Public Submission

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For Treasury's Public Consultation on

Protecting Consumers from Unfair Trading Practices: Consultation Regulation Impact Statement

Overview

The Treasury Consultation Paper identifies four policy and reform options concerning unfair trading practices. It understandably does not express a preference for any of those options at this stage of the consultation process, pending reactions from stakeholders.

As it outlines its options at the conceptual level rather than at the level of detail at this stage, all that can be done by submissions (such as this Submission) that are not providing evidence about the nature and scale of the problem to which unfair trading practices regulation is the answer, is to highlight issues of policy, statutory, and precedential coherence and certainty concerning the options under consideration and issues that arise in implementing any of them. Finally, this Submission is confined to the implications and knock-on effects of the options under consideration for the framework, effectiveness, and judicially unresolved issues of statutory unconscionability.

On balance, the view of the author of this Submission is as follows, for the reasons outlined in this Submission. Option 2 ('Amend statutory unconscionable conduct') definitely should not be adopted. It is the worst of the four options for consideration. It would create far more problems than it solves, with no conclusive way of assessing at the 'idea' level the different ways in which it might be implemented, whether it would produce any real benefit at all, or that any such benefit would outweigh the legal and practical transaction costs of making the suggested changes. If it is considered further in this Consultation, it needs to accommodate any changes to statutory unconscionability recommended by the ALRC and accepted by the Australian Government, so that statutory unconscionability is sufficiently consistent, coherent, and certain across the Australian Consumer Law (ACL) and the ASIC Act.

If there is a real problem at large of unfair trading practices based on other evidence and submissions, not least in the way in which Artificial Intelligence (AI) and other technology are exacerbating the problem, then Option 1 ('Status quo') has some but very limited capacity to address that problem. Option 3 ('Introduce a general prohibition on unfair trading practices') and Option 4 ('Introduce a combination of genera and specific prohibitions on unfair trading practices') deserve priority over Options 1 and 2 in further consideration from here in policy, legal, and regulatory responses addressing the problem of unfair trading practices.

Background Expertise

My academic expertise, practical experience, and governmental inquiry involvement of relevance to this Consultation is as follows. As an academic, I have 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, I provided advice and training for

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commercial clients and lawyers on the law and practice surrounding unconscionable business conduct, contractual good faith, and the relationship between them.

In my academic capacity, I have also made public submissions to cognate public and parliamentary inquiries, including the current ALRC inquiry on corporations and financial services law reform, as well as the earlier AGD inquiry on good faith under Australian statutory law. I incorporate by reference here the analysis of statutory unconscionability, its judicially unresolved issues, and the implications for policy and regulatory reform of any changes to statutory unconscionability, as canvassed in detail in my three public submissions to successive interim reports from the ALRC on its current inquiry, available on the ALRC website.

Based upon my dual academic expertise and practical experience, the Australian Government appointed me to a three-member Expert Panel in 2009-2010 examining potential reform of statutory unconscionability, with the Australian Government accepting all of the Expert Panel's recommendations and the enacting 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, I no longer speak as a member of that Expert Panel, but only in my individual academic capacity.

The Politics of Public Consultations and Law Reform

More than one of the options under consideration increases rather than decreases the sum of legal obligations and potential liabilities for business enterprises, and the transactions costs in addressing them. There are always big 'P' politics and small 'p' politics in stakeholder-responsive policy development and law reform. So, it is best to be open and honest about them in a public consultation process.

Large companies and those who advise or advocate for them are unlikely to support any increase in regulatory reach that, from their standpoint, is perceived to increase unnecessarily or fruitlessly any exposure to legal risk and liability for business conduct, by effectively lowering the bar to catch conduct that is 'unfair', however defined. There will be any number of reasons in principle and rhetorical support that can and will be cited in favour of blocking, diluting, or otherwise minimising or even rendering unnecessary such reform.

Similarly, the set of regulators, small business, consumers, and those who advise or advocate for them are likely to support any increase in regulatory reach that, from their respective standpoints, is likely to increase their capacity to hold large companies accountable for a broader range of business conduct than under the current law. Equally, academics and other commentators on all sides of the reform question have their own disclosed or undisclosed policy and legal preferences, whatever specialist expertise they also possess. So, selecting the best option rests on more than mere head-counting of submissions on each side of the argument.

For clarity in following the approach an content of this Submission, three suggested criteria for choosing between competing options and submissions about them are: (i) the evidential base showing that there is a problem *and* a gap in regulating it; (ii) a balanced assessment that a particular law reform option will make a real difference in alleviating or even solving the problem; and (iii) the overall policy, legal, regulatory, and precedential coherence and practical workability of the chosen reform option within the particular law and related laws.

This Submission focuses upon the second and third criteria. For that purpose, it assumes that there is sufficient evidence of the problem to justify introducing one of the law reform options. Its concern lies with navigating around the problems and issues of policy, legal, regulatory, and precedential incoherence

and uncertainty (and practical unworkability) that then arise, when discounting or ranking any option, deciding between options, or in implementing a chosen option, in the follow-up processes of this Consultation.

Unfair Trading Practices Prohibitions as Part of Fostering 'A Modern Australian Commercial, Business or Trade Conscience' Through Law and Regulation

The necessity, desirability, and workability of unfair trading practices regulation needs to be assessed in its own right and as part of the broader scheme of regulation of which it forms part. It cannot be assessed properly from the former standpoint alone. Nor can it be considered solely in terms of merging fairness-based and unconscionability-based standards under statutory unconscionability.

Any new and distinct prohibition of unfair trading practices would also become part of a concerted and pre-existing Australian scheme of law and regulation in a competitive and principled economy, including one committed to the highest standards of legal and ethical conduct, to foster and support the development of what Australian courts have described as 'a modern Australian commercial, business or trade conscience'.[2] Reinforcing that characterisation, Chief Justice James Allsop indicated extra-judicially in 2017 that '(t)he working through of what a modern Australian commercial, business or trade conscience contains and requires will take its inspiration and direction from our legal heritage in Equity and the common law, and from modern social and commercial legal values identified by Australian Parliaments and courts'.[3]

Other areas of law and regulation that form part of that scheme for an informed business conscience include: consumer protection under legislation such as the Australian Consumer Law (ACL), ASIC Act, and the Corporations Act; statutory unconscionability; prohibition of unfair contract terms; obligations of 'good faith' under the statutory law of relevance to business; delivery of financial services 'efficiently, honestly, and fairly'; and even obligations concerning environmental, social (including ethical), and governance (ESG) considerations in corporate and investment decision-making laws and other regulatory standard-setting.

The existence of this broader scheme of regulation has at least two implications for this Consultation from a policy-making and law reform perspective. First, there is nothing inherently uncertain or otherwise objectionable in having fairness-based norms under legislation, as they exist under the general law and have been enshrined satisfactorily in other legislation. Secondly, there might well be enhancements (including gap-filling) for that overall scheme of conscience-based regulation from introducing unfair trading practices regulation, beyond the discrete merits or demerits of an unfair trading practices scheme considered simply on its own, under more than one option for consideration.

Of course, the devil is always in the detail, depending on which (if any) of the outline reform options is chosen as desirable policy and implemented, monitored, and reviewed as legislation. Chief Justice Allsop's general extra-judicial reminder that trying to capture what is necessary in detailed prohibitive rules does not guarantee certainty and can be counter-productive is apposite in this particular Consultation: 'Certainty is rarely, if ever, the produce of intricate sharply drawn rules. Prolix rule making, not necessarily based on a reflection of honest common-sense and of the reasonable expectation of honest people, is likely to engender as much uncertainty as certainty'.[4]

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[2] Eg *Paciocco v ANZ Banking Group Ltd* [2015] FCAFC 50, [296] (per Allsop CJ, Besanko and Middleton JJ agreeing), using a description endorsed most recently by the Full Federal Court in *ACCC v Mazda Australia Pty Ltd* [2023] FCAFC 45, [482] (per Mortimer and Halley JJ).

[3] J. Allsop, 'Conscience, Fair-Dealing and Commerce: Parliaments and the Courts' (2017) 91 *Australian Law Journal* 820, 839.

[4] J. Allsop, 'Conscience, Fair-Dealing and Commerce: Parliaments and the Courts' (2017) 91 *Australian Law Journal* 820, 826.

The Policy Problems and Desirable Reform Options in a Nutshell

At present, according to the courts, and perhaps excluding 'sharp' business practices,[5] business conduct can be 'harsh' and even 'unfair' conduct, without necessarily rising to the high-water mark of being *unconscionable* conduct, whether under the general (or judge-made) law or statutory unconscionability.[6] In 2018, Justice Beach pithily summarised the current legal position as follows:[7] 'To repeat, neither unfair conduct nor harsh conduct nor both are sufficient to establish unconscionable conduct'. So, statutory unconscionability sets a different and higher prohibitive standard than 'unfairness', at least generally speaking.

In other words, statutory unconscionability contains a higher standard under the current law than one or more dimensions of 'unfairness', generally speaking. Conversely, more business activity will be legally problematic under a fairness-based standard than under an unconscionability-based standard.

Dropping the regulatory bar from the high-water mark of *unconscionable* conduct to a low-water mark of *unfair* conduct is a reform option that has been agitated in one form or another in almost every periodic official review of statutory unconscionability since its inception decades ago. That body of work is also available and relevant in making decisions about the options presented for consideration in this Consultation.

Setting the bar at unfairness inevitably means that the net of potential liability is cast over a wider range of business conduct than setting the bar at unconscionability. If any proof or authority is needed to substantiate what is at stake, both legally and in commercial life, in choosing between a 'fairness' standard and an 'unconscionability' standard, or a mixture of the two standards, it appears directly and succinctly in the much-quoted passage of the judgment of Chief Justice Spigelman almost 20 years ago:[8]

> Unconscionability is a concept which requires a high level of moral obloquy. If it were to be applied as if it were equivalent to what was 'fair' or 'just', it could transform commercial relationships … The principle of 'unconscionability' would not be a doctrine of occasional application, when the circumstances are highly unethical, it would be transformed into the first and easiest port of call when any dispute … arises.

At the same time, the fact that unconscionability and unfairness are different standards does not mean that there is no inherent or legislated relationship between them. The general law and the statutory law are each replete with notions and norms of unfairness, unconscionability, and unreasonableness that do distinct and sometimes overlapping work in regulating personal, commercial, and governmental conduct, which is a factor about the nature and state of the law that also informs consideration and assessment of the options up for discussion about unfair trading practices.

Statutory unconscionability already explicitly contains 'unfair tactics' as an aspect of one indicator of statutory unconscionability,[9] and there are other statutory indicators of unconscionability that implicitly enshrine other aspects of fairness (eg fair dealing). However, as conceptual labels, 'unfair tactics' is simply a sub-set of 'unfair practices', which itself is one of many sub-sets (and strands) of 'unfairness', which is different from (albeit related to) 'unconscionability'.

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[5] Eg *ACCC v South East Melbourne Cleaning Pty Limited (In Liq)* [2015] FCA 26, [116].

[6] *ACCC v Medibank Private Limited* [2018] FCAFC 235, [274], [349] (per Beach J), as also acknowledged in: The Treasury, *Protecting Consumers from Unfair Trading Practices* (Consultation Regulation Impact Statement), 15.

[7] *ACCC v Medibank Private Limited* [2018] FCAFC 235, [349].

[8] *Attorney General of New South Wales v World Best Holdings Limited* [2005] NSWCA 261, [121].

[9] As also acknowledged in: The Treasury, *Protecting Consumers from Unfair Trading Practices* (Consultation Regulation Impact Statement), 23.

To that extent, any assessment of Option 1 and Option 2 in The Treasury Consultation Paper must accommodate at least the following considerations. The current law of statutory unconscionability already contains explicit and implicit elements of unfairness, which offers some (albeit limited) consumer and business protection based upon some (albeit limited) notions of fairness. Further, Australian courts including the High Court have indicated that all of the statutory indicators of unconscionable business conduct must be considered where they are live and relevant considerations on the facts. In other words, parties and courts cannot cherry-pick the statutory indicators that suit their position and ignore the rest.[10]

To that extent, the consideration and assessment of the existing law under Option 1 and potential changes to statutory unconscionability under Option 2 needs to distinguish between two different senses of 'mandatoriness' that are implicated in more than one option, and possibly and unintentionally conflated in the summary discussion of one option and the framing of one question (ie Question 2.8) in The Treasury Consultation Paper, where it says:[11]

> This policy option would retain the core prohibition on unconscionable conduct but would propose to extend the prohibition to capture unfair conduct within subsection 21(3) or section 22 as a factor or element that must be assessed in determining whether conduct is unconscionable … (Currently, the courts *may* consider the factors and elements listed in section 22.)
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> …
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> An alternative approach would be to add the concept of unfairness to the unconscionable conduct provision itself (section 21 of the ACL). The rationale for this is that 'unfair tactics' are already referred to in the list of factors courts should take into account in determining unconscionability, and that elevating this to *something courts must consider (as opposed to may consider)* may not have a material effect.

In passing, it is worth noting that subsection 21(3) is perhaps not an ideal location for the signalled change. Subsection 21(4) might also be of some relevance.

Aspects of those quoted passages and their discussion of mandatoriness (eg 'may' versus 'should' versus 'must') are difficult to reconcile with the following judicial passage from the new Chief Justice of Australia, in an earlier High Court decision and before his elevation to his current role:[12]

> The word 'may' in [the cognate ASIC Act provisions on statutory unconscionability] was not permissive, but conditional. … The provision made clear that, where any one or more of those matters existed in respect of particular conduct, each of those extant matters was to form part of the totality of the circumstances mandatorily to be taken into account for the purpose of determining the statutory question … The provision did not leave it open to a consumer who alleged that conduct of a supplier was in breach of [statutory unconscionability] to pick and choose. The customers could not choose to rely on matters referred to in [some provisions], yet to ignore matters referred to in [other provisions].

What is the upshot of this point for this consultation? First, under the existing law, courts *must* consider and apply *all* of the statutory indicators of unconscionability that are enlivened in the circumstances. They do not have a choice to ignore any relevant ones. Secondly, at the same time there is presently no mandatory obligation upon courts to make findings that business conduct has been unconscionable or

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[10] Eg *ASIC v Kobelt* [2019] HCA 18, [155] (Nettle and Gordon J); *Paciocco v ANZ Banking Group Ltd* [2016] HCA 28, [189] (Gageler J); and *Productivity Partners Pty Ltd (t/a Captain Cook College) v ACCC* [2023] FCAFC 54, [213]-[217] (on appeal at the time of writing).

[11] The Treasury, *Protecting Consumers from Unfair Trading Practices* (Consultation Regulation Impact Statement), 23 (original emphasis for first italicised quote and added emphasis for second italicised quote).

[12] *Paciocco v ANZ Banking Group Ltd* [2016] HCA 28, [189] (per Gageler J), as reinforced in: *ASIC v Kobelt* [2019] HCA 18, [83] (per Gageler J); *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6, [57] (per Gordon J); and *Productivity Partners Pty Ltd (t/a Captain Cook College) v ACCC* [2023] FCAFC 54, [213]-[216] (per Wigney and O'Bryan JJ).

otherwise unlawful simply because of one or more particular statutory indicators, whether they are grounded in fairness-based considerations or anything else. More than one option being considered might change that existing position under the law, depending upon the option selected, the element of mandatoriness implicated, and how it is effected in the drafting.

So, where fairness-based considerations presently arise under the existing law of statutory unconscionability, a court *must* take account of 'unfair tactics' and other aspects of unfairness under statutory unconscionability in deciding overall whether or not there has been unconscionable business conduct, and cannot simply ignore them. In addition, while the listed indicators of statutory unconscionability are illustrative and non-exhaustive, the courts also accept that one or more of them (including 'unfair tactics') can ground a finding of unconscionable business conduct in the right circumstances.

Accordingly, there cannot be a real situation where there could be a judicial finding of 'unfair tactics' that is then ignored in the final determination about the presence or absence of truly 'unconscionable' business conduct. However, the limited extent to which fairness-based considerations must already by taken seriously by courts in making findings of unconscionable business conduct (see Option 1) is not the same as a more extensive net of protection from unfair trading practices (see Options 3 and 4).

Cross-Over Issues with the ALRC Inquiry on Corporations and Financial Services Law Reform

Statutory unconscionability appears in similar terms in cognate provisions in the ASIC Act (for the financial services sector) and the Australian Consumer Law (ACL) (for all other industry sectors). The desirability of Option 2 rests upon the body of precedent not being disrupted (and unnecessary legal and practical uncertainty created) by having the two statutory unconscionability regimes being different and meaning different things in substance. Any change to statutory unconscionability arising from this Consultation for the ACL should be assessed also for its impact upon and variance from the cognate ASIC Act provisions, both in their current form and in their future form after the ALRC referral is completed, as well as for the consistent body of precedent upon which both regimes rely.

The current state of the law of statutory unconscionability upon which Option 2 and comments about Option 2 are predicated is not the same as the state of that body of law if the ALRC recommends and the Australian Government accepts what the ALRC has flagged as its preferred reform of statutory unconscionability in its interim reports. So, that consideration needs to be kept in mind in stakeholder and governmental consideration and assessment of Option 2. The difference in views between the ALRC and me that are relevant in this Consultation can be distilled as follows. The ALRC does not believe that its proposals to date for simplification and removal of duplication involve a real risk of having a substantive effect upon the state and direction of the law on statutory unconscionability. I see it differently.

For example, both the ALRC and The Treasury contemplate maintaining the incorporation within statutory unconscionability 'of the unwritten law developed under equity'. If that mutual position is adopted (and any other changes made to statutory unconscionability), how that is done matters in each of the two Acts where it will appear in existing or revised form, to avoid undesirable confusion and uncertainty, resulting in unnecessary and costly legal advice or strategic litigation to exploit any perceived differences. My earlier ALRC Submissions outline the residual issues surrounding the meaning and scope of this incorporation of the unwritten law, and the knock-on effects for the amplified provisions of statutory unconscionability, in assessing the current state of the law, unresolved issues, and the substantive risks to be acknowledged and managed in making any reforms.

The Treasury Consultation Paper makes reference to the *ACCC v Quantum Housing Group Pty Ltd* decision of the Full Federal Court,[13] which is another good example of the care that needs to be taken with reform of statutory unconscionability under either Act to ensure precedential coherence and certainty. While the first discussed way of implementing Option 2 aims 'to retain the body of case law that has developed based on the current statute', the second discussed way of implementing Option 2 admittedly makes a substantive change in the law on statutory unconscionability:[14]

> However, amending section 21 of the ACL to create a deliberate and explicit delineation from the unwritten meaning of unconscionability within equity law may be required to lower the threshold that can be applied as a departure from its traditional meaning and interpretation.

The High Court is yet to rule on whether the *Quantum Housing* position is a correct interpretation of the law, or whether Justice Keane was correct in his view of statutory unconscionability in the *Kobelt* case. That difference of position and its significance for this Consultation can be distilled as follows. The Keane J view is that the unwritten law on unconscionable conduct embodies *Amadio*-like 'special disadvantage' *and* that it serves as a gateway or precondition for accessing the broader provisions of statutory unconscionability. Put another way, relevant to this Consultation, consideration of 'unfair tactics' would only arise under the existing law of statutory unconscionability if unconscionable conduct under the unwritten law is present as a precondition, whatever the extent to which other provisions might otherwise modify or alleviate (without eliminating or destroying the essence of) that notion of unconscionable conduct under the unwritten law.

The *Quantum Housing* view removes that precondition. The result is that a much broader range of business activity might be regulated under statutory unconscionability and might justify findings of unconscionable business conduct, because the case does not need to be brought within the confines of the notion(s) of unconscionable conduct under the unwritten law.

In my view, the *Quantum Housing* view is correct,[15] but the High Court is yet to have its final say on that issue. The state of legal flux is relevant in considering and assessing Option 2 and other options.

However, that is not the only unresolved issue of relevance to the reliance in The Treasury Consultation Paper upon the pre-existing state of the law. The current Chief Justice of Australia also warned in the *Kobelt* case against the danger of interpreting statutory unconscionability in a way that would 'dilute the gravity of the equitable conception of unconscionable conduct so as to produce a form of equity-lite'.[16] Of course, such a change can be achieved by statutory amendment, but that would affect the structure and interpretation of statutory unconscionability, with additional precedential consequences for its ongoing consistent interpretation and standard-setting across two major Acts in the national scheme of regulation covering all industry sectors.

The changes flagged for consideration risk having an impact on some judicially unresolved issues about statutory unconscionability at the highest judicial level. Making substantive legislative changes to a set of provisions still throwing up constructional choices that judges at the highest level are yet to decide

[13] *ACCC v Quantum Housing Group Pty Ltd* [2021] FCAFC 40, as followed in subsequent cases.
[14] The Treasury, *Protecting Consumers from Unfair Trading Practices* (Consultation Regulation Impact Statement), 23 (on both quoted passages).
[15] See, for example, the views about this issue (but before *Quantum Housing* was decided) as expressed by four judges of the High Court – Gageler J, Nettle and Gordon JJ, and Edelman J – in *ASIC v Kobelt* [2019] HCA 18, as also distilled in my last Submission to the ALRC referral.
[16] *ASIC v Kobelt* [2019] HCA 18, [90] (per Gageler J).

conclusively brings its own risks and counter-productive effects in terms of desirable policy, legislative clarity and coherence, precedential consistency, commercial understanding, and practical application.

Put another way, Option 2 assumes certain things about the existing law that are perhaps not so certain. It takes a statutory framework that is a combined and integrated package of provisions, structured around principles of interpretation, a set of prohibitions, and non-exhaustive indicators that must be applied by courts where present in the circumstances but which are weighed in the balance of considerations and not themselves automatically determinative in making an overall finding about unconscionable business conduct, and injects and elevates one or more mandatory fairness-based considerations that are determinative of the outcome and apply a different standard.

The game under Option 2 must be worth the candle and worth the wick too. There are real doubts about that conceptually, and there are better options for introducing any necessary unfair trading practices regulatory reform without risking damage to the framework, integrity, and body of precedent concerning statutory unconscionability.

A change in the standard for statutory unconscionability 'to lower the threshold' for departing from the existing position under the law, because of a signal from the courts and regulators that 'unfair' conduct will not necessarily amount to 'unconscionable' conduct,[17] risks introducing an unnecessary bifurcated approach to statutory unconscionability, with other undesirable knock-on effects.

Conceptually, there are grave difficulties and risks, and many issues to be worked through, in trying to cure any unfair trading practices problem through changes to the regime for statutory unconscionability. The changes discussed risk the integrity of the framework for statutory unconscionability, by isolating one or more fairness-based considerations within that framework, wherever and however it might be located in that framework, and – unlike other indicators of unconscionable business conduct – elevating such fairness-based considerations to a position of mandating a finding of unconscionable business conduct where they are present on the facts.

In summary, for the reasons outlined here and in my earlier submissions to the ALRC, Option 2 should not be considered as a desirable or even viable option. Other options for consideration are better placed to address any problem of unfair trading practices.

I am happy to speak further to anything in this Submission, in any follow-up processes in this Consultation. I also agree to this Submission being treated and published as a public submission.

[17] The Treasury, *Protecting Consumers from Unfair Trading Practices* (Consultation Regulation Impact Statement), 23.