumers differently from others, but in similar circumstances, perhaps by taking advantage of 'dark patterns' practices with online consumers, the disparity of treatment might implicate the listed indicator of statutory unconscionability about dissimilarity in treatment of different consumers. A similar point might be made about the business systems and patterns of behaviour that similarly point towards unconscionable business conduct towards consumers and small business, without having to prove every single fact about every single victim.

Fourthly, the examples suggested in the indicative grey list in the Consultation Paper[4] implicate some elements that might also implicate elements of statutory unconscionability (eg informational asymmetry, and impeding exercise of rights).

Finally, explicit requirements of reasonableness apply under statutory unconscionability and will condition the proposed general prohibition on unfair trade practices, if the first alternative form of the general prohibition is adopted. Their degree of overlap in a particular set of circumstances is possible, depending upon the ultimate form of wording in drafting the general prohibition. To the extent that both contractual good faith under the general law and good faith in the listed indicators of statutory unconscionability also import notions of reasonableness, another regulatory overlap potentially arises.

Three additional observations are relevant in unpacking that policy problem and navigating around it in the drafting of the general prohibition. First, a similar problem of systemic non-efficiency and non-effectiveness already exists in litigation and enforcement action, and the desirable policy position is not to make that existing situation any worse. As a matter of good practice on policy and legislative drafting, new prohibitions should not exacerbate the existing systemic problem of duplicate facts giving rise to multiple alternative pleadings and to satisfy the elements of overlapping prohibitions, just to cover the field. As Justice Roger Derrington concluded in a 2022 case brought by the corporate regulator in the Federal Court of Australia[5]:

> ASIC was successful in arguing that the same facts that supported the charge of unconscionability of NAB's conduct applied to its other charges, though unconscionability involved a different measure or characterisation of the conduct. The basis of that success means that NAB is found liable upon several items

[4] The Treasury, *Unfair Trading Practices: Consultation on the Design of Proposed General and Specific Prohibitions*, November 2024, 12.

[5] Eg see *ASIC v National Australia Bank Limited* [2022] FCA 1324, [379].

> for the same conduct in relation to different forms of legislation directed to the same purpose, consumer protection, where the added claims are based on no further culpability. The same culpability merely meets the different description of offences contained in separate statutory provisions designed to be adequate to catch different forms of misconduct within their purview. This result is undesirable, and although it was perfectly valid to bring the claims in the alternative as a precaution, the question whether all should be pursued to finality should now be considered by ASIC.

Secondly, in its currently proposed form (still at the conceptual level and not yet at the drafting level), and as outlined above, the proposed general prohibition contains elements that risk overlapping with statutory unconscionability, at least to some degree, because the latter prohibition already covers 'unfair tactics', disparity of treatment in similar circumstances, elements of reasonableness (albeit in a specific and perhaps different context), and information asymmetries that constitute 'situational' disadvantage for the purpose of unconscionable conduct under the general law and amplified statutory unconscionability. Those informational asymmetries also characterise at least some of the 'dark patterns' that the Consultation Paper is rightly targeting.

Thirdly, having identified a real problem and a real risk to be avoided if possible, is there a solution and what is it? Put another way, should the stated policy rationale about the necessity of unfair trade practices laws put its money where its mouth is, and do something if possible to avoid unnecessary duplication of facts, prohibitions, and litigation about them?

As the proposed general prohibition is still expressed only at the 'idea' level, anything that can be done in this vein is a matter for attention in the legislative drafting. One option is a legislated principle of interpretation (reinforced in extrinsic material available for use in statutory interpretation) that, where there is any ambiguity, the general prohibition (and any specific prohibitions that have the same issue) should be read down so that either it or the ACL (or statutory unconscionability at least) applies to the same facts and conduct, but not both. There is already a model and drafting precedent for special rules of interpretation in discrete areas of consumer protection, in the form of the principles of interpretation for statutory unconscionability.

If this suggestion is adopted, consideration might also be given in the context of new unfair trade practices laws of inserting a similar principle of interpretation, as in the prohibition of unconscionable conduct, of the regulator and others being able to rely upon systems and patterns of business conduct that constitute 'dark patterns', rather than having to prove every single element for every single victim.

A second option would be to draft an appropriate carve-out from applicable legislation. Such a carve-out already exists in statutory unconscionability, where the legislation effectively says that simple statutory unconscionability does not apply where amplified statutory unconscionability applies: see ACL section 20(2). In other words, only one form of the prohibition against unconscionable business conduct applies in the end. However, that does not prevent parties pleading both in the alternative, which tends to defeat the point of the carve-out in practice. Moreover, the carve-out only applies to statutory unconscionability and its simple and amplified forms under the ACL. Different policy considerations might apply where two separate prohibitions are each engaged, for good reason. Still, the reality-check here is that the Consultation Paper's clear expectation is that a new prohibition is needed and should apply where the matter is not picked up by the existing law, especially in the ACL. Such a policy rationale must mean something in substance.

A third option tackles the problem at the back end of litigation judgments and not at the front end of litigation pleadings. It is difficult and otherwise undesirable to try to limit what parties and their lawyers might choose from alternative but available arguments about potential causes of action. Trying to do so in

advance by law, simply to avoid potential overlap of coverage between an action based upon unfair trade practices and another based upon statutory unconscionability risks using a sledgehammer to crack a nut, and a potential nut at that. Of course, none of that justifies avoidable overlap and ambiguity in the law, which leads to parties and their lawyers being conservative in covering all bases in pleadings.

So, just as courts can take various considerations into account when a breach of directors' duties has occurred, there might be a suitable legislative drafting device that deploys such an option if there has been a judicial determination that both unconscionable conduct and unfair trade practices have occurred. It could permit judges not to double down on penalties just because the same facts constitute breaches of two different prohibitions. Exceptions could be made where there is a genuine policy difference that justifies penalties under both regimes, or something else that qualifies as an additional aggravating factor that warrants both prohibitions. The point is to avoid unfair and unintended overlap of prohibitions, not to dilute consumer protection.

A fourth option would be to limit the capacity of big business and perhaps small business to access the unfair trade practices regime in purely business-to-business (B2B) contexts, either completely or at least initially, until any unintended overlap or other problem is sorted out in the domain of consumer protection. This is raised simply to list it as an option. There might well be good policy reasons against it, in terms of allowing exceptions or otherwise diluting the net of prohibitions across statutory regimes that now regulate what some Australian courts call 'a modern Australian commercial, business or trade conscience'.[6] The package of regulation that can be characterised in that way clearly includes statutory unconscionability, unfair contract terms laws, and any new unfair trade practices laws, across multiple statutory regimes aimed at consumer and small business protection.

There might well be other drafting options to address the identified problem. More might become apparent once the detail of the drafting of the proposed prohibition is known. The issue raised cannot be taken any further in the abstract.

In the absence of an appropriate solution to this unintended outcome, at least on the face of the Consultation Paper, parties to litigation and their lawyers will be forced to plead and argue everything available to them, just in case. They will be forced to do so even though the Consultation Paper says there is no intended overlap. Unless precluded or otherwise avoided with reasonable certainty, such an outcome is inevitable in factual terms, inefficient in legal terms, and non-effective in policy terms.

Of course, it might never come to that either. The legislative drafters might consider and find ways to avoid the identified problem of overlap. A court might ultimately decide that there is no overlap at all between the different prohibitions, whatever legislative drafting approach is taken. At present, however, we have an explicitly stated policy position that unfair trade practices laws are needed to address gaps in consumer protection, including under statutory unconscionability, with a proposed general prohibition at the conceptual or 'idea' level that reasonably raises both the potential for overlap of prohibitions, and hence the need to consider and address this issue if possible in the legislative drafting process.

For clarity, none of this means that there should not be a general prohibition akin to the one proposed. But the devil is in the detail of the drafting, in avoiding avoidable overlaps and duplications, given that the proposal is only intended to cover a real gap in the law, not an overlap of applicable laws, especially if that overlap is only decided at the back end of litigation in a court judgment.

[6] *Paciocco v ANZ Banking Group Ltd* [2015] FCAFC 50, [296] (Allsop, CJ, Besanko J at [371] and Middleton J at [398] agreeing); see also: J. Allsop, 'Conscience, Fair Dealing and Commerce: Parliaments and the Courts' (2017) 91 ALJ 820, 838.

'General Prohibition'

The Consultation Paper leaves no uncertainty about its policy intent. It is there to fill a perceived gap in consumer protection, not to create overlaps of prohibitions between new trade practices laws and the ACL:[7]

> The proposed general prohibition would be principles-based, addressing unfair trading practices that cause consumer harm but *cannot be addressed by the ACL's current provisions*. The general prohibition would be designed to provide sufficient certainty as to its application while *avoiding regulatory overreach or unintended consequences (including undermining established ACL provisions)*.

Conceptually – which is all we have to go on at this stage – the proposed general prohibition on unfair trade practices will catch business conduct that:[8]

- 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.

In addition, and similarly to statutory unconscionability, the proposed general prohibition would have 'a non-exhaustive list of examples of conduct (referred to in this paper as a "grey list") which may, depending on the circumstances, meet this test'.

If policy precedent and any further policy justification is needed for the proposed structure of a general prohibition coupled with non-exhaustive examples to inform its scope of coverage in practice to the greater public good of enhanced consumer protection, it exists in the ACL already. So, there is nothing objectionable per se about the way that the prohibition and its correlative examples are structured. It's been done before.

However, there are a considerable number of issues to work through in making the proposal as bullet-proof as possible in the legislative drafting process, so that the identified risks of 'regulatory over-reach' and 'unintended consequences' are minimised or even eliminated.

As mentioned by others in the consultation seminar also attended by the author, the usefulness of a body of cross-cutting precedent on similar terms in various statutory regimes for consumer protection is at risk of dilution or confusion whenever different terms are used, unless the difference is justified and explained. Nuances and differences of wording matter in legal and litigious domains. Should it be 'detriment' in one prohibition and '*material* detriment' in another, and is the difference justifiable? Does the 'distortion' or 'manipulation' need to have a *materia*l impact, or just some impact? Whatever its materiality, should the detriment be limited to 'financial detriment' or extend to non-financial detriment (even mere consumer inconvenience or psychosocial harm?). Will the guardrail hold for legitimate business practices and tactics involving consumers simply by invoking a qualifying condition of 'unreasonableness'? What is the measure of an '*unreasonable* distortion' or '*unreasonable* manipulation' in any case, as distinct from distortions and manipulations per se? Must the business conduct be a meaningful cause or likely cause of the detriment or alternatively intended or foreseeable as having that effect?

These are not simply characterizable and dismissible as mere lawyerly semantics or word games. Their interpretation and application make a difference to how widely the net of consumer protection is cast,

[7] The Treasury, *Unfair Trading Practices: Consultation on the Design of Proposed General and Specific Prohibitions*, November 2024, 11; emphasis added.

[8] The Treasury, *Unfair Trading Practices: Consultation on the Design of Proposed General and Specific Prohibitions*, November 2024, 12; emphasis added.

what businesses must do to guard against breaching the prohibition, and what costly and unproductive 'test case' litigation is minimised or avoided altogether.

What is the solution, if variance of terminology is needed across different prohibitions? If slightly different terms are retained in the finalised proposal, at the very least there should be a clear explanation inserted into the extrinsic material available to courts to inform statutory interpretation, so that they have clear parliamentary intentions available to them (and to parties in enforcement action and litigation, and their lawyers) about the justified difference, scope, and limits of the prohibition under each statutory regime. This is crucial when a number of prohibitions under different statutory regimes all promote consumer protection and could potentially apply.

Put another way, it is acceptable to use slightly different legal terminology in different prohibitions, provided everything is explained clearly and congruently with other prohibitions. This is an aspect of explanatory accountability, public visibility, and good legislative practice (eg legislative consistency, coherence, comprehensibility, and non-ambiguity), in a deliberative democracy of many contested interpretations and applications in litigation and what former Chief Justice of Australia, Professor Robert French, liked to call 'constructional choices' in statutory interpretation.[9]

'Conduct Element' and 'Grey List'

Depending on the final wording in the drafting, the qualification of 'unreasonableness' should not go to the degree of distortion or manipulation involved. In the abstract, that is not the mischief sought to be addressed by the introduction of the qualifying words, 'unreasonably distorts or manipulates'. The Consultation Paper is clear elsewhere about what the real mischief is and what work 'reasonableness' has to do:[10]

> It is intended that by confining the application of the prohibition to only conduct which is unreasonable, common-place and legitimate marketing tactics employed by businesses will not be captured.

Similarly, there is no qualifying of the degree or quality of the deception or manipulation in the EU Digital Services Act's requirement that '(p)roviders of online platforms shall not design, organise or operate their online interfaces in a way that deceives or manipulates the recipients of their service or in a way that otherwise materially distorts or impairs the ability of the recipients of their service to make free and informed decisions'. Like the notions of material detriment and material interests, material distortion or impairment involves a comprehensible and appropriate qualifier – something either is or is not material in its effect upon free and informed consumer choices. By contrast, any deception or manipulation of a vulnerable consumer is inherently objectionable, and could never properly be within scope of accepted and standard business and marketing tactics. Attaching the qualifier of 'unreasonableness' to those business actions is misplaced. Again, it all depends on the actual wording used in the drafting.

A business practice or tactic will be unfair if it actually distorts or manipulates consumer decisions or behaviour. It is unclear what a *reasonable* distortion or manipulation would look like, as distinct from an *unreasonable* distortion or manipulation. What makes the business conduct or tactic unreasonable is the impairment of the informational base, understanding, and decision-making of the affected consumer, to their detriment, not the nature or degree of the impairment. The impairment per se is the problem.

[9] Eg R. French, 'The Courts and the Parliament', Queensland Supreme Court Seminar, 4 August 2012, 8-9.
[10] The Treasury, *Unfair Trading Practices: Consultation on the Design of Proposed General and Specific Prohibitions*, November 2024, 13.

To use a related example to illustrate the point, there is either sharp conduct or no sharp conduct. There is no clear or comprehensible measure to separate *unreasonable* sharp conduct from *reasonable* sharp conduct. Where sharp conduct is present, the question is whether or not it rises to the level of unconscionable conduct. By its nature, sharp conduct is inimical to good faith.[11]

Distortion and manipulation are akin to sharp conduct. They are also akin to unfair tactics, undue influence, and duress as indicators of statutory unconscionability. Legislative consistency and coherence in the standard for prohibiting unfair and unconscionable conduct is important.

Of course, the real twin mischiefs to address here are not rendering business liable for legitimate ways of influencing consumer decisions and behaviour, and not having unnecessary collateral disputes about whether such influence goes beyond standard and acceptable business conduct, and falls over the line of distortion or manipulation. The solution to that potential problem is to address those twin mischiefs explicitly. There are four (4) options, which could also be combined with one another:

(1) use an appropriate and non-ambiguous qualifying or conditioning set of words about the right object – namely, the impact on the consumer, not the degree or quality of the distortion or manipulation;
(2) include a non-exhaustive list of business actions and tactics that do not amount to unfair trade practices, to complement the proposed 'grey list' of indicative unfair trade practices;
(3) have an appropriate precondition to liability, ensuring that standard and acceptable business tactics and influence are outside the net of liability; and/or
(4) allow an express defence or exclusion to similar effect.

The literature and comparative regimes suggest qualifiers and exceptions grounded in professional diligence. Other possibilities cited include good faith and reasonableness. The Consultation Paper chooses the latter mechanism. However, the stated rationale for using 'unreasonableness' rather than 'good faith' or 'professional diligence' proceeds as if the latter two options are merely complementary rather than alternative controls:[12]

> As the proposed formulation of the test would prohibit unreasonable conduct, this paper does not propose including an additional limb to the test which incorporates professional diligence or good faith.

On that question, if unreasonableness Is retained, the author suggests recognising its limits and defusing inevitable uncertainty in its operation, by bolstering the prohibition with either a precondition or defence that immunises non-targeted conduct, or alternatively a list of non-exhaustive examples that constitute what does not amount to unfair trade practices. Both are familiar legislative devices in other contexts.

The Consultation Paper is rightly alert to both the novelty and potential difficulty of using 'unreasonableness' in the way proposed. It invites feedback on an alternative, asking in Question 4:

> Or would an alternative approach of only capturing conduct where it is not reasonably necessary to protect the business's legitimate interests provide a better level of protection for consumers?

Given a choice between those two options, the author supports the latter option. It is better than using the term, 'unreasonably' as a qualifying or conditioning agent for the targeted manipulation or distortion. First, it reduces or even eliminates any arguable ambiguity about the wording of the first alternative and to what the 'unreasonableness' is attached. Secondly, it more clearly focuses upon what business most fears about

[11] Eg *Australian Postal Corporation v Digital Post Australia* [2013] FCAFC 153, [74]; and *Insight Radiology Pty Ltd v Insight Clinical Imaging Pty Ltd* [2016] FCA 1406, [97].
[12] The Treasury, *Unfair Trading Practices: Consultation on the Design of Proposed General and Specific Prohibitions*, November 2024, 14; emphasis added.

potential and unintended trespass upon legitimate business actions and tactics, and collateral disputes and 'test case' litigation about it. In other words, it delineates a clearer dividing line based upon legitimate business interests.

Thirdly, it uses terminology that has equivalents in other prohibitions on consumer protection. So, it is familiar to business and has its own body of precedent and judicial guidance to be applied in the new context of unfair trade practices laws. On this point, the Consultation Paper notes that a similar statutory device is included in the unfair contract terms regime. It also appears in statutory unconscionability, albeit with additional qualifying words and nuances. However, the point remains that the use of the 'beyond legitimate interests' device in the three prohibitions – namely, statutory unconscionability, unfair contract terms, and unfair trade practices laws – promotes consistency and coherence across statutory regimes for consumer protection, as well as a body of precedent and judicial guidance for reference across those regimes.

If, after feedback from this Supplementary Consultation, Treasury and the Government stick with the first alternative, based upon the 'unreasonably distorts or manipulates etc' wording, the drafting instructions and approach need to be clear that 'it is unreasonable to distort or manipulate etc'.

However, there are also good reasons to choose 'good faith' as a suitable control, either instead of 'unreasonableness' or else complementing it, for the following reasons. As the Consultation Paper notes, the prevalence and relevance of industry codes must be considered.[13] However, industry codes are not just factors in deciding upon a phased introduction of the new laws for B2B dealings. Many industry codes now incorporate explicit, non-exhaustively defined, and non-excludable obligations of good faith.

Moreover, breach of codes of conduct can constitute unconscionable conduct under statutory unconscionability, and a breach or absence of good faith can do likewise. Good faith is readily recognised by courts (but not all commentators) as having elements of honesty, fidelity to the bargain struck, and reasonableness (but not at large). Context and circumstances also matter and differ, in applying 'good faith' to the different prohibitions in statutory unconscionability and new unfair trade practices laws.

So, all industries potentially caught by unfair trade practices laws already need to comply with obligations of good faith, from one source or another, and good faith arguably includes notions of reasonableness. Business manipulations and distortions that do or are likely to have adverse influence upon vulnerable consumers cannot be in good faith, just as they cannot be reasonable. The use of 'good faith' would include but not be limited to reasonableness, and so would give additional protection to consumers. At the same time, the use of 'good faith' would immunise standard and acceptable business tactics and behaviour from being picked up by unfair trade practices laws, and provide further and explicit protection for business. At face value, it is a principled trade-off, and worth consideration.

Whatever option and language are chosen, there must be clear immunisation of mainstream business tactics and consumer influence that do not rise to the unacceptable level of distortion or manipulation of consumer decisions and behaviour.

The proposed use of a qualifying condition of 'unreasonableness', or its alternative, might work best within a combined package of legislated measures, where it is:

(1) directed at the right mischief;

[13] The Treasury, *Unfair Trading Practices: Consultation on the Design of Proposed General and Specific Prohibitions*, November 2024, 24; emphasis added.

(2) illustrated by non-exhaustive examples that ordinary business influence and tactics will not transgress;
(3) reinforced by clear statements in extrinsic material for the Commonwealth Parliament and courts about the intended policy outcome;
(4) combined with a 'detriment element' and causal connection of the kind envisaged;
(5) enhanced by adding to the list of non-exhaustive examples of offensive business conduct an additional non-exhaustive list of business conduct that will not amount to unfair trade practices;
(6) introduced with appreciation of the inherent limits upon the use and certainty of 'unreasonableness' in any context; and
(7) bolstered by the insertion of a precondition or defence that, even just for the sake of clarity, excludes ordinary business marketing and tactics from the net of liability, and only targets anything truly characterizable as manipulation or distortion of consumer decisions or behaviour.

In other words, clarity and certainty for all parties, and policy consistency and coherence across statutory prohibitions, can both be enhanced by drafting that does not overestimate the work that 'unreasonableness' is capable of doing on its own. On that point, the law commonly uses notions such as 'unfairness', 'unconscionability', and even 'unreasonableness' in various contexts. So, there can be no legitimate objection to their use in appropriate legislative drafting. However, they retain a penumbra of undetermined meaning and application as open-textured, principle-based, and context-dependent standards, especially when used in a new context and without the backing yet of a body of precedent about their meaning and application in the chosen context.

For that additional reason, it is desirable to consider a package of one (1) or more measures in the drafting of the kind suggested above, rather than simply relying upon 'unreasonableness' alone to carry the day. In particular, a list of non-exhaustive examples of conduct that will not amount to unfair trade practices has a number of advantages. It could be achieved up front in the legislative prohibition or in progressively updated industry codes of conduct, catering to particular industry circumstances. It would allow for further industry and consumer consultation in focusing upon business conduct that everyone can agree is not being targeted by the new laws, thereby inclusively bringing stakeholders further into the drafting process, and creating more buy-in for the final result.

Neither consumers nor regulators and business benefit from wasteful and costly test litigation, just to sort out issues of non-clarity, ambiguity, or uncertainty that could otherwise have been avoided addressed in the law-making process initially. Unfair trade practices laws are new to Australia, at least in the form proposed, with some novel features. The benefits of additional legislative mechanisms and further stakeholder consultation while drafting the proposed general prohibition are worth the costs. If two public consultations are justified just on the concept or 'idea' of something, so too is a further and perhaps even select consultation process as the drafting parameters become clearer.

'Detriment Element'

The fact that the unfair contract terms prohibition targets both financial and non-financial detriment supplies a rationale and precedent for doing so in the unfair trade practices prohibition too. There would be further benefits of clarity, certainty, and avoidance of wasteful and unnecessary 'test case' litigation for consumers, business, and regulators alike if the boundaries of 'non-financial' detriment are clearly confined to the examples of identifiable 'emotional detriment, inconvenience or loss of autonomy' contemplated by the Consultation Paper. Personal inconvenience is not co-extensive with commercial inconvenience, for example. Further legislative guidance is desirable.

'Remedies for a Breach of a General Prohibition' and 'Other Considerations: Application to Business-to-Business Dealings'

The Consultation Paper notes an important reason favouring a staggered or phased introduction of unfair trade practices laws to business-to-business (B2B) transactions. It notes that other ACL prohibitions were phased in for B2B dealings after commencing for business-to-consumer (B2C) dealings. It proposes 'a staged approach', whereby the new unfair trade practices regime applies initially only to B2C dealings. It states the rationale that more 'commercial certainty' about how the new law works would result, as would working out of any unidentified issues through case law.

There is also a broader and related question. Big business and those who advise and lobby for them might not welcome but might also live with new unfair trade practices laws in their dealings with consumers and possibly in their dealings with small business, but might or might not have a different view about such regulation applying to dealings between big businesses alone. Experience in the law and litigation shows that someone who doesn't want something in the law that could be used to create wasteful collateral disputes against them might nevertheless want it if they see an advantage in having it as an option available to them if necessary.

One reality-check on this discussion is that the inherent nature of 'dark patterns' is their targeting and applicability to consumer dealings and small business dealings. Still, informational asymmetries online can affect others.

At this stage of public consultations, the point might be made that the policy rationale for introducing new unfair trade practices laws to protect consumers and small business is diluted or even lost when it comes to dealings between large corporations, who can be expected to look after themselves, who do not have the same vulnerability as others, and who do not welcome the reputational damage and tactical weaponization of ultimately unsuccessful claims by competitors. Some high-level judges, former judges, and commercial barristers have similarly argued that statutory unconscionability should be wound back and not applied to dealings between big businesses, especially multinational corporations (MNCs) with operations in Australia and other countries, because of their perception of its inherent uncertainty and indeterminacy.

Those high-level judicial critics perceive statutory unconscionability as inherently subjective and hence an unacceptable threat to the certainty of commercial dealings and dispute resolution. This is a contestable position, and would need to be raised by analogy in the context of unfair trade practices laws. More broadly, they argue that the existence of this body of law also poses a threat to the attractiveness of Australia and Australian law as the forum and governing law respectively for international commercial adjudication and arbitration.

For example, prior to his elevation to being Chief Justice of New South Wales, Justice Andrew Bell told an international audience that '(m)uch like an implied duty of good faith, the concept of unconscionability under Australian statute law and, in particular, the Australian Consumer Law (ACL), is unlikely to inspire confidence in commercial parties or supply the requisite certainty so as to make a choice of Australian law to go with a choice of Australian forum particularly attractive'.[14]

[14] A. Bell, 'An Australian International Commercial Court – Not a Bad Idea or What a Bad Idea?' (2020) 94 ALJ 24, 38. For comments to similar effect by former heads of jurisdiction, see: T. Bathurst, 'Law as a Reflection of the "Moral Conscience" of Society', Opening of Law Term Address, Sysdney, 5 February 2020; and M. Pelly, 'Business "Weaklings" Using Australian Laws to Dodge Contracts', *Australian Financial Review* online, 18 May 2023 (quoting comments by former HCA judge and Chief Justice of the Federal Court of Australia, Pat Keane). For discussion on this point by academics and legal practitioners, see: M. Scott, 'In the Interests of Commercial Certainty – Is it Time to Reconsider the Application of Key Provisions of the Australian Consumer Law?

The short answer at present to such points, if raised in the context of unfair trade practices laws, is that it depends upon what the new laws actually say in detail, whether they include adequate safeguards of the kind canvassed in this Submission, and what problems are identified in phasing in their introduction for consumer dealings initially. An additional part of that answer is that, unlike perhaps statutory unconscionability in its current form, unfair trade practices laws exist in other jurisdictions, with which MNCs and their lawyers would be familiar.

For clarity, the author is not in favour of an anomalous, complete, and enduring carve-out of business-to-business (B2B) dealings just for dealings between big businesses alone, as an outcome of this Supplementary Consultation on unfair trade practices laws alone. If entertained, such an outcome would need to be considered for more than just unfair trade practices laws and extend to statutory unconscionability,[15] for policy consistency and coherence, and justified as a divergence from the overall legislative package of laws regulating 'a modern Australian commercial, business or trade conscience'.[16] It is presently out of scope.

In short, the Consultation Paper's proposal and rationale for a phased introduction have a precedent in the phased introduction of other statutory regimes and prohibitions concerning consumer protection. It therefore has sound policy reasons and precedent in past policy and legislative practice. Those considerations are sufficient to support it here.

In addition, there are other benefits of a staggered introduction. They include having more time for stakeholder consultations about indicative examples of acceptable marketing and other business tactics and influence, whether included in a list of examples of acceptable practices when the legislation commences for B2B dealings, or otherwise incorporated in regulated codes of conduct.

'Financial Services'

The Consultation Paper indicates that alignment of the ACL and the ASIC Act, so that both have prohibitions on unfair trade practices, awaits further discussion. It notes 'important differences between the ACL and financial services law in Australia'. Any such differences ae not weighty reasons against such alignment.

However, there is a policy coordination and timing issue that arises across statutory regimes for consumer protection. The Consultation Paper note that '(o)nce options to amend the ACL have been considered and agreed in consultation with States and Territories, the government will consider what changes are required to financial services regulated by the ASIC Act to ensure *appropriate alignment across the ACL and financial services laws*'.[17]

The ALRC inquiry into financial services reforms has recommended changes to statutory unconscionability in the ASIC Act but not yet to the ACL, for sound reasons. It is one thing to hold public consultations, consult all affected stakeholders, and suggest reforms to statutory unconscionability across multiple industries regulated by the ACL, which can also be applied to the financial services industry regulated by

(2024) 32 AJCCL 184, 186-187. For a contrary view, that unconscionability law is not inherently contrary to 'rule of law' requirements, and indeed might contribute to the rule of law by principled restraining of unconscionable exercises of rights, see: M. Harding, 'Equity and the Rule of Law' (2016) 132 LQR 278.

[15] See: M. Scott, 'In the Interests of Commercial Certainty – Is it Time to Reconsider the Application of Key Provisions of the Australian Consumer Law? (2024) 32 AJCCL 184, 186-187.

[16] *Paciocco v ANZ Banking Group Ltd* [2015] FCAFC 50, [296] (Allsop, CJ, Besanko J at [371] and Middleton J at [398] agreeing); see also: J. Allsop, 'Conscience, Fair Dealing and Commerce: Parliaments and the Courts' (2017) 91 ALJ 820, 838.

[17] The Treasury, *Unfair Trading Practices: Consultation on the Design of Proposed General and Specific Prohibitions*, November 2024, 26; emphasis added.

statutory unconscionability in the ASIC Act. The reverse does not hold true. The tail must not be allowed to wag the dog.

The two policy reform and legislative drafting processes need to be considered in tandem, and any divergences actively considered and publicly justified. Anomalies will already result in the overall net of consumer protection regulation if statutory unconscionability is changed in the ASIC Act but not in the ACL. Those anomalies will be compounded if new unfair trade practices laws apply to all other industries under the ACL but not to the financial services industry under the ASIC Act.

They will be exacerbated further if unfair trade practices laws never apply to B2B dealings or big business are exempted from their operation only in dealings between themselves. Finally, other anomalies and precedential difficulties will arise if, despite the stated policy position that unfair trade practices laws are necessary and will apply to gaps in consumer protection where statutory unconscionability and prohibition of unfair contract terms will not apply, cases arise that demonstrate points of overlap between unfair trade practices and the other prohibitions in the ACL.

The point of highlighting such potential anomalies is simply to indicate the need for coordination of parallel processes of reform of consumer protection laws. This is desirable for ongoing consultations with key stakeholders, discussion with States and territories, and joined-up government.

In the end, there are number of reasons why there should be unfair trade practices prohibitions in both the ACL and the ASIC Act, if there are to be such prohibitions at all. First, if the same policy problems of 'dark patterns' arise in the financial services industry as well as other industries, the new unfair trade practices laws should apply across multiple industries. Secondly, both Acts have statutory unconscionability and unfair contract terms laws. So, it would be anomalous not to do the same with new unfair trade practices laws. Thirdly, the ASIC Act regulates one industry – namely, financial services – and the ACL regulates all other industries. So, leaving the ASIC Act out of the regulatory loop would need serious and explained justification.

Fourthly, changes to statutory unconscionability in the past have been simultaneously cascaded through both Acts, without apparent difficulty. Finally, the ALRC inquiry into corporations and financial services was an outlier, in the sense that its scope covered the financial services industry and not other industries. So, its ultimate recommendation not to make the same changes simultaneously to statutory unconscionability under the ASIC Act and the ACL is not really a precedent against cascading new unfair trade practices laws through both Acts.