MONASH BUSINESS SCHOOL

Competition reform and the Consumer law: Finishing the journey

A submission[1] to The Australian Government the Treasury consultation paper:
Protecting consumers from unfair trading practices[2]

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[2] Available at: https://treasury.gov.au/sites/default/files/2023-08/c2023-430458-cris1.pdf
[3] See page 26 for further information about the author.

NOTICE OF TRANSMITTAL

This paper is a submission to The Australian Government the Treasury consultation paper, *Protecting consumers from unfair trading practices*, published in August 2023.[4] The author is solely responsible for the views expressed in this submission as well as any errors or omissions. The views expressed below may not reflect the views of the Monash Business School or the Consumer Policy Research Centre (where the author is a board member). This submission contains no information of a confidential or commercially sensitive nature.

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[4] Available at: https://treasury.gov.au/sites/default/files/2023-08/c2023-430458-cris1.pdf

ABSTRACT

This submission contemplates amendments to the Australian Consumer Law (ACL) within the context of a 30 year policy arc that began with the Hilmer Review into National Competition Policy (NCP). The central contention of this submission rests in the proposition that **until the consumer law focusses on consumer outcomes, it will remain incomplete and competition policy reform will remain unfinished**.

The Treasury consultation paper pre-emptively concludes that it is not possible to identify an objective definition of fairness. This pre-emptive conclusion immediately narrows the available opportunities for reform. It leaves the paper confined to only considering options pertaining to business conduct rather than the consequences of that conduct. This means that under current (and proposed) settings, businesses are permitted to take advantage of information asymmetries unless specifically prohibited from doing so. By exclusively focussing on conduct rather than outcomes, **the law's permissive bias leaves consumers bearing the risks of market distortions** arising from information asymmetries while they wait (and hope) for the law to catch-up to the market.

As noted in this submission, not all unfair consumer outcomes are caused by overtly unfair business practices. In some contestable markets, consumers remain at risk of poor outcomes even in the absence of overt forms of conduct. In these instances, consumer detriment will remain unchecked if reforms to the ACL are limited to prohibiting particular forms of conduct.

Finishing the policy reforms which began 30 years ago with Hilmer's NCP review requires a new and **broad (general) prohibition of unfair trade practices which is tied to fair consumer outcomes**. After all, trading practices (or business interactions with customers) are typically fleeting while consumer outcomes are often enduring. Simply prohibiting undesirable business practices cannot be an 'end' in itself if it permits market distortions from information asymmetries to persist. Correcting market failures caused by information asymmetries cannot just attend to how information is provided. It must also attend to how information is received and used by consumers.

This submission proposes **an objective and workable definition of (un)fairness** that can be used in a comprehensive (general) prohibition on unfair trading practices. Some preliminary thoughts are also offered on 'Minimum Standards of Fair Conduct' for assessing businesses' compliance with the proposed general prohibition. These reforms would support consumers' agency and autonomy to make informed choices, but they go further. They would require businesses, under certain circumstances, to **assist customers to exercise their autonomy in a way that is not detrimental to their own interests**. Businesses would be responsible for supporting fair consumer outcomes.

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Appendix A responds to questions in the consultation paper while **Appendix B** reflects on the limited utility of applying traditional cost-benefit analysis to reforms focussed on improving fairness. **For the avoidance of doubt, this submission supports, in order of preference, Options 4 and 3 in the consultation paper** but contends an even broader approach is possible.

1. Introduction: Finishing the reform journey

History and context matter. They always do. This submission contemplates amendments to the Australian Consumer Law (ACL) within the context of a 30 year policy arc that began with the Hilmer Review – more specifically, National Competition Policy (NCP). This submission highlights how the current review provides the opportunity to finish the reform journey that began all those years ago. It is a submission about policy, not law. It is not written by a lawyer, nor is it a legal treatise. No doubt other respondents will offer those arguments. And, undoubtedly, numerous submissions will provide case studies highlighting where existing standards are proving insufficient.

National Competition Policy commenced with a promise to the community that benefits would flow from exposing private and public service providers to the disciplines of competitive market forces. In the language of the economists who compelled this reform agenda, NCP was about removing industry protection, removing cross-subsidies, ensuring prices were reflective of underlying costs, and limiting the role of regulation to addressing clearly identified market failures.

Competition reforms focussed heavily on the supply side of markets. Barriers to entry were lowered, misuse of market power was prohibited, and access regimes were imposed on monopoly infrastructure. Competition policy did not attend heavily to the demand side of the market. That was left, in large part, to state and federal fair trading laws which eventually coalesced into the Australian Consumer Law in 2011.

Competition and consumer laws have been updated from time-to-time as markets evolve and new shortcomings in those laws are exposed. While technology has been a powerful driver of market evolution, it is not the sole driver. Competition is highly effective at motivating suppliers of goods and services to find and, where possible, take commercial advantage of shortcomings in the legal protections afforded customers. Firms remain free to do so until the law and regulators catch-up. This 'cat and mouse' dynamic emerges because of the consumer law's permissive bias – that is, everything is permitted until the law says it is not.

The Treasury's recently released consultation paper, *Protecting consumers from unfair trading practices*, explains it is motivated by yet another wave of shortcomings in the consumer law.[5]

> *Unfair trading practices … are particular types of commercial conduct which are not covered by existing provisions of Australia's consumer laws (such as misleading or deceptive or unconscionable conduct), but nevertheless can result in significant consumer and small business harm. Evidence suggests that a* ***large and growing range of commercial practices and business models fall into this category****, including in the digital economy. (p.4)* [Emphasis added]

In the meantime, consumers bear the risks of harm associated with these shortcomings while they wait for regulators and the law to catch-up to the market. This outcome is not consistent with the 'promise' made to consumers 30 years ago (and since) about the benefits of competitive markets. Despite all the benefits competitive markets have delivered, this lop-sided allocation of risk was never part of the promise of national competition policy.

This submission contends this lop-sided allocation of risk is the consequence of an incomplete consumer law.

[5] Available at: https://treasury.gov.au/sites/default/files/2023-08/c2023-430458-cris1.pdf

It is largely self-evident why competition laws focus almost exclusively on the supply-side of markets. These laws address the actions of suppliers of goods and services to ensure they are not contrary to the objective of a competitive market. For the most part, there is no reference to consumers in these laws. It is somewhat surprising, however, the consumer law also operates on the supply side of the market with little reference to its impact on consumers. Prohibited conduct by suppliers is generally defined without reference to consumers. While consumer laws are intended to bestow benefits on consumers, those benefits are not defined with regard to consumers' interests. At most, they are defined or described with reference to the efficient operation of the competitive process – as though that it is sufficient to safeguard consumers' interests; as though that is all that is required to fulfil the promise made 30 years ago.

The central contention of this submission rests in the proposition that **until the consumer law focusses on consumer outcomes, it will remain incomplete and competition policy reform will remain unfinished**. Finishing that reform journey requires a general prohibition on unfair trading practices – where the notion of 'unfair' is defined with unequivocal reference to the interests of consumers and not just the actions of suppliers.

The submission proceeds as follows.

- Section 2 briefly highlights the difference between business (or trading) practices and consumer outcomes, and the need for a more expansive approach to address the latter.
- Section 3 emphasises how unfair consumer outcomes can arise even in the absence of overtly unfair trading practices.
- Section 4 describes the link between particular market features and unfair consumer outcomes, and how regulatory remedies focusing on business practices do not adequately respond to the risks these markets pose for consumers.
- Section 5 demonstrates how the consultation paper's approach to identifying unfair practices can be used to overcome its concerns about unfairness being an "inherently subjective concept" – that is, there exists a workably objective definition of fairness that can be used to the conclusive benefit of consumers and to support the objectives of competition policy.
- Section 6 uses this objective definition of fairness to formulate a comprehensive (general) prohibition on unfair trading practices tied to fair consumer outcomes. The discussion also offers some preliminary thoughts on potential 'Minimum Standards of Fair Conduct' for assessing compliance with the general prohibition.
- Section 7 concludes the paper by arguing that firms who benefit from entering a market also have an obligation to support consumers 'ability to trust' when engaging in that market. A strictly prescriptive approach to regulation that promotes a culture of 'mere compliance' can never achieve that outcome.

Appendix A responds to questions in the consultation paper while **Appendix B** reflects on the limited utility of applying traditional impact assessments to reforms focussed on improving fairness. **For the avoidance of doubt, this submission supports, in order of preference, Options 4 and 3 in the consultation paper** but contends an even broader approach is possible.

Focussing the ACL on consumer outcomes will finally complete the reform journey begun so long ago.

2. Business practices vs Consumer outcomes

In a recent keynote address, Gerard Brody, a luminary of the Australian consumer movement, challenged the traditional framing of the consumer law. He explains the traditional economic justification for consumer protection draws a nexus between unfair business practices, consumer mistrust of markets, and reduced market efficiency. He goes on to openly defy this view by declaring consumer trust is an unrealistic expectation:

> *This idea, that consumers can ever trust firms, is in my view, a fallacy. (p.5)*

For this reason, he urges switching from the traditional 'building trust' narrative to a policy objective of minimising distrust.

> *This is why it is vital to have a prohibition on unfair trading, and active enforcement of the prohibition – to ensure distrust doesn't become embedded, to ensure markets work for consumers and the community. (p.6)*

This forms the basis of his argument for the law to focus on prohibiting unfair business practices in order to minimise the pernicious effects of consumer distrust. Mr Brody provides the following definition of an unfair business practice.[6]

> *Ultimately though, when you look at all the laws and gaps in ours, I think of an unfair business practice [is] one which distorts or undermines the autonomy and economic choices of consumers, confuses them, or inhibits them unreasonably. (p.7)*

Mr Brody lists "the types of practices that offend this principle, but don't easily breach existing provisions of the ACL". These are:

- irresponsible sales practices, particularly the growing issue of manipulative design
- issues with unfair pricing and product design
- issues of safety in an online world, including protecting data or preventing losses from scams, and
- the vital issue of customer service, which is particularly important for people experiencing some level of vulnerability.

Mr Brody presents strong arguments in support of a broad prohibition on unfair trading practices.[7] While supporting Mr Brody's view, this submission considers the time has come to take an even more expansive approach – namely, to adopt a prohibition on trading practices that results in unfair consumer outcomes. After all, trading practices (or business interactions with customers) are typically fleeting while consumer outcomes are often enduring.

The remainder of this submission discusses the basis for, and construction of, such a prohibition.

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[6] Brody, Gerard (2023) *Using Consumer Protection to drive Fairness and Equity: The Promise of Unfair Trading*. ACCAN Consumer Congress, Keynote Speech. September. Available at: https://www.linkedin.com/posts/gerard-brody-33ba72187_speech-to-accan-congress-activity-7107547405138501632-eAvF/

[7] Mr Brody offered a more detailed definition during a recent webinar hosted by the Consumer Policy Research Centre (CPRC). See **Appendix C**

3. Unfair consumer outcomes can persist

The micro-economic reforms of the 1990s and beyond, initiated by the National Competition Policy review (the 'Hilmer Review'), were complex and far-reaching. It is not the purpose of this submission to delve too far into the depth and breadth of those reforms, but some points need to be made.

The micro-economic reforms were predicated on a few relatively straightforward premises and their implications. The premises relevant to this discussion include:

- Competition imposes an effective and strong discipline on profit maximising firms to act in the interests of their customers.
- Consumers are best placed to express their preferences over their desired mix of goods and services, consumption and leisure.
- Matters of inequality and inequity can and should be addressed outside the competitive market (eg. through welfare transfers and/or community service obligations and payments).

The relevant policy implications of these premises include:

- The role of regulation is to address market failures where they are demonstrated.
- Barriers to entry and compliance costs should be as minimal as possible to facilitate competition and innovation.
- Consumer choice is promoted through the provision of information (disclosure) and minimising transaction costs (eg. search costs).

The Australian Consumer Law responds to the empirical realities that, despite the above premises and their implications, consumer detriment continues to be observed. Other factors are at work. Hence, the need for the current consultation paper.

Elsewhere, regulators have responded to findings of demonstrable consumer detriment with conclusions along the lines of, "If competition isn't working, then more effort is required by regulators and policy makers to make competition work."

Hmmm, maybe. But probably not.

In some markets, there appear to be structural limitations on what competition can achieve. These limitations certainly demand the prevention of overtly unfair business practices, however, focussing exclusively on unfair *practices* means unfair *outcomes* can persist. Alternatively stated, not all unfair consumer outcomes in competitive markets are caused by overtly unfair business practices.

The next section describes how some structural market features can allow unfair consumer outcomes to persist even if traditional notions of unfair business practices are prohibited. Section 5 then turns to the question of whether it is possible to construct an objective and workable definition of fair consumer outcomes.

4. Structural features enabling unfair outcomes to persist

The competition reforms briefly mentioned in section 3 were pursued during the 1990s and early 2000s across many markets for consumer goods and services. This submission contends insufficient regard was given to the structural characteristics of some of these markets and the inherent risks of unfair outcomes these differences posed (and continue to pose) for consumers.

There exists a subset of markets which are clearly contestable but in which the presumed disciplining forces of competition are curtailed by some of the structural features of those markets. These markets display to varying extents some, many or most of the following characteristics (in no particular order).

- Consumption is involuntary or effectively involuntary. This may be because the service is 'essential' or because consumption is required by fiat (for example, electricity and superannuation, respectively).
- Consumption is largely inelastic (or fixed), that is, it does not vary significantly with price.
- The service is consumed in a largely continuous stream rather than in discrete lots, while payments to the provider occur intermittently. As a result, the consumer and provider have an ongoing [contractual] relationship. They do not merely transact.
- The unit of consumption is not readily observed or easily understood by the consumer.
- A non-trivial proportion of the total payment to the provider is unrelated to the quantum of consumption.
- Cessation or withdrawal of the service is likely to have a punitive impact on the consumer.
- While there may be multiple providers for a service (ie. the market is contestable), there are no genuinely viable substitutes for the service.
- The service is largely homogeneous with little scope for product differentiation. Rival providers therefore invent perceived points of differentiation that, in reality, produce no or negligible additional consumer benefits.
- The service is only an input to, rather than a direct source of, consumer utility.
- Service providers may have regulatory obligations to supply consumers, and/or their discretion to unilaterally withdraw the service may be constrained.

Experience shows that consumers can find it exceedingly difficult to efficiently navigate markets with these characteristics. Experience also shows contracts in these markets tend to involve disproportionate levels of complex and obscure detail. Many or most consumers find these contracts either incomprehensible or just too tiring to contend with. Nonetheless, consumers are often compelled to enter a contract regardless of whether they have properly understood its terms; or whether they have adequately assessed how it compares to other available offers. Under these circumstances, there is clearly an elevated likelihood that consumers make purchases or enter contracts that do not align with their individual best interests.

Many explanations drawing from neo-classical and behavioural economics have been offered for the persistence of such outcomes. These explanations include: information asymmetries, excessive search costs[8], missing markets[9], bounded rationality, and cognitive biases. Whatever!

The end result is the same. Worsening consumer outcomes. Community discontent. Political irritation. Public inquiries. Piecemeal regulatory interventions. Discontent quelled. Wait 5-10 years. Start again. Worsening outcomes. Community discontent. Political irritation … and so on.

While unfair business practices may – and often – contribute to this cycle of unfair consumer outcomes and community discontent, the cycle is not singularly dependent on overtly unfair practices. In the subset of markets with the features described above, the cycle is also fuelled by the incomprehensibility of contracts, the frustrations of having to navigate a forest of choices, and the consequences of decisions that are ultimately misaligned with the individual's best interests.

Traditional remedies to the structural market deficits noted above have relied on:

- providing consumers with more information (disclosure)
- educating consumers about product choice and their rights
- encouraging consumers to shop around (switch suppliers)
- reduced transaction costs (nudge-inspired market design), and
- promoting greater competition (lower barriers to entry).

These efforts are hard to refute, but they present a two-edged sword. While they may assist some customers, they can also make these markets even more incomprehensible.

Attempting to address these concerns with specific industry regulation, is becoming increasingly difficult. The boundaries of individual markets are blurring with product convergence, the use of digital channels, and the proliferation of third-party platforms. Industry regulators have little hope of keeping up with the markets they regulate. The conduct observed in these markets will continue to outpace conduct-based regulatory frameworks. That's what competitive markets reward – finding gaps in regulatory protections and taking advantage of those opportunities.

None of this suggests that these services should not be provided via markets. If that conclusion be true, then it would be true for reasons other than those proffered in this submission. Nonetheless, the inherent relationship between certain market features and unfair consumer *outcomes* has profound implications for the current inquiry into the adequacy of the Australian Consumer Law. It can be said with certainty that large swathes of consumer detriment will remain unchallenged if reforms to the ACL are limited to prohibiting traditional notions of overtly unfair business practices. Such prohibitions, while necessary, must be nested within a broader regulatory purpose of preventing unfair consumer *outcomes*.

The next section examines whether this purpose can be described objectively.

[8] Under a strict neo-classical view of markets, seemingly unfair consumer outcomes may be viewed as the product of rational consumer choices – that is, consumers weigh the effort (cost) of searching for the best contract against the expected benefit from doing so. While there may be some merit in this 'rational unfairness' argument, it is limited; and of itself, does not justify unfair consumer outcomes.

[9] For example: intermediating or brokerage services.

5. Toward an objective definition of fairness

Fairness is one of the most complicated and contested notions in the development of public policy. It is a concept that is highly dependent on the context in which it is being considered as well as the perspective and values of the observer. Despite these characteristics, it is not necessarily true that fairness cannot be objectively defined. The discussion paper is somewhat unclear on this matter. It separately observes [emphasis added]:

> *At the same time, taking policy action to deal with unfairness, which **in many respects is a subjective concept**, poses a number of design and implementation challenges.* (p.4)
>
> *Unfairness is an **inherently subjective concept**, thus highlighting the need for a calibrated policy response.* (p.19)

These statements are inconsistent. The first statement implies there are *some* 'respects' in which fairness may not be a subjective concept, while the latter statement precludes this possibility. This submission supports the first interpretation for the reasons outlined below.

The consultation paper pre-emptively concludes there is no objective definition of fairness that can be applied in all the circumstances. It simply asserts this position without further examination. The paper's pre-emptive approach unnecessarily narrows the available opportunities for reform.

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The consultation paper, as per the ACL, focusses its efforts on prohibiting *unfairness* rather than explicitly promoting fairness. For a non-lawyer (such as the author) it is not clear why it is necessary to construct the law in this way. Perhaps it is because of the consultation paper's concern about fairness being a subjective concept. But then again, if that were the case, then the definition of unfairness must also be subjective.

Perhaps it is because particular forms of undesirable conduct can be relatively well specified once they have been identified and agreed.[10] Perhaps from a legal perspective proscribing undesirable conduct is easier than prescribing desirable conduct. The problem this presents for consumers, however, is that it implies an intrinsic 'right' for businesses to take advantage of consumers unless specifically prohibited from doing so. It means consumers are left bearing the risk of unfair outcomes until legislators, regulators or the courts act to prohibit the contributing business conduct.

Prohibiting a particular form of conduct only after it has been identified and deemed undesirable leads to a 'cat and mouse' and 'whack a mole' approach to consumer protection.[11] Legislators, regulators and the courts are destined to be followers only. This is not only an inefficient form of regulation, but it leaves consumers exposed to unfair practices and unfair outcomes while the authorities contemplate what to do and how to do it.

The consultation paper does not explain why it (or the ACL) grants this primacy to service providers rather than consumers. It does not explain how businesses merely complying with prohibitions is

[10] Although, as noted in the consultation paper, this does not necessarily translate into ready application by the courts. See discussion on unconscionable conduct on pp.13-17.
[11] As implied by the discussion at the bottom of p.18 of the consultation paper.

better aligned with the interests of consumers than placing a positive and broad responsibility on providers to act fairly – or at a minimum, a positive and broad responsibility *not to act unfairly*.

But the challenge of defining a positive and broad responsibility of this nature returns the discussion to whether it is possible to identify a sufficiently objective and enduring definition of *unfair* business practices that also protects consumers from *unfair* outcomes.

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This submission contends it is possible to establish an objective definition of (un)fairness that protects consumers from unfair outcomes. Perhaps a little surprisingly, it is the consultation paper which offers the foundations for doing so [emphasis added]:

> *Some specific trading practices are unlawful under the ACL. These protections target certain harmful business practices that distort consumers' economic behaviour through **information asymmetries** (where one party has more or better information than the other) or through more **overt practices** such as coercion or undue harassment. (p.18)*

The long-standing regulatory response to these two sources of unfairness – information asymmetries and overt practices – has been to improve disclosure requirements and prohibit known overt practices. While this is self-evidently a worthwhile endeavour, granting consumers access to better information (uncorrupted by overt practices) is only ever a means to an end. It is a necessary condition for informed choice, but the utility of information is not just a function of its provision. The utility of information also depends on how it is comprehended and used. Merely providing information – no matter how complete, accurate and timely – therefore, does not necessarily correct this source of market failure. Likewise, merely removing the distorting effect of overt practices does not necessarily resolve or diminish market failures arising from information asymmetries.

(Indeed, there is plenty of evidence demonstrating the counterproductive effect of too much information on: the navigability of choice, the comprehensibility of contractual terms and conditions, and the efficacy of decision-making.)

Section 4 describes market conditions that inherently tend to complexity and obscurity for consumers. Even the most thoroughly designed information requirements and prohibitions on unfair trading practices may not adequately prevent, or even reduce, the possibility of consumer harm under these conditions. Poor consumer outcomes remain possible no matter how well consumers' agency or autonomy is safeguarded from undesirable business practices.

Addressing the pernicious effects of market failures was the ultimate objective of the policy arc that begun 30 years ago. That arc continues to this day. This includes overcoming market failure from asymmetric information (including its exploitation through overt practices). Simply prohibiting known business practices which pervert the provision, receipt and use of information cannot be an 'end' in itself if it permits distorted outcomes to persist. The desired 'end' to which the consumer law is dedicated must surely be a fair (ie. distortion-free) consumer <u>outcome</u>.

*

By identifying information asymmetry (exacerbated by overt practices) as the source of unfairness, the consultation paper implies fairness can be achieved, or at least enhanced, by removing these distorting influences. In this sense, the objective of consumer law mirrors the objectives of

competition policy – namely, minimising market failure wherever it might arise and for whatever reason in might arise (of course, including information asymmetry).

In other words, the consultation paper has effectively provided an *objective* (albeit somewhat abstract) definition of fairness – namely: **fairness is represented by market outcomes undistorted by information asymmetries.** As already noted, this definition requires having regard not only to how information is provided, but also how it is received and used.

Although grounded in an abstract economic concept, distortion-free (ie. *fair*) market outcomes can be described in broadly objective and agreed terms. **It's the outcome consumers would choose** if they had complete information (or at a minimum, the same information about the product and/or contract as the provider offering the service).

*

It is important to note that the above objective definition of "fairness" is limited to the outcome experienced by a consumer as a party to a trade. It makes no reference to much broader social notions such as equity, equality, justice, culture, and so on. Those concerns lie beyond the remit of the consumer law which is exclusively concerned with trade.

*

The National Competition Policy (NCP) reforms of the 1990s and 2000s were predicated on the pursuit of distortion-free market outcomes. This was the 'promise' offered to the community in exchange for the disruptions caused by NCP to many long-established modes of service delivery. On the flipside, firms (investors) entering markets following the liberalisations of NCP did so knowing their entry was enabled by the policy objective of distortion-free markets.

The inclusion of the ACL as a schedule to the Competition and Consumer Act 2010 evinces the reality that competition policies are not sufficient to fulfil the 'promise' of distortion-free consumer outcomes. The current consultation paper is necessitated by the persistence of Information asymmetries and the overt business practices fanning the unfairnesses of such asymmetries.

Under current settings, businesses are permitted to take advantage of market distortions unless prohibited from doing so. By exclusively focussing on conduct rather than outcomes, this permissive bias in the law leaves consumers bearing the risk of market distortions (from information asymmetries) while the law catches-up.[12] This means fairness will remain an elusive ideal for as long as firms are not held to account for conducting themselves in accord with the policy objectives of competition policy. Surely firms have an obligation to uphold these objectives. After all, it is these very policies that enable their participation in markets.

Expecting firms to pursue distortion-free market outcomes – even if such distortions arise from consumers exercising their autonomy and agency – must surely be the *quid pro quo* for a policy and legal environment that grants those firms the right to participate in markets.

Now is the time to complete the consumer law and finish the mission of competition policy reform.

[12] **Appendix B** reflects on the favourable treatment the permissive bias receives under standard benefit-cost analysis.

6. Completing the Australian Consumer Law

The promise of competition policy will not be realised until the consumer law is made whole.

The consumer law's current focus on prescriptive prohibitions on specified forms of conduct promotes a business culture of 'mere compliance'. Firms focus on meeting the 'letter of the law' without having to consider whether or not this delivers fair (distortion-free) outcomes for consumers. Service providers can be completely compliant with the ACL while taking advantage of any extant information asymmetries. Worse still, competitive pressure creates incentives for some, many or most firms to take advantage of the permissive bias described in section 5.

Completing the consumer law requires holding firms to account for the success of the competitive policies that enable them to participate in markets. This submission proposes making the consumer law whole by including a comprehensive (general) prohibition on unfair trading practices that is tied to unfair consumer outcomes as defined in section 5.

Proposition 1. A comprehensive (general) prohibition on unfair trading practices

Firms must not engage in any act that has the purpose, or has or is likely to have the effect, of contributing to an unfair consumer outcome.

where:

A fair consumer outcome is one which the consumer could reasonably be expected to choose for themselves when free of any information asymmetries.

This proposed form of a general prohibition deliberately echoes the construction of section 46 of the *Competition and Consumer Act* 2010 (CCA).[13] Section 46 pursues competition as an end in its own right. It treats competition as a necessary condition for distortion-free (ie. *fair*) market outcomes but it makes no reference to consumers.[14,15] The inclusion of the ACL as a schedule to the CCA recognises the qualified relationship between competition and fair consumer outcomes. By echoing the construction of section 46, the general prohibition proposed above serves as a reminder that the CCA and ACL are intrinsically intertwined in the pursuit of distortion-free (ie. *fair*) consumer outcomes.

[13] *Competition and Consumer Act* 2010, Section 46(1) "A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition…"

[14] Section 46 only recognises that in some instances "persons to whom or from whom the body corporate supplies or acquires goods or services in that market" may have countervailing market power. It is highly unlikely the types of customers contemplated in the Treasury consultation paper will ever have this type of countervailing market power.

[15] The Treasury consultation paper (p.5) states: "For the purposes of this paper, unless otherwise specified, a 'consumer' means an individual person, or small business which employs fewer than 100 persons or has a turnover for the last income year of less than $10 million."

The proposed definition of a fair consumer outcome crucially rests on the phrase, "could reasonably be expected to choose for themselves when free of any information asymmetries." In other words, if information asymmetries are present, then the relevant test becomes whether the consumer would choose the same outcome (contract) if those distortions were not present. While this test requires examination of overt business practices that might have perverted how information was provided, received or used, it is not limited to those forms of conduct. Rather, it begins with the outcome incurred by the customer and questions whether it aligns with the decision that the customer could have been expected to make in the absence of any informational disadvantages.

The proposed general prohibition can also be expressed from a service provider's perspective. It requires a service provider to turn its mind to the interests of its customers – to *step into the shoes of the customer* to confirm the suitability of the product or contract it is offering to the customer. That is, the provider must bring its knowledge of the product together with knowledge about the customer to ascertain whether a sale would align with the customer's interests.

Given the conceptual nature of the general prohibition proposed above, some preliminary thoughts on 'Minimum Standards of Fair Conduct' for assessing compliance with this general prohibition are offered in the following textbox.

Proposition 2. Minimum Standards of Fair Conduct (some preliminary thoughts)

Service providers are required to:

(a) make relevant and reasonable inquiries about a customer's interests, circumstances and understanding of the relevant product and contract

(b) take into account this information when representing, promoting, establishing, administering or terminating a service contract (or any other arrangement involving the customer)

(c) present relevant information in terms that are meaningful and helpful to the customer

(d) dissuade a customer from entering (or remaining on) a contract, or other arrangement, that is not aligned with their interests

(e) avoid any action or outcome consistent with the misuse of market power

> *Note*: The term *consistent with* is intended to convey the relevant test is not whether market power has, in fact, been exercised. It only requires assessment of whether an action or outcome is *consistent with* what might be observed when market power is exercised – most notably, consistent with market power arising from an information asymmetry.

(f) consider whether actions over-and-above these minimum standards are required

(g) be honest and as objective as possible in all these matters, and

> *Note*: These standards do not distinguish between acts of omission and acts of commission.

(h) keep records evincing efforts to comply with these standards.

In response to a general prohibition of this nature, **a reciprocal responsibility should be placed on consumers to cooperate** with service providers' efforts to comply with these minimum standards of fair conduct.

It should be open to the regulator to issue guidance on compliance with these minimum standards, and to decide whether such guidance is binding or non-binding.

While this submission proposes a comprehensive (general) prohibition on unfair trading, it would be unreasonable to impose to the same degree the standards the minimum standards of fair conduct on all types of trade. Hairstyling, education and banking involve fundamentally different forms of trade. This submission does not address which, if any, of the proposed minimum standards should apply to different types of trade. Relevant factors might include those listed in section 4 as well as some-or-all of:

- the risk and scale of potential harm
- the financial commitment required from the consumer
- a customer's vulnerability, disability or disadvantage
- the 'essentiality' of the service
- whether there is an explicit or implicit (deemed) contract
- the complexity of the decision to purchase
- the (in)comprehensibility of contracts, terms and conditions
- the length of the contracted period

The minimum standards become increasingly germane as more factors are present.

7. Conclusion: The ability to trust

Consumers should be able to trust markets. This submission explores how a general prohibition on unfair trading practices can contribute to upholding consumers' trust in markets.

Gerard Brody has emphasised the need for the law to prevent business practices which undermine, distort, confuse or inhibit consumers' autonomy to make economic choices in their own interests.[16] This submission endorses Mr Brody's framework but goes on to identify circumstances in which consumers' choices may be compromised even in the absence of the undermining, distorting, confusing or inhibiting business practices he describes. Compromised consumer choices can also arise because of the structure of a market or the characteristics of the services on offer (section 4).

It must not be forgotten that service providers (and investors) always enter and remain in markets of their own free volition. Their right to do so is safeguarded by policies and regulatory arrangements that seek to promote competition by seeking to counter the possibility of market failure and the emergence of market power.

Consumer law seeks to address information asymmetry as a recognised source of market failure involving consumers. The ACL seeks to prohibit overt business practices which typically seek to exploit how information is provided, received and used.

This submission has sought to draw attention to unfair consumer outcomes which might persist despite current competition and consumer laws. These unfair outcomes erode consumers' trust in markets and, therefore, the overall efficiency of the market economy.

Who then is responsible for upholding consumers' ability to trust markets?

Legislators can do their best, but they cannot impose a right to trust by fiat. Regulators, no matter how vigilant, cannot be present at the point of trade. Courts only resolve disputes after the fact. Therefore, service providers who have chosen to enter and remain in markets must bear a responsibility for upholding consumers' ability to trust in markets. Service providers remain because they gain financial benefits from doing so. They gain financial benefits despite, and because of, unfair consumer outcomes. They benefit regardless of whether they have caused or contributed to those unfair outcomes.

Competition policy was not intended as a zero sum game where service providers benefit at consumers' expense. Providers' obligations cannot be limited merely to complying with all relevant laws if mere compliance leaves consumers enduring an unfair outcome while providers continue to gain financial benefit. The persistence of such discordances – where one party (providers) is permitted to gain while another party (consumers) incurs detriment – whether through the action or inaction of the provider – breaches the community's rightful expectation that competition policy was implemented to serve their best interests.

Implementing a general prohibition tied to fair consumer outcomes, and not just overt business conduct, will complete the National Competition Policy reforms commenced 30 years ago with the Hilmer Review. It will acknowledge that specific prohibitions while necessary and beneficial, can never 'cover the field'. Markets are just too creative for consumers to rely on specific prohibitions.

[16] See section 2.

The general prohibition and minimum standards of fair conduct described in this submission would support the autonomy of choice highlighted by Mr Brody, but it would go further. Where relevant, it would require providers to assist customers not to unwittingly use their autonomy to their own detriment. Service providers would be responsible for supporting fair consumer outcomes while consumers would have a reciprocal responsibility to cooperate with service providers' efforts.

Mr Brody questions whether consumers can "ever trust firms". This submission contends the only way to respond to Mr Brody's challenge is to finish the journey which began with Hilmer's National Competition Policy review. It is time to fulfil the promise made to consumers 30 years ago. This review, by recommending a broad (general) prohibition of unfair trade practices, has the opportunity to complete that reform journey.

— END —

APPENDIX A

RESPONDING TO QUESTIONS IN THE CONSULTATION PAPER

This appendix responds to questions in the consultation paper. Where appropriate, references are provided to the relevant sections in the body of the submission. For the avoidance of doubt, **this submission supports, in order of preference, Options 4 and 3, respectively**. Further work is required to determine whether Option 2 could achieve the outcomes highlighted in this submission. Option 1 is rejected.

Appendix B provides a general commentary about the limitations of applying a traditional cost-benefit analysis to the four options identified in the consultation paper.

Key focus questions	
Q1.	Do you agree or disagree with the representation and scope of unfair trading practices identified in this paper? Please provide any evidence to support your position.
	This submission considers the scope of the consultation paper is sufficiently broad, with one exception. The consultation paper should not pre-emptively conclude that unfairness is an "inherently subjective concept". Doing so unnecessarily forecloses on important reform options. See section 5.
Q2.	How do you think unfair should be defined in the context of an unfair trading prohibition? What, if any, Australian or overseas precedent should be considered when developing the definition? Are there things which you think should be included, or excluded, from the definition?
	Proposition 1 in section 6 of this submission offers a definition of unfair trading practice tied to unfair consumer outcomes.
Q3.	Do you have any specific information, analysis or data that will help measure the impact of the problems identified?
	The proposals put forward in this submission are argued from first principles, and within broader historical and policy perspectives.
Q4.	Do you agree with the consultation objectives as outlined? If not, why not?
	Yes, though the paper would benefit from a broader policy, historical and market perspective. See sections 3 and 4.
Q8.	What is your preferred reform option, or combination of options? What are your reasons?
	Section 6 of this submission outlines a proposed reform option tying a general prohibition to fair consumer outcomes. Supporting arguments are presented throughout the submission.
Q9.	Are there any alternative or additional reform options to those presented you think should be considered?
	Yes. See Section 6 of this submission.

Option 1 – Status quo

1.1 Do you agree with the impact analysis of this option? Are there other issues that should be taken into account when analysing the impact of this option?

No. The cited benefit – that "the status quo provides certainty for consumers" – is misplaced. The existing protections under the ACL are incomplete and leave consumers exposed to risks and harms that could otherwise be avoided. See sections 1, 5 and 6.

1.3 Could a focus on stakeholder education help reduce the prevalence of unfair trading practices under existing consumer protections?

Possibly, but not conclusively. Education must consider how information is received, not just how it is provided. There are limitations on how information is received. Further, there are structural features in markets which mean traditional remedies such as "stakeholder education" are unlikely to be sufficient. See section 4 and 5, respectively.

Option 2 – Amend statutory unconscionable conduct

2.3 Are there any consequences or risks that need to be considered when pursuing this policy option? Please provide details.

2.5 Do you consider amending 'unconscionable conduct' under the ACL would sufficiently deter businesses from engaging in unfair trading practices? Please provide reasons for your response.

2.7 Do you think that the prohibition should be made prospective, so it applies to conduct that is *likely* to be unconscionable? Why or why not?

2.8 Should the list of factors contained in section 22 be mandatory for courts to consider in determining whether conduct is unconscionable? In other words, should section 22 be amended so that the courts *must* have regard to the list of factors for the purposes of section 21?

2.9 Are there any other principles that would be useful to consider in amending statutory unconscionable conduct? Please provide details.

The author is not well placed to answer these questions about how the law might be constructed, as opposed to the policy outcomes it should pursue. The relevant tests to apply when assessing any amendments to provisions addressing statutory unconscionable conduct are whether they would produce consumer outcomes and supplier conduct aligned with Propositions 1 and 2 in section 6 of this submission.

Option 3 – Introduce a general prohibition on unfair trading practices

3.3 Would this policy option potentially create uncertainty for business or limit competition and innovation? Would it place any additional financial or administrative cost or burden on small businesses and/or consumers?

These questions entail premises which are tested in Appendix B (see below).

3.4 Do you consider a general prohibition on unfair trading practices would sufficiently deter businesses from engaging in conduct that is considered unfair, harmful or detrimental to consumers?

The best chance of deterring businesses from engaging in these forms of conduct is to: (1) construct the general prohibition with regard to consumer outcomes rather than focused on particular forms of conduct, (2) provide clear guidance to business – preferably in a mix of binding and non-binding (but instructive) forms, and (3) provide the regulator(s) with sufficient discretion and enforcement powers (appealable).

3.5 Should a general prohibition on unfair trading practices define what is considered unfair? If so, what elements should be incorporated? Should a definition of unfair be similar to the recent unfair contract terms amendment under section 24 of the ACL?

A general prohibition should be outcomes focused and not exclusively focused on businesses' conduct. It should overturn the extant permissive bias in the consumer law discussed in sections 1 and 4 of this submission. It should focus on tying an unfair practice to its impact on consumers rather than just the behaviour of the supplier. Proposition 1 in section 6 of this submission seeks to offer an example of how this might be achieved. An exclusive focus on unfair *practices* will inevitably result in an ongoing games of 'cat and mouse' and 'whack a mole' described in sections 1 and 5 of this submission.

Section 24 of the ACL is framed around contracts and rights, not consumers and outcomes. It is therefore not clear how this framing would usefully inform a general prohibition on unfair trading practices.

Option 4 – Introduce a general and specific prohibition on unfair trading practices

4.4 Do you consider a specific prohibition on unfair trading practices in the form of a list or schedule of unfair conduct would be an adaptable policy option for technological change?

There is no self-evident reason for not complementing a general prohibition with specific prohibition provided it was clear that full compliance with the specific prohibitions did not guarantee compliance with the general prohibition. Legislation is typically slow and cumbersome to change. It would be worth exploring giving the regulator(s) (or ministers) an instrument to respond more flexibly.

4.5 Do you consider a specific prohibition on unfair trading practices would sufficiently deter businesses from engaging in conduct that is considered unfair, harmful or detrimental to consumers?

While, ideally, a well-constructed general prohibition should suffice in protecting consumers' interests, there are risk mitigation benefits to be gained from taking a 'belt and braces' approach (ie. general and specific prohibition). In any event, the approach outlined in response to question 3.4 is the pertinent response to this question.

4.6 What types of unfair trading practices should be specifically prohibited? Should they be industry specific or economy-wide?

Given the discussion in section 4 of this submission about the potentially specific or unique structural features of some markets, there would be merit in considering a mechanism of addressing specific prohibitions for specific industries (but only where industry specific regulation does not already exist or is clearly deficient).

APPENDIX B

SOME CONCERNS ABOUT COST-BENEFIT ANALAYIS

For the reasons outlined below, this submission cautions against the standard approach to conducting an impact assessment where the objective of regulatory reform is improving the fairness of trade. A far more nuanced approach is required.

*

Over the past 30 years, regulatory impact assessments have become *de rigueur* for legislative and regulatory processes. This practice emerged from the broader suite of reforms implemented under the aegis of the micro-economic reforms discussed in this submission. Those reforms placed the onus on policy makers to justify their interests in introducing new regulatory arrangements.

Since that time, regulation and policy-making assumed the language of 'cost benefit analysis'. This approach derived from the private sector's well-established methods for assessing the *business* case for new investments. In the heady milieu of that earlier reform era, it was simply asserted these methods could be imported into all forms of government decision-making.

Perhaps this assertion was correct when it came to government decisions over whether to invest in a bridge or tunnel to get people across a river. Perhaps it was even correct when considering whether traversing the river was a more worthwhile investment than upgrading a rail network in an entirely different location. Such methods, however, become far murkier when they require assessment of impacts that not self-evidently commercial or economic. While purists may argue that all impacts can ultimately be assessed in economic terms, only they believe their arguments.

Nowhere is the chimera of precision (or even pseudo-precision) more wanting than when assessing policy or regulatory proposals seeking to improve 'fairness' (in all its meanings).

*

The assessment of the four options in the consultation paper is framed around very traditional constructs of costs and benefits. The paper adopts this approach despite its entire purpose being consideration of options for improving the *fairness* of trade. This results in a clear lop-sidedness in the way the paper refers to costs and benefits. References to costs include:

- compliance and transition costs for businesses (eg. new systems and training)
- administrative costs for regulators ("implementation, oversight and enforcement")
- impact on business confidence and innovation (and presumably, investment)

while the paper's references to benefits are framed in terms such as:

- deterrence against "predatory, aggressive or misleading" business conduct
- better alignment with community expectations and increased consumer confidence
- governments and regulators having more tools to respond to unfair practices.

That is, costs are largely described in terms which readily translate to 'numbers on a page' (or cabinet submission), while benefits are described in terms that are largely intangible and/or unquantifiable.

In framing the assessment in this way, the consultation paper invites businesses to submit long lists of costs and risks that an unfair trading provision would impose upon them (and the economy). Many of

these submissions can be expected to raise the spectre of "unintended consequences" – the policy equivalent of 'monsters under the bed'. In any event, if policy makers are inclined to take unintended consequences into account, then **equal weight should be given to unintended (unforeseen) benefits**.

*

By placing the onus on policy makers to justify the introduction of new regulatory (or policy) arrangements using cost-benefit methods, **impact analysis downplays the consequence of retaining an unfair status quo.** Impact analysis limits the focus of policy-making on to the incremental costs and benefits of proposed changes. This effect is illustrated in the highly stylised example in Box B1.

Box B1: Misjudging costs and transfers

Let's assume under current consumer laws, businesses are benefiting from an unfair trading practice. In this initial state (the status quo), one unit of benefit is transferred from consumers to businesses.

A reform is now proposed to eliminate the unfair practice. The reform would require one unit of investment by businesses (eg. new systems and staff training). It would reverse the one unit previously transferred from consumers to business. A simple impact assessment might look like this.

	Consumers	Business	
Initial state:	–1	+1	
Required investment		*–1*	
Reversal of transfer	*+1*	*–1*	
Cost-Benefit of reform	*+1*	*–2*	➔ Net impact = –1

This cost-benefit assessment appears to suggest that although consumers would be 1 unit better-off as a result of the reform, this benefit would be more than offset by a cost of 2 units befalling businesses – suggesting the reform should not proceed. This conclusion would be wrong for two related reasons. First, it confuses the reversal of the transfer that exists in the initial state as a cost to business. Of course, business will want policy makers to see it that way and can be expected to claim (wrongly) the reversed transfer represents destroyed economic activity. Second, such a conclusion would confer a legitimacy on the initial state which it does not deserve, after all, the practice leading to the transfer has been found to be unfair.

That said, the required investment by business is a genuine cost (of one unit). But although it is a genuine cost, it only becomes necessary by virtue of the unfair trading practice. Were there no such practice, there would be no need for the investment. It is a cost that business has brought upon itself. Business may argue it was acting within the law until the practice was found to be unfair (ie. taking advantage of the law's permissive bias – see section 5) and therefore it should not incur the cost of the investment. Perhaps. But then again, business had profited from the practice at consumers' expense. Could or should business have foreseen the practice might eventually be found to be unfair?

This submission contends it is absurd to place no responsibility on a business to turn its mind to such questions when trading with consumers.

*

Discount rates present a further distorting effect when assessing regulatory (or policy) proposals using standard cost-benefit analysis. This approach sees the stream of costs and benefits that accrue over time (unlike the one-shot example in Box B1) being discounted to the present time. A *business* cost of capital is typically used to derive the net present value (NPV) of the proposed reform. This approach will generally further tilt the impact analysis against fairness-motivated reforms. Business implementation costs are typically front-loaded while consumer benefits typically only accrue over time. As a result, benefits are minified more significantly than costs – making the case for reform even harder.

But that is not the only concern with applying a positive discount rate to reforms oriented towards improving the fairness of trade.

Applying a positive discount rate also implies consumers value fairness in the future less than they value fairness in the present. This is a peculiar implication for which there is no basis in economics or elsewhere. There is no doubt a positive discount rate should be applied to calculate business' opportunity cost of capital. For consumers, however, zero or near-zero discount rates should be applied when calculating the NPV of fairness.

*

Finally, the consultation paper questions whether addressing fairness might "limit competition" in some way (see Question 3.3). The question treats competition as an end in its own right. See section 4 of this submission for further discussion about treating competition as an end rather than a means to an end.

Appendix C

Mr Brody's proposed amendment (as at 16 October 2023)

During a webinar hosted by the Consumer Policy Research Centre (CPRC) on 16 October 2023, Mr Brody offered the following drafting for a proposed unfair trading prohibition.[17]

> *A person must not, in trade or commerce, engage in conduct or business practices that are or are like to be unfair.*

where:

> *The definition of "conduct or business practices that are or are like to be unfair" includes conduct or business practices that:*
>
> - *unreasonably distorts or undermines the autonomy and economic choices of consumers*
> - *Omits, hides, or provides unclear, unintelligible, ambiguous, or untimely material information, or*
> - *Unreasonably inhibits access to or enjoyment of a good or service already purchased.*

During his presentation, Mr Brody described how the first limb of his proposed definition addresses concerns about free choice and the impact on consumers; the second limb addresses devices such as 'dark patterns'; while the third limb addresses suppliers' conduct post-sale.

This submission supports Mr Brody's proposal but contends that poor consumer outcomes will continue to be incurred if reforms to the ACL are limited to the behaviours addressed by his three limbed definition (for the reasons outlined in sections 4 and 5). A further, catch all provision is required (as described in section 6).

[17] See: https://cprc.org.au/makeunfairillegal/

About the author

Dr Ron Ben-David holds a Professorial Fellowship with the Monash Business School and is the principal of Solrose Consulting. Between 2008 and 2019, Ron served as full-time chair of the Essential Service Commission (Vic) where he led far-reaching reforms in many areas of economic regulation administered by the commission. Prior to his appointment to the commission, Ron was a Deputy Secretary in the Department of Premier and Cabinet (Vic) and headed the national secretariat for the Garnaut Climate Change Review.

Ron is a board member at ClimateWorks Australia, the Consumer Policy and Research Centre, and the Regulatory Policy Institute (A-NZ). He is an advisory board member for the Centre for Market Design and an associate to Utilities Regulation Advisory (URA). He has been a member of the AER's Consumer Reference Group and Consumer Challenge Panel. In July 2022, Ron was appointed to the Victorian Gambling and Casino Control Commission as deputy chair.