Arnold Bloch Leibler
Lawyers and Advisers

Level 21
333 Collins Street
Melbourne VIC 3000
Wurundjeri Country
www.abl.com.au

29 November 2023

By E-mail

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

consumerlaw@treasury.gov.au

Your Ref

File No. 0101444444

Contact
Jason Rudaizky
Direct

Partner
Matthew Lees
Direct

Dear Director

Submission on proposed prohibition of "unfair trading practices"

1 We refer to the Consultation Regulation Impact Statement (**CRIS**) published by Treasury on 31 August 2023 as part of the public consultation on proposed reforms to address "unfair trading practices" in the *Australian Consumer Law* (**ACL**) on behalf of the States and Territories.

2 We welcome Treasury's consideration of e-commerce business practices, given the dynamic nature of the digital sector and its increasing significance to the Australian economy. Consumption and consumer activities are increasingly shifting online, both in Australia and globally.

3 We also consider it important for Treasury to engage in broad public consultation on proposed reforms that are as far-reaching and consequential for businesses as those now under consideration.

4 As competition lawyers, we regularly advise Australian businesses about the application of the ACL. We have also had the opportunity to engage with the ACCC regarding issues relating to misleading or deceptive conduct, unconscionable conduct, unfair contract terms and digital platforms, and we were extensively involved in the consultation processes that were part of the Competition Policy Review (**Harper Review**). We welcome the opportunity to draw on those experiences in making the following submission.

The proposed general prohibition

5 We do not support the proposed introduction of a general prohibition of "unfair trading practices". The CRIS does not propose a specific definition of "unfair trading practices", which means that the consultation at this stage must necessarily be at a high-level and further consultation would be required before the introduction of any proposed prohibition. However, for a number of reasons, we consider that a general prohibition of "unfair trading practices" in the nature of that foreshadowed in the CRIS would not be effective and would do more harm than good.

6 First, a general prohibition of "unfair trading practices" would be inherently uncertain and subjective, and accordingly lead to significant compliance and legal costs as well as complex and expensive litigation. This would include small businesses facing claims

or potential claims from other small businesses or consumers who seek to avoid agreements they subsequently regret making or other legal obligations.

7 Second, a general prohibition of "unfair trading practices" is unnecessary given the existing general prohibitions against misleading or deceptive conduct, unconscionable conduct and unfair contract terms. We address the scope of unconscionable conduct further below. We note also that potential penalties of up to $50 million for unfair contract terms have come into effect only this month, in line with the existing penalties for unconscionable conduct, false or misleading representations and some other breaches of the ACL.

8 Third, a general prohibition of "unfair trading practices" would fail to tackle the fundamental policy issues of when, and in what circumstances, specific practices should be prohibited or permitted and instead handball those difficult questions to an individual judge, who will decide each matter on a case-by-case basis having regard to the unique circumstances, evidence and factual findings in the particular case, and having regard to whether serious legal consequences for the defendant/respondent should flow from such a nebulous concept.

9 Fourth, a general prohibition of "unfair trading practices" is therefore likely to lead to judges commonly deciding that a trading practice is not "unfair" if the consumer agreed to it and if there was no misleading or deceptive conduct, no unconscionable conduct and no unfair contract terms involved. In other words, conduct will not be considered "unfair" if the consumer agreed to the trading practice and it does not breach existing laws. This can be seen in the analysis below of the decision in *ACCC v Medibank* regarding unconscionable conduct.

10 Fifth, for these reasons, a general prohibition of "unfair trading practices" is particularly ill-suited to address new and evolving issues regarding e-commerce and digital platforms. It will take years before conduct is investigated and prosecuted and the matter proceeds through the courts to trial, judgment and potentially appeal. By that time the conduct, and any guidance by the Court on it, may no longer reflect current practices and issues. It may take decades for any useful precedents to be established by the High Court of Australia.

11 We note that there has been no significant judicial consideration of the laws on concerted practices or misuse of market power, which commenced more than six years ago. Those laws were also introduced in response to perceived deficiencies with the current law – in that case, the cartel laws and the former prohibition of misuse of market power – following unsuccessful litigation by the ACCC, and, in the case of concerted practices, were based on laws from other jurisdictions. The fact that the ACCC has been unsuccessful in litigation is not, however, by itself a valid reason to amend the legislation. This issue is addressed further below in relation to unconscionable conduct.

12 Sixth, it is apparent that the prohibitions on "unfair" conduct in other jurisdictions, as referred to in the CRIS, largely overlap with the prohibitions against misleading or deceptive conduct, unconscionable conduct and unfair contract terms, as well as other specific prohibitions under Australian laws.

13 Caution is required in importing legal concepts from other jurisdictions. High-level legal concepts or labels may not have the same meaning across different legal systems, particularly if they are qualified by case law. Also, there are differences between legal systems in terms of issues such as how the laws are enforced and the remedies that are available. For example, a prohibition that can only be enforced by a regulator in one country, or that is subject only to modest penalties, may not be appropriate in another country where it can be enforced by private action and is subject to substantial penalties.

"Dark patterns"

14 The proposed prohibition appears to have been largely motivated by concerns regarding the use of so-called "dark patterns" on digital platforms. These are said to include practices such as forced action, interface interference, nagging, obstruction, sneaking, social proof and urgency.

15 However, it is apparent from the definition of these types of conduct that they:

(a) would already be subject to the prohibitions on misleading or deceptive conduct, unconscionable conduct and unfair contract terms; and

(b) to the extent not already prohibited by existing laws, may encompass widely accepted marketing practices.

16 There are dangers in extrapolating a measure designed to deal with one type of business activity – here, e-commerce and digital platforms – across all business activity generally. Further, for the reasons explained above, if there are specific practices of concern – for example, misuse of consumers' personal information or particular ways that technology can be used to manipulate consumers – a general prohibition of "unfair practices" is unlikely to be effective in combating those practices.

17 Rather, we consider it is vital that those practices are carefully analysed from a policy perspective in terms of:

(a) what should be permitted, and what should not be permitted;

(b) whether the consumer's consent is effective to permit the conduct; and

(c) if consent is effective, whether there should be any requirements as to how that consent must be given or any disclosures required to ensure that the consent is fully informed.

18 In our view, new problems created by technology may require innovative technological solutions, rather than relying on a one-size-fits-all approach of litigation over whether they are "unfair". In relation to consumer data, targeted regulation in the digital economy might involve, for example:

(a) setting minimum requirements for the terms and presentation of agreements for the collection, holding and use of consumer data;

(b) setting minimum requirements for consumers' access to and control of their data collected, held and used by businesses;

(c) establishing an effective dispute resolution procedure that consumers can resort to if there is any dispute about the collection, holding or use of their data;

(d) establishing a public register for digital businesses who collect, hold and use consumer data to provide accessible information about their products or services and how they access, maintain and use consumer data;

(e) requiring businesses to publish information in a standard, easy-to-understand format about how they use consumers' personal information; or

(f) if technically feasible, empowering consumers to set standard privacy settings, in a form they can understand, that are automatically applied across all platforms or apps that seek to utilise their personal information, rather than the

consumer having to try to navigate and implement their privacy preferences in each different platform or app separately.

19 There may also be a role for a national public education campaign to improve consumer literacy regarding online privacy. Such a campaign may help consumers understand common practices in the digital economy and give them the tools to make more informed choices.

20 To be clear, we are not at this stage advocating any specific measures, which would require further investigation and consideration of their feasibility. Those matters, and the need for specific prohibitions, are already being considered further by the ACCC as part of its ongoing Digital Platform Services Inquiry. It must also be kept in mind that the ability of a business to utilise consumer data may be important to the operation of that business and the business's ability to continue to provide a valuable service to the consumer, sometimes free of charge.

21 This type of regulation also needs to be carefully considered in terms of the compliance burden on businesses, as well as the potential to create unnecessary burdens for consumers in using the relevant products/services.

Unconscionable conduct

22 In our respectful submission, the analysis in the CRIS of the law of unconscionable conduct does not provide a reliable basis for assessing whether there is any deficiency in that law, or whether there is any "gap" that needs to be addressed.

23 In particular, in presenting a number of case studies, the CRIS sets out the ACCC's allegations in each case and then refers to the Court's decision without explaining whether the ACCC proved its allegations or otherwise explaining the factual basis of the Court's decision. This is particularly important in cases of unconscionable conduct, which turn on a consideration of all the relevant facts and circumstances.

24 For example, the case study on *ACCC v Medibank* (page 15) recites serious allegations by the ACCC of knowing exploitation, knowingly causing harm and unethically breaching industry norms. However, the ACCC did not succeed in proving those allegations. Rather, the trial judge found that:

(a) Medibank had not made the representations alleged by the ACCC ((i) that members would not incur out-of-pocket expenses for in-hospital diagnostic services and (ii) that if Medibank made detrimental changes to the benefits it offered it would tell its members);[1]

(b) the previous arrangements, before the decision complained about by the ACCC, did not always prevent Medibank members from being out-of-pocket in respect of all the relevant services – and that continued to be the case after the decision;[2]

(c) the ACCC had not proved that Medibank used market research or a knowledge of consumer vulnerability to inform an alleged "limited communication strategy";[3]

[1] *ACCC v Medibank Private Ltd* [2017] FCA 1006, [161]-[246].
[2] Ibid [253]-[254].
[3] Ibid [286]-[295].

(d) based on unchallenged testimony, Medibank's reasons for not sending members a communication of the type proposed by the ACCC included:[4]

(i) Medibank's policies at the time did not promise members that they would not receive out-of-pocket expenses for diagnostic services, and many members would have received out-of-pocket expenses for those services;

(ii) the expected additional out-of-pocket expenses were not likely to be material relative to the out-of-pocket fees that members already typically paid for hospital visits; and

(iii) there was no universal "across-the-board" change being implemented by Medibank and members could still avoid out-of-pocket expenses for diagnostic services by using particular providers.

25 The trial judge's description of Medibank's reasoning as a "business judgment" should not be taken – as might be thought from reading the CRIS – to indicate that business judgments are somehow immune from the laws of unconscionable conduct. Here, the trial judge did not consider there was anything remotely unconscionable about Medibank's reasoning[5] and the same reasons could be relied on to find the conduct was not unfair.

26 While in the Full Court Justice Beach did indicate that his Honour was "*prepared to conclude that* [Medibank] *acted unfairly*", that comment does not, in our submission, amount to a legal conclusion or mean that Medibank would have been found to have breached a general statutory prohibition of unfair trading practices.

27 As Justice Beach explained, it was inherent in the ACCC's case that Medibank "*should have gone further than the bargain with members enshrined in the contractual and legislative regime*".[6] In this regard, his Honour cited Chief Justice Allsop (emphasis added):[7]

> *The variety of considerations that may affect the assessment of unconscionability only reflects the variety and richness of commercial life. It should be emphasised, however, that* ***faithfulness or fidelity to a bargain freely and fairly made*** *should be seen as a central aspect of legal policy and commercial law. It binds commerce; it engenders trust; it is a core element of decency in commerce; and it gives life and content to the other considerations that attend the qualifications to it that focus on whether the bargain was free or fair in its making or enforcement.*

28 These matters reflect the issue highlighted above: that judges would understandably be reluctant to find a breach of the ACL for "unfair" conduct when that conduct was agreed to by the consumer or small business, was not misleading, deceptive or unconscionable, and was otherwise compliant with the law.

29 Further, Justice Beach held that Medibank's conduct was not inconsistent with industry practice, Medibank was not seeking to ultimately profit to its own account. Medibank's decision was not secret, the financial consequences should not be overstated, and there was no suggestion that Medibank did not act in good faith.[8]

---

[4] Ibid [301]-[302].
[5] Ibid [302].
[6] *ACCC v Medibank Private Ltd* [2018] FCAFC 235, [343].
[7] *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, [297].
[8] *ACCC v Medibank Private Ltd* [2018] FCAFC 235, [345]-[352].

30 There have also been other recent examples of cases where unconscionable conduct allegations have been proved. For example:

(a) in April 2021, the Federal Court ordered that vehicle hire business Australian 4WD Hire and its former officers pay penalties totalling more than $1.2 million for unconscionable conduct and other breaches, including by sending intimidating and threatening emails to customers;[9]

(b) in June 2021, the Full Federal Court dismissed an appeal against the primary judge's finding that Geowash (a hand car wash and detailing franchisor) acted unconscionably through its practices relating to the charging of its franchisees, with total penalties of $4.2 million ordered against Geowash and its officers for unconscionable conduct and other breaches;[10] and

(c) in July 2023, the Federal Court imposed record penalties of $438 million against former vocational college Phoenix and its marketing arm CTI, which had been found to have engaged in unconscionable conduct and misleading or deceptive conduct relating to the supply of VET courses.[11]

31 The CRIS (page 23) advances an option of amending the unconscionable conduct laws so that a Court "must" (rather than "may") assess unfair conduct. However, the list of non-exhaustive matters for consideration in section 22(1) of the ACL already includes whether any "unfair tactics" were used, whether the supplier acted "in good faith" and other matters that may be considered relevant to an assessment of fairness. Further, Justice Beach made the point in the Medicare decision that if any matter in the non-exhaustive list is potentially relevant to the conduct under consideration, that matter must be considered.[12] In other words, the word "may" in section 22(1) is conditional rather than permissive.

32 In light of the above, we do not agree that there is a need to amend or expand the scope of the test for statutory unconscionable conduct.

Other issues

33 If, contrary to our submission, a general prohibition of unfair trading practices was to be adopted, the definition of what is "unfair" would need to be carefully considered.

34 We do not consider the definition of "unfair" used in the unfair contract laws would be appropriate. That test does not apply to terms that define the main subject matter of a contract – such as what goods or services are being provided – or that set the upfront price payable.[13] In other words, the unfair contract laws are mainly directed to subsidiary terms that have not been the subject of genuine negotiation between the parties. The proposed general prohibition of unfair trading practices would, however, not be so limited and, as explained above, would need to confront squarely the issue of consent.

35 Moreover, given the broad scope and inherent uncertainty of a prohibition of unfair trading practices, such a prohibition should not be subject to the substantial pecuniary penalty regime in the *Competition and Consumer Act 2010* (Cth) and the ACL. This

[9] *ACCC v Smart Corporation Pty Ltd (No 3)* (2021) 153 ACSR 347.
[10] *Ali v ACCC* (2021) 394 ALR 227.
[11] *ACCC v Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement) (No 3)* [2023] FCA 859; *ACCC v Phoenix Institute of Australia Pty Ltd (Subject to Deed Of Company Arrangement)* [2021] FCA 956.
[12] *ACCC v Medibank Private Ltd* [2018] FCAFC 235, [252].
[13] *Australian Consumer Law* s 26.

would be consistent with the prohibition on misleading or deceptive conduct in section 18 of the ACL, which is not subject to pecuniary penalties.

Conclusion

36 For the reasons set out above, we respectfully submit that Treasury should:

(a) not endorse a general prohibition of "unfair trading practices"; and

(b) instead focus efforts on formulating specific prohibitions and other measures to address specific issues identified, particularly emerging issues regarding digital platforms and "dark patterns".

37 If, contrary to our submission, a general prohibition of unfair trading practices is endorsed, we consider the definition of "unfair trading practices" should be subject to further consultation and pecuniary penalties should not apply.

38 We also do not agree that there is any need to amend or expand the scope of the test for statutory unconscionable conduct.

39 Please do not hesitate to contact us if you have any queries.

Yours faithfully

Matthew Lees
Partner

Jason Rudaizky
Lawyer