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8 November 2023

Dear Sir/Madam

Submission to Unfair Trading Practices Consultation

I would like to begin by thanking the Federal Government and the Treasury for inviting submissions to their consultation on 'Unfair Trading Practices', opened on 31 August 2023. This is a critically important topic that warrants this level of discussion and attention.

I am a commercial legal practitioner and Senior Lecturer tenured at the University of Adelaide Law School. My research expertise is in contract law and consumer law, and I am a member of the Research Unit on the Regulation of Commerce, Corporations, Insolvency and Taxation (ROCCIT). The University of Adelaide is a member institution of the esteemed 'Group of Eight' research intensive universities in Australia. It is ranked 88th in the world on the 2023 Times Higher Education World University Rankings and 89th in the world on the 2023 QS World University Rankings. The Adelaide Law School is the second oldest in Australia and has a proud history of producing highly successful and influential alumni.

This submission is my own and does not necessarily reflect the views of ROCCIT, the Adelaide Law School, or the University of Adelaide. I provide below some responses to a selection of the Treasury's various proposals and questions outlined in its 'Consultation Regulation Impact Statement' (August 2023) ('Consultation Paper').

Question 1.2

> *If a trading practice is found to have caused consumer harm, do you think that the courts are able to determine appropriate remedies in line with community expectations under the current legal framework? If not, why not?*

Yes. The courts have sufficient capacity to determine appropriate remedies in line with community expectations under the current legal framework, largely due to the recent harmonisation of the maximum penalties applicable to various kinds of illegitimate commercial conduct. For example, from 9 November 2023, the penalties for violation of the unfair contract terms provisions of the *Australian Consumer Law* ('ACL') are now harmonious with those for various other offences in the *Competition and Consumer Act 2010* (Cth) ('CCA') and the ACL. These and other increases for other provisions of the CCA and ACL in recent years reflects the Federal Government's appreciation of the significance and reprehensibility of various forms of commercial misconduct.

Question 1.3

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

No. It is obvious from the volume and nature of cases decided in Australian courts since the inception of the CCA and ACL that stakeholders, particularly corporate entities, cannot be trusted to respond to educational initiatives to reduce the prevalence of unfair trading practices under existing laws.

Consider, for example, the Australia and New Zealand Banking Group Limited ('ANZ'). In October 2020, the Federal Court of Australia ('FCA') held that ANZ had engaged in unconscionable conduct contrary to s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'). ANZ was fined $10,000,000.[1] In October 2021, the FCA held that ANZ had made false and/or misleading representations concerning the benefits of services it offered to customers contrary to s 12DB(1)(e) of the ASIC Act. ANZ was fined $25,000,000.[2] Finally, in September of this year (2023), the FCA held that ANZ had misled consumers as to the funds available to them in certain credit card accounts and to various fees payable, contrary to s 12DB(1)(g) of the ASIC Act and s 47(1)(a) of the *National Consumer Credit Protection Act 2009* (Cth). ASIC was fined $15,000,000.[3]

I acknowledge Treasury's restraint of consideration to a possible unfair trading prohibition under the ACL and not to a similar provision in the ASIC Act.[4] However, this example nonetheless demonstrates the propensity for some major corporations to persist in breaching consumer protection laws despite ongoing educational initiatives and compliance programs, some of which have been court-ordered. Moreover, many of the consumer protection provisions of the ASIC Act are mirrored in the ACL, so this example retains relevance for the present discussion.

Examples specific to contraventions of the ACL can be found as well. Telstra Corporation Ltd ('Telstra'), for example, has been found on numerous occasions to have breached consumer protection laws. In 2021, Telstra, Australia's largest retail supplier of mobile phones and data services, was penalised $50 million for acting unconscionably towards 108 Aboriginal and Torres Strait Islander consumers – many from regional and remote Indigenous communities – between January 2016 and August 2018.[5] In November 2022, Telstra was again penalised (this time $15 million) for engaging in misleading or deceptive conduct (ACL s 18) and making false or misleading representations in respect of its internet plans (ACL s 29).[6] Finally, in April 2023, the Australian Communications and Media Authority (ACMA) found that Telstra had violated consumer protection rules by failing to notify more than 5,400 customers before restricting or suspending their services. The ACMA issued Telstra with a formal warning.[7] Although this related to violations of the *Telecommunications Consumer Protections Code*, enforced through the *Telecommunications Act 1997* (Cth), it nonetheless pertained to commercial misconduct aimed at consumers; misconduct which, after repeated penalties and criticisms from the Australian judiciary, should not continue to occur.

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[1] *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3)* [2020] FCA 1421.
[2] *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2022] FCA 1251.
[3] *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2023] FCA 1150.
[4] Consultation Paper, p 4.
[5] *Australian Competition and Consumer Commission v Telstra Corp Ltd* (2021) 392 ALR 614.
[6] *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2022] FCA 1398.
[7] Available at https://www.acma.gov.au/sites/default/files/2023-04/Final%20investigation%20report%20-%20Telstra%20Corporation%20Limited.pdf.

Question 2.4

> *Would this policy option place any additional financial or administrative cost or burden on small businesses and/or consumers?*

Yes. Both consumers and small businesses already grapple with the scope and content of the extensive competition and consumer law framework that currently exists. The unconscionability doctrine has been inconsistently applied by the Australian courts and has led to confusion as to the precise meaning and effect of the statutory and common law versions of the doctrine.[8] Further tinkering with the unconscionability provisions of the ACL via the manner suggested in Option 2 may be more problematic than helpful.

Question 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?*

Yes. There are two reasons why this idea is sensible: (1) it is consistent with the approach taken when applying ACL s 18, which prohibits misleading or deceptive conduct or conduct that is *likely to mislead or deceive* (though I acknowledge s 18 is so worded to permit this broader application); (2) it is consistent with the unconscionability doctrine's longstanding position that one need not *intentionally* exploit another and that there need not be evidence of active exploitation (as can often be lacking in the case of passive acceptance of gifts).

Question 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?*

Yes. Given the disparity in approaches the appellate courts have taken in applying the s 22 factors in appropriate cases, and the resultant inconsistencies and uncertainties that have arisen, it would be appropriate to mandate that the courts consider these factors. This is conducive to consistency.

General comment on 'Option 2'

The Consultation Paper (p 23) notes that 'amending section 21 of the ACL to create a deliberate and explicit delineation from the unwritten meaning of unconscionability within equity law [ACL s 20] may be required to lower the threshold that can be applied as a departure from its traditional meaning and interpretation'. In some respects, such delineation already exists. ACL s 20(2) states that the section does not apply to conduct that is prohibited by ACL s 21. The issue here is not with the wording of the provisions but with – and I say this with all due respect – the High Court of Australia's (in particular) erroneous conflation of these provisions, as I submit occurred in *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409. The Australian courts, in blurring the statutory and equitable unconscionability doctrines, are perpetuating the interpretative uncertainties that presently plague the doctrine.

My only other comment on Option 2 is that, by proposing to capture a range of other forms of misleading, harsh, oppressive or predatory conduct, it effectively equates 'unconscionable' conduct with 'unfair' conduct. Unfair conduct is not necessarily unconscionable; the latter imposes a far higher threshold under existing equitable principles. Although the concept of

[8] This is something I have previously written about. See Mark Giancaspro, 'Still Jammed! Lingering Questions About the Statutory Unconscionability Doctrine Post *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409' (2023) 35(1) *Bond Law Review* 1.

‘unfairness’ is almost certainly easier for consumers and small businesses to comprehend than the concept of ‘unconscionability’, Option 2 would nonetheless involve some ‘undoing’ of previous judicial expressions of legal principles defining and giving content to the term ‘unconscionability’.

Question 3.2

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

Broadly speaking, all behaviours contravening the ACL are ‘unfair’. There is therefore a risk that introducing a broad provision prohibiting unfair trading practices will stifle the express prohibition of ‘new’ or emerging forms of commercial misconduct that are not, prima facie, caught by such a provision.

Question 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?*

I strongly recommend that any general prohibition on unfair trading practices define, with a sufficient measure of specificity, what is considered unfair. With equivalent provisions of the ACL, which list proscriptions of certain forms of commercial conduct but rarely provide exhaustive definitions of those forms of conduct, the courts have been left to determine whether particular forms of conduct contravene the respective provisions. For example, the courts have over time developed a number of recognised ‘categories’ of actually or potentially misleading or deceptive conduct under ACL s 18.

Given the breadth of the notion of ‘unfairness’, however, I support the notion of a definition that gives content to the offence. This would be consistent with the approach taken to establishing a test of unfairness of terms in standard form contracts under ACL s 24. Of course, the language of s 24 is inappropriate for adaptation to any new unfair trading practices provision. When seeking out options for phrasing for such a provision, the model utilised in the United States and contained within s 5 of the *Federal Trade Commission Act* (US) is, in my view, helpful in providing helpful guidance for the courts and the broader market while also permitting sufficient latitude to determine if any impugned conduct is in fact unavoidable or ultimately beneficial to consumers or to competition. This being said, I still favour ‘Option 4’ insofar as it purports to supplement such a definition with a list of specific prohibited practices.

Question 3.6

> *Should civil penalties be attached to a general prohibition on unfair trading practices? Please provide reasons for your response.*

Yes. This would be consistent with the application of civil penalties to similar forms of conduct in the CCA and ACL, including misuse of market power (CCA s 46), exclusive dealing (CCA s 47), unconscionable conduct (ACL ss 20-21), and various other forms of commercial misconduct (see, eg, ACL ss 29-37).

Question 4.1

> *Do you agree with the impact analysis of this option? Are there other benefits or costs that should be taken into account when analysing the impact of this option?*

Yes, I agree. I think the benefits and costs mentioned are worthy of consideration.

Question 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?*

Yes. Although such a provision would feature in the ACL, a schedule to a federal statute, meaning its amendment would be subject to the normal (and traditionally cumbersome and time-consuming) legislative processes, a list of specific unfair trading practices would seemingly be less difficult to amend than other provisions of the ACL and other statutory instruments. It is, after all, a list of specific behaviours that supplement the principal statutory proscription against unfair trading practices. A list can be more easily altered than a complex statutory provision with multiple functional components which may interact extensively with other provisions of the same or other statutes.

Having a list also establishes a basis for the recognition of new forms of unfair trading practices brought about through technological change. Such practices could simply be added to the list complementing the generic proscription.

Question 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?*

It is, of course, unclear what the deterrent effects of such a provision would be. However, if communicated appropriately to the market, with emphasis on the various types of presently 'untargeted' misconduct that may or will violate such a provision (which would feature in the list of specific prohibited practices proposed in Option 4), then I would be confident that a specific prohibition would have a significant deterrent effect.

Question 4.6

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

There is a wide range of unfair trading practices that should, in my view, be specifically prohibited. Broadly speaking, the behaviours identified on p 9 of the Consultation Paper are kinds which should be included in any such statutory prohibition. However, one behaviour that is *not* listed and which absolutely *must* be is *price gouging*.

I am certainly an advocate for free enterprise and do not lightly suggest that the Executive impose controls on the market and its participants. I acknowledge and accept the economic arguments against such intervention. However, this practice has not only become more prevalent and damaging during recent periods of crisis – notably the Black Summer bushfires and the COVID-19 pandemic – its effects have been exacerbated by the current economic climate in which wages are stagnant and inflation and the cost of living are rising to dangerous levels and imperilling consumers.

I am especially supportive – and see it as a 'minimum' – of a prohibition against price gouging *during times of crisis*. I have outlined the theoretical justifications for my position, as well as suggestions for model legislation, in my attached article published in vol 44(4) of the *University of New South Wales Law Journal*. The article is also accessible here: https://www.unswlawjournal.unsw.edu.au/article/perilous-fires-pandemics-and-price-gouging-the-need-to-protect-consumers-from-unfair-pricing-practices-during-times-of-crisis. I implore

the Federal Government and Treasury to consider including price gouging among the list of specific unfair trading practices developed should Option 4 be endorsed.

Question 4.7

> *Should civil penalties be attached to a combined prohibition on unfair trading practices? Please provide reasons for your response.*

Yes, for the reasons stipulated in my response to Question 3.6, above.

General comment on 'Option 4'

I wholeheartedly support Option 4 and consider it the best of the four options proposed in the Consultation Paper. This is the most comprehensive and targeted policy approach which readily distinguishes the proposed unfair trading practices provision from existing provisions of the ACL and complements those existing provisions. This combined approach is consistent with that endorsed in other common law jurisdictions, including the UK and Singapore, as well as the European Union. Such harmonisation with approaches abroad also ensures that our competition and consumer law framework has global appeal and keeps pace with trends in international markets.

Option 4 represents the 'best of all worlds' by incorporating both a general prohibition and a list of specific practices regarded as forms of unfair trading. Such a principles-based approach is already reflected within the ACL, as with the general proscription against misleading or deceptive conduct in s 18, which is supplemented by various other forms of false or misleading conduct, such as the making of false or misleading representations in respect of goods or services (see ACL ss 29-30).

Thank you for considering my submission. If you had any questions concerning my submission or any other matters relevant to this consultation, please feel free to contact me. My contact details are below.

Yours sincerely,

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Enc: Giancaspro price gouging article, *University of New South Wales Law Journal* (2021).

PERILOUS FIRES, PANDEMICS AND PRICE GOUGING: THE NEED TO PROTECT CONSUMERS FROM UNFAIR PRICING PRACTICES DURING TIMES OF CRISIS

MARK GIANCASPRO*

Recent crises affecting Australia, including the Black Summer bushfires and Coronavirus pandemic, have devastated social morale and crippled our economy. Countless lives and properties have been damaged or lost. These conditions have inflated demand for basic consumer goods and services, such as hygiene products, staple foods, and utility services. Sadly, some sellers have exploited public desperation, with widespread reports of price gouging. This notorious practice involves pricing high-demand essentials at levels significantly higher than what is commonly considered acceptable, reasonable or fair. This article critically analyses moral and economic arguments surrounding statutory controls before proposing a model law regulating price gouging during times of crisis. It argues that such a law is both essential and easily adaptable to Australia's consumer law framework. The model law provides a basis for the federal government to consider desperately required change to ensure consumers do not suffer during current crises or those to come.

I INTRODUCTION

The 2019–20 Australian bushfire season, referred to by Prime Minister Scott Morrison and others as the 'Black Summer',[1] was one of the worst in the nation's history. A series of ferocious fires burned relentlessly and caused widespread devastation across the country, primarily throughout New South Wales and the Australian Capital Territory.[2] More than 10 million hectares were scorched,[3] 3,000 homes and 7,000 other buildings were destroyed,[4] 33 people and one billion animals

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1 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 February 2020, 2 (Scott Morrison, Prime Minister); Transcript of Proceedings, *In the Matter of the Royal Commission into National Natural Disaster Arrangements* (Ceremonial Hearing, Commissioner Binskin, 16 April 2020) 5; Bellinda Kontominas, 'Bushfire Royal Commission into Australia's Harrowing "Black Summer" Begins in Canberra', *ABC News* (online, 16 April 2020) <https://www.abc.net.au/news/2020-04-16/bushfire-royal-commission-begins-into-australia-black-summer/12152680>.

2 Other states affected include Queensland, South Australia, Tasmania, Victoria and Western Australia.

3 *In the Matter of the Royal Commission into National Natural Disaster Arrangements* (n 1) 7.

4 Ibid 11.

killed.[5] Disturbingly, in the midst of the crisis, reports surfaced of some retailers doubling the price of bottled water and tripling the price of loaves of bread.[6]

As the fires were finally contained and extinguished, Australia, as with the rest of the world, was then gripped by a Coronavirus (COVID-19) disease pandemic.[7] The illness rapidly spread, infecting millions and killing hundreds of thousands.[8] Governments around the globe have responded swiftly, imposing 'lockdowns' of various kinds, most of which have forced many non-essential businesses to close temporarily.[9] Following the formation of the National Cabinet on 13 March 2020,[10] the Australian federal, state and territory governments imposed a series of restrictions on non-essential gatherings, travel, events and business trade. As at October 2021, some nations which have successfully 'flattened the curve' are beginning to relax restrictions while others continue to struggle with containment. A selection of countries, like Australia, find themselves in the middle of the spectrum (with some parts of the country being effectively free of the virus and others battling growing numbers of infections). Again, like when the Black Summer struck, the selfish side of humanity reared its head, with widespread reports of profiteering by retailers and private sellers. In some cases, retail prices on basic goods such as toilet paper and hand sanitiser,[11] as well as medical supplies such as surgical face masks,[12] skyrocketed as panic-driven demand surged.

These pricing practices are classic instances of 'price gouging'. This term describes the practice of sellers pricing goods or services at a level significantly higher than what is objectively considered acceptable, reasonable or fair.[13] This practice is normally a response to abrupt increases in demand or decreases in supply, with such fluctuations invariably being triggered by crises such as natural

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5 Climate Council, *Summer of Crisis* (Report, 11 March 2020) 11.

6 Kelsey Wilkie, 'Service Station in Bushfire-Ravaged Town is Blasted for Doubling the Price of Bottled Water', *Daily Mail Australia* (online, 2 January 2020) <https://www.dailymail.co.uk/news/article-7843399/Service-station-bushfire-ravaged-region-DOUBLES-price-bottled-water-48.html>.

7 The World Health Organisation officially declared the COVID-19 outbreak a pandemic on 11 March 2020: Tedros Adhanom Ghebreyesus, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (Speech, World Health Organisation, 11 March 2020). General information on the disease can be found at 'Coronavirus', *World Health Organisation* (Web Page) <https://www.who.int/health-topics/coronavirus/>.

8 At the time of writing, there have been over 7.5 million confirmed infections and at least 420,000 deaths worldwide: Helen Sullivan, 'Global Report: WHO Warns of Accelerating COVID-19 Infections in Africa', *The Guardian* (online, 12 June 2020) <https://www.theguardian.com/world/2020/jun/12/global-report-who-warns-of-accelerating-infections-in-africa-but-says-severe-cases-not-going-undetected>.

9 Christian Twigg-Flessner, 'The COVID-19 Pandemic: A Stress Test for Contract Law?' (2020) 9(3) *Journal of European Consumer and Market Law* 89, 89.

10 Council of Australian Governments, *National Partnership on COVID-19 Response* (Agreement, 13 March 2020).

11 Kelly Burke, 'Coronavirus Price Gouging Out of Control Says Choice', *7News* (online, 14 April 2020) <https://7news.com.au/lifestyle/health-wellbeing/coronavirus-price-gouging-out-of-control-says-choice-c-974544>.

12 Pippa Bradshaw, 'Pharmacies Caught Price Gouging, Capitalising on Coronavirus Panic', *9Now* (online, 6 February 2020) <https://9now.nine.com.au/a-current-affair/coronavirus-sparks-face-mask-price-gouging-in-australia/c442730e-efaf-46e3-8f51-c2f338ece091>.

13 Frederick F Wherry and Juliet B Schor, *The SAGE Encyclopedia of Economics and Society* (SAGE, 1st ed, 2015) 1310.

disasters. The exorbitant price increases are generally short-lived and confined to a particular geographical area, especially those which are remote and have difficulty accessing coveted goods and services.[14]

This article argues that this practice is reprehensible and advocates for legal reform to protect consumers from the same during times of crisis. It does so in four parts. Part II briefly investigates the economic forces driving this behaviour. Part III explores existing legal protections in Australia and abroad pertaining to price gouging, considering and appraising the various models that exist. Part IV evaluates the arguments both for and against the introduction of laws specifically proscribing price gouging, submitting that the benefits of such laws outweigh the drawbacks. Finally, Part V suggests a model anti-price gouging law for inclusion within the Australian Consumer Law ('*ACL*').[15] It is ultimately argued that laws prohibiting price gouging are not only justifiable but essential.

II THE ECONOMICS OF PRICE GOUGING

A rudimentary understanding of the microeconomics underpinning the competitive free market helps to understand how and why price gouging occurs. Economists utilise the 'supply and demand' model to analyse market behaviour and the movement of resources. They first plot a graph whose *y*-axis represents an escalating scale of price and whose *x*-axis represents an escalating scale of quantity. They then add two lines on the graph: the upward-sloping 'supply curve' (representing the correlation between the cost of a good or service and the quantity supplied) and the downward-sloping 'demand curve' (representing the correlation between the cost of a good or service and the quantity demanded).[16] The point of 'equilibrium' is where both the supply and demand curves intersect.[17] 'At the equilibrium price, the quantity of the good or service that buyers are willing and able to buy exactly balances the quantity that sellers are willing and able to sell'.[18]

Price gouging typically occurs when the demand curve shifts to the right, leading to excessive demand for goods or services and a subsequent shortage of the same, prompting sellers to raise prices often well above the competitive market rate.[19] This shift in demand invariably follows a natural disaster or other crisis, with essential goods (such as food and fuel) and services (such as building and utility services) – for which there are often no substitutes and for which demand is inelastic – becoming increasingly critical for survival, safety and transportation. An event of such scale would also make it more difficult and perhaps more expensive for the seller to obtain essential goods or provide desperately needed services,

14 Ibid.

15 *Competition and Consumer Act 2010* (Cth) sch 2 ('*ACL*').

16 Patrick J Welch and Gerry F Welch, *Economics: Theory and Practice* (Wiley, 11th ed, 2016) ch 3.

17 N Gregory Mankiw, *Principles of Microeconomics* (South-Western Cengage Learning, 5th ed, 2008) 77.

18 Ibid (emphasis omitted).

19 Emily Bae, 'Are Anti-Price Gouging Legislations Effective against Sellers during Disasters?' (2009) 4(1) *Entrepreneurial Business Law Journal* 79, 81. As will be explained in Part IV, there are often many reasons for raising prices in this manner.

leading to a reduction in supply and thereby shifting the supply curve to the left, further increasing the equilibrium price.[20]

The habit of market prices rising in response to crisis-driven demand is far from new. Historical accounts dating back centuries show that when disaster strikes, the market predictably reacts the same way. Following the Great Fire of London in 1666, the price of eels – a staple food of the time – reportedly increased by 300%, while the price of wagons for transport rose by 1,900% shortly after the devastating San Francisco Earthquake of 1906.[21] The recent instances of price surges following the Black Summer bushfires and COVID-19 pandemic in Australia are just additional examples of the self-regulating free market at work. Renowned Scottish economist and philosopher Adam Smith famously described free market behaviour through the analogy of the 'invisible hand', explaining how the uninhibited free choice of vendors to sell at any price and produce in any way ultimately dictates the rate of pricing and product distribution within a given society.[22] This, according to Smith, is for society's benefit. The self-interest guiding economic behaviour is channelled by the market system in such a way that the market reaches equilibrium and consequently prospers through the efficient allocation of resources. Of course, price gouging is a disruption to this natural process and one commonly triggered by opportunistic traders.

The economic arguments both for and against the practice of price gouging are explored in greater depth in Part IV, as are the general moral arguments. Before proceeding, it is important to emphasise one key point. There are many reasons why a seller might choose to significantly increase their prices during a crisis.[23] They may, for example, simply be offsetting increased supply costs as opposed to soliciting a much greater profit.[24] This article is concerned with, and advocates for statutory proscriptions against, purely exploitative (profit-driven) price increases which amount to instances of price gouging. With an understanding of the basic economics underlying price gouging, we now turn to examine the various laws against price gouging in Australia and abroad.

III LAWS AGAINST PRICE GOUGING IN AUSTRALIA AND ABROAD

Price gouging is not illegal in Australia. There is no proscription against this practice in the *ACL* or any other law (with one specific exception, to be discussed shortly). The Australian Competition and Consumer Commission ('ACCC'),

20 Ibid.

21 Debra Wilson, 'Price Gouging, Construction Cartels or Repair Monopolies?: Competition Law Issues following Natural Disasters' (2014) 20(1) *Canterbury Law Review* 53, 53–4.

22 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed James E Thorold Rogers (Clarendon Press, 1869) vol 2, 28.

23 These reasons will be explored in Part IV.

24 It may seem inappropriate to label such justifiable price increases as instances of 'price gouging'. However, the essence of price gouging as defined in this article is the *perception* that the price charged may be unacceptable, unreasonable or unfair. Accordingly, price gouging may be entirely acceptable.

Australia's consumer law regulatory authority, has no statutory power to regulate pricing. However, as Commission Chairman Rod Sims recently observed, the *ACL* does contain other provisions which the ACCC enforces and which may indirectly operate to penalise price gougers:

> The ACCC cannot prevent or take action to stop excessive pricing, as it has no role in setting prices. But in some circumstances excessive pricing may be unconscionable, for example where the product is critical to the health or safety of vulnerable consumers. If a business makes misleading claims about the reason for price increases, it will be breaching the Australian Consumer Law.[25]

Sims was clearly referring in part to section 18 of the *ACL*, which prohibits persons, in trade or commerce, from engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. This provision has previously been deemed to have been violated where pricing practices have misled consumers.[26] While section 18 of the *ACL* could plausibly apply to instances of price gouging, there would need to be evidence of the seller's marketing strategy. The practical reality is that this would be near impossible to substantiate. It is almost certain that sellers would not disclose their actual reasons for increasing prices, save perhaps for making vague references to the disaster or crisis in question impacting on the market. Unless there was reasonably strong evidence that the seller had blamed increased supply costs for illegitimate and extortionate price inflation (where the supply costs have not actually impacted on the seller), it would be very hard to penalise price gouging under section 18 of the *ACL*.

Despite the wording of section 18 of the *ACL* making clear that conduct need only be *capable* of misleading or deceiving consumers to violate the provision,[27] it would still be incredibly difficult to establish that a mere price in itself could potentially mislead ordinary and reasonable consumers[28] by representing that it reflects only the seller's costs plus reasonable profit margins. Making matters even more difficult for consumers is the fact the *ACL* does not apply to private transactions.[29] As such, the law will not aid those who are charged over the odds

25 Rod Sims, 'Managing the Impacts of COVID-19 Disruption on Consumers and Business' (Speech, Gartner CEO Forum, 8 April 2020).

26 See, eg, *Australian Competition and Consumer Commission v Audi Australia Pty Ltd* (2007) ATPR ¶42-211 (a car manufacturer represented that the 'drive away' price of a vehicle was AUD79,990 when this amount did not include additional dealer delivery fees and statutory charges); *Australian Competition and Consumer Commission v Jewellery Group Pty Ltd [No 2]* [2013] FCA 14, [7]–[8] (Lander J) (a jeweller advertised items of jewellery using 'was/now' pricing when it had never sold the items at or close to the 'was' price and also had a vigorous discounting policy outside of 'sale' periods meaning the 'was' price was rarely paid); *Australian Competition and Consumer Commission v Australian Private Networks Pty Ltd* (2019) 136 ACSR 80 (an internet provider advertised that consumers could access internet speeds of up to 100 Mbps for AUD59.95 a month with no setup fee when in fact this plan only offered significantly lower speeds and attracted a set-up fee of AUD99.95 if the consumer did not sign up to a 12-month plan).

27 See, eg, *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 197 (Gibbs CJ).

28 *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177; *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45.

29 See, eg, *O'Brien v Smolonogov* (1983) 53 ALR 107. It should be noted that, while this case concerned section 53A of the now defunct *Trade Practices Act 1974* (Cth), this provision similarly prohibited particular conduct occurring in 'trade or commerce'. As such, the principles expressed in the case with respect to the meaning of this phrase are applicable to section 18 of the *ACL*.

for vital goods or services on the secondary market (operating outside the primary retail market and involving consumers on-selling goods or services to others).

Sims also suggested in his comments cited above that price gouging could amount to unconscionable conduct.[30] The *ACL* contains two proscriptions against unconscionable conduct in trade or commerce. Where section 20 prohibits unconscionable conduct 'within the meaning of the unwritten law from time to time', section 21 prohibits unconscionable conduct in connection with the supply or acquisition of goods or services.[31] Section 20 (and previously, section 51AA of the *Trade Practices Act 1974* (Cth)) have been judicially interpreted as being confined to the various equitable classifications of unconscionable conduct,[32] particularly the doctrine famously established in *Commercial Bank of Australia Ltd v Amadio* ('*Amadio*').[33] To prove that price gouging is unconscionable under this provision, a consumer would need to establish three things: (1) they, as the weaker party, were affected by a special disadvantage; (2) the seller, as the stronger party, was aware of this disadvantage; and (3) the seller took advantage of the consumer's disadvantage in circumstances where the transaction was not fair, just and reasonable.[34]

It will be extraordinarily difficult for a consumer to satisfy the first and third limbs of *Amadio* in particular.[35] The concept of 'special disadvantage' extends to characteristics which place the consumer in a markedly weaker position of power,

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30 Sims has reiterated this suggestion elsewhere. He said that '[i]t is … possible that extreme price gouging for essential products may amount to unconscionable conduct': Australian Competition and Consumer Commission, 'ACCC Response to COVID-19 Pandemic' (Media Release 51/20, 27 March 2020) <https://www.accc.gov.au/media-release/accc-response-to-covid-19-pandemic>.

31 Originally, only one prohibition against unconscionable conduct existed in the *Trade Practices Act 1974* (Cth) ('*TPA*'), predecessor to the *Competition and Consumer Act 2010* (Cth) ('*CCA*'). The relevant provision, section 52A, was introduced in 1986 and applied only to consumer transactions. In 1992, section 52A became section 51AB and a new section 51AA was introduced. Section 51AA, like the current *ACL* section 20, prohibited unconscionable conduct within the meaning of the unwritten law. The purpose of this new provision was to allow small businesses (not just consumers) to access the statutory protections against unconscionable conduct: see Commonwealth, *Parliamentary Debates*, Senate, 10 December 1992, 4757 (Siegfried Spindler). Section 51AC was introduced in 1998 and designed to specifically address certain kinds of business transactions. Again, this amendment was designed to 'better protect the legal rights of small businesses' and provide those unfairly treated with an adequate means of redress: Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1997, 8800 (Peter Reith, Minister for Workplace Relations and Small Business). The *CCA* converted *TPA* sections 51AA, 51AB and 51AC to sections 20, 21 and 22 respectively. Finally, in 2011, the current *ACL* sections 20 and 21 were introduced. Section 21 unified the prohibitions against unconscionable conduct in the context of both consumer and small business transactions, while section 20 retained its status as the prohibition against unconscionable conduct within the meaning of the unwritten law.

32 See, eg, *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2001) 117 FCR 301; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; *Good Living Co Pty Ltd (As Trustee for the Warren Duncan Trust No 3) v Kingsmede Pty Ltd* (2019) ACSR 221.

33 (1983) 151 CLR 447 ('*Amadio*').

34 Ibid 474 (Deane J).

35 It will be habitually simple to satisfy the second limb of the *Amadio* test: *Amadio* (1983) 151 CLR 447. A price gouging seller will likely be taken to be aware, if they were not already, that the majority of consumers seeking to purchase essential goods or services from them would be in desperate need and potentially incapable of meeting the highly unusual and extreme asking prices.

such as lack of education, seniority, infirmity of mind, and language difficulties.[36] The High Court in *Blomley v Ryan* did accept that 'poverty or *need of any kind*' could meet this threshold,[37] which supports the idea that a consumer who cannot afford to pay exorbitant prices for basic goods is disadvantaged in the legal sense. However, the High Court also observed many years later that a mere inequality in bargaining power is *not* sufficient to support a claim of unconscionability.[38] Retailers can charge what they like for goods, and the fact assigned prices are beyond reach for some does not mean these persons are legally – as opposed to economically – disadvantaged.

The other difficulty consumers face is in satisfying the third limb of *Amadio*. Sellers bear the onus of proving that, notwithstanding any special disadvantage afflicting the buyer, the transaction was 'fair, just and reasonable'.[39] A seller could conceivably justify their price gouging under the pretence of meeting increased supply costs and disguise their malevolence in this manner. This plan may come unravelled if they were pressed for documentary evidence of these increased costs, but the mere increase in sale volume would speak to the heightened demand and support the argument that retail prices must proportionately rise.

A claim under section 21 of the *ACL* has greater prospects. As mentioned, this provision prohibits unconscionable conduct in connection with the supply or acquisition of goods or services. It is not limited to the meaning of unconscionable conduct as understood in the unwritten law.[40] To determine if a breach of section 21 has occurred, the courts may consider a non-exhaustive list of factors in section 22 of the *ACL*. Of these factors, those relevant to an allegation of price gouging are:

- the relative strengths of the bargaining positions of the supplier and the customer (section 22(1)(a));
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer by the supplier (section 22(1)(d));
- the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier (section 22(1)(e)); and
- the extent to which the supplier and the customer acted in good faith (section 22(1)(j)(l)).

A consumer would place much weight on the fact a supplier of essential goods has a supremely strong bargaining position at the best of times, let alone during a crisis. Price gouging could also clearly be construed as an 'unfair tactic' given it is purely profit-driven and designed to exploit desperate consumers. Hiking prices well above objectively reasonable profit margins in a time of crisis is also sure to be contrary to the tenets of good faith. A court would most likely be swayed by the

36 *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J), 415 (Kitto J).
37 Ibid (emphasis added).
38 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 64 (Gleeson CJ); *Thorne v Kennedy* (2017) 263 CLR 85, 112 (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).
39 *Amadio* (1983) 151 CLR 447, 474 (Deane J).
40 *ACL* s 21(4)(a).

seller's greed in this scenario. The third factor listed above is an interesting one and could work either way. A consumer might be able to prove that a particular supplier or suppliers are heavily exceeding market rates for essential goods or services compared to equivalent suppliers, which works in their favour. On the other hand, as is normally the case, the accused supplier(s) might be one of very few in a particular locality, meaning this factor actually works in the suppliers' favour.

Regardless, the courts employ a holistic analysis and consider all of the statutory factors, facts and circumstances when determining whether section 21 has been violated.[41] Conduct which demonstrates an obvious disregard for conscience and which is 'irreconcilable with what is right or reasonable' is sure to be unconscionable.[42] A seller price gouging during a time of crisis will scarcely be seen as doing something which is right or reasonable, commensurate with conscience and excusable under the statutory factors. This provision can also apply to systems of conduct or patterns of behaviour, even where no individual can be identified as having been disadvantaged by this conduct or behaviour.[43] This means that a practice of unconscientiously increasing prices during times of crisis, even where those times are few and far between or produce no 'victims', may still be deemed unconscionable. Until section 21 of the *ACL* is tested in the price gouging context, it can at best be said that this provision offers consumers the greatest chance.

As was mentioned earlier, the Australian Government has, in one limited context, exercised legislative power under the *Biosecurity Act 2015* (Cth) to address price gouging. This action concerned certain medical supplies in high demand. On 30 March 2020, Health Minister Greg Hunt made a determination under section 477(1) of this Act[44] expressly prohibiting[45] the practice of price gouging in relation to essential medical goods such as disposable face masks, gloves and gowns, alcohol wipes, and hand sanitiser.[46] Under this determination, a person is taken to engage in price gouging in relation to essential medical goods if they purchased the goods in a retail transaction on or after 30 January 2020, supplied (or offered to supply) the goods during the COVID-19 human biosecurity emergency period,[47] and applied a price of more than 120% of the value for which they purchased

41 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 61 (Nettle and Gordon JJ). While their Honours were speaking in the context of sections 12CB and 12CC of the *Australian Securities and Investments Corporation Act 2001* (Cth), these provisions are equivalent to *ACL* sections 21 and 22 respectively, and so, the principle expressed is applicable to the *ACL*.

42 *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd [No 2]* (2009) 253 ALR 324, 347 (Foster J).

43 *ACL* s 21(4)(b).

44 Section 477(1) of the *Biosecurity Act 2015* (Cth) permits the Health Minister to determine emergency requirements during a human biosecurity emergency period. These requirements extend to the restraint or prevention of the movement of goods required to prevent or control the spread of listed human diseases. COVID-19 is a listed human disease.

45 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020* (Cth) s 5(1) ('*Essential Medical Goods Determination*'): 'A person must not engage in price gouging in relation to essential goods'.

46 Ibid s 5(5).

47 Pursuant to section 475 of the *Biosecurity Act 2015* (Cth), the Governor-General declared a human biosecurity emergency on 18 March 2020: *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth).

the goods.[48] As the Explanatory Statement to the determination noted, this action was a response to 'growing public concern that protective gear and disinfectants [were] not reaching those with the greatest need', as price gougers were continuing to 'purchase these goods in large quantities from retailers with the intention of re-selling them at extortionate prices'.[49] Complimentary amendments were also made to the *Customs (Prohibited Exports) Regulations 1958* (Cth) to ensure that exploitative exports of these essential medical goods were halted.[50]

The main problem with this statutory control on pricing is that it is very limited in scope. The broad and inclusive definition of 'goods' in section 19(1) of the *Biosecurity Act 2015* (Cth) is certainly expansive enough to also apply to non-medical goods. However, the powers conferred by the Act to control the pricing of such goods apply only during times of a 'human biosecurity emergency period',[51] and such a period can only be declared by the federal Health Minister to exist where a 'listed human disease is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale'.[52] Accordingly, this statutory control could not be utilised for *other* crises beyond disease outbreaks.

Section 46 of the *Competition and Consumer Act 2010* (Cth) ('*CCA*') prohibits corporations with a 'substantial degree' of power in a market from engaging in conduct that has the purpose or likely effect of lessening competition in that market or any other in which the corporation supplies or acquires goods or services. Where there is only one or a small number of suppliers in a market and those suppliers unilaterally and significantly increase prices, or reduce production to prompt demand and trigger price increases, it is conceivable that this could amount to a misuse of market power contrary to section 46. If suppliers in a limited market conspire to hoard supplies and artificially drive demand, or set far higher prices among themselves, section 45 of the *CCA*, which prohibits contracts or arrangements that have the purpose or likely effect of lessening competition, might also be enlivened. Nevertheless, these provisions have not been tested in the crisis-driven price gouging context, meaning attempts to adapt them for this purpose would be uncertain.

In some Australian jurisdictions, there are some laws which provide finite protections against excessive pricing for goods and services that would be regarded as essential in times of crisis. For example, pursuant to the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), the Independent Pricing and Regulatory

48 *Essential Medical Goods Determination 2020* (Cth) s 5(2). However, section 5(4) of the determination notes that the increase in price attributable to the costs reasonably incurred by the vendor in transporting or delivering the goods is to be disregarded from this calculation.

49 Explanatory Statement, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020 (Cth) 1.

50 *Customs (Prohibited Exports) Amendment (COVID19 Human Biosecurity Emergency) Regulations 2020* (Cth) as at 30 March 2020.

51 *Biosecurity Act 2015* (Cth) sub-ss 475(1), (3)(c).

52 *Biosecurity Act 2015* (Cth) s 475(1)(a). A 'listed human disease' is defined by section 42(1) of the Act as one which the Director of Human Biosecurity considers one that may (a) be communicable and (b) cause significant harm to human health. Pursuant to section 544(1), the Director of Human Biosecurity is 'the person who occupies, or is acting in, the position of Commonwealth Chief Medical Officer'.

Tribunal of New South Wales can fix maximum prices for 'government monopoly services'.[53] Such services are those 'supplied by a government agency and declared by the regulations or the Minister to be a government monopoly service'.[54] These currently include electricity and water.[55] However, while certainly helpful, this legislation is also limited, not only by jurisdiction – it would only operate within the boundaries of New South Wales – but by the limitation to services supplied by a government agency *and* 'declared' under the same. This would exclude many other essential goods and services which do not meet the statutory criteria.

As yet, no general laws prohibiting price gouging with respect to essential goods have been introduced in Australia. Internationally, however, there has been some activity on this front. Across jurisdictions, anti-price gouging statutes appear to come in three basic forms: (1) price freezes (fixing prices at pre-crisis amounts); (2) capped price increases;[56] and (3) broad proscriptions on 'unconscionable', 'excessive' or similarly worded increases.[57] In the United States of America ('US'), anti-price gouging statutes are quite common, with 36 jurisdictions currently having such laws on the books and others drafting laws which are currently pending.[58] Most of these laws were based upon New York's model, which in part reads:

> During any abnormal disruption of the market for goods and services vital and necessary for the health, safety and welfare of consumers or the general public, no party within the chain of distribution of such goods or services or both shall sell or offer to sell any such goods or services or both for an amount which represents an unconscionably excessive price.[59]

This law falls into the third category of statute described above. The provision defines 'abnormal disruption' as including any 'national or local emergency' or other cause abnormally impacting upon the market and resulting in a declaration of state of emergency.[60] A judicial finding of contravention must be based on the fact that the excess in price is extreme, that unfair leverage was applied or unconscionable means were used, or both.[61]

The Californian statute is an example of the second category cited above. This statute imposes a 10% cap on price increases on consumer goods or services following a declaration of emergency, which lasts for 30 days (or more in the case of certain services such as those for repair or reconstruction).[62] The strictest form of anti-price gouging statute is the kind which prohibits any price increases

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53 See *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) div 5.

54 Ibid s 4(1).

55 All declared services are outlined in the Historical Notes to the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW). See also New South Wales, *New South Wales Government Gazette*, No 146, 18 December 1992, 8893; New South Wales, *New South Wales Government Gazette,* No 22, 11 February 2000, 816.

56 Most price gouging statutes of this class cap price increases at around 10–25%: Bae (n 19) 83.

57 Bae (n 19) 80; Michael Brewer, 'Planning Disaster: Price Gouging Statutes and the Shortages They Create' (2007) 72(3) *Brooklyn Law Review* 1101, 1114.

58 Food Industry Association, *State Price Gouging Laws* (Web Page, 12 March 2020) <https://www.fmi.org/docs/default-source/gr-state/price-gouging-state-law-chart.pdf?sfvrsn=9058b75c_2>.

59 NY General Business Law § 396-r(2) (McKinney, 2020).

60 Ibid.

61 Ibid § 396-r(3)(a).

62 Cal Penal Code §§ 396(b)–(f) (West 2021).

whatsoever. An example of this in the US context is the State of Connecticut, whose laws prohibit any increases of prices for retail goods during times of declared emergency.[63]

Other countries also have anti-price gouging laws of various kinds. Section 8(1)(a) of the *Competition Act 1998* (South Africa), for example, prohibits suppliers from charging an excessive price to the detriment of consumers. This broad protection was reinforced by the introduction of the *Consumer and Customer Protection and National Disaster Management Regulations and Directions* in March 2020.[64] This instrument specifically targets price gouging with respect to basic food and consumer items, medical and hygiene supplies, and more. While Canada has no federal competition laws expressly prohibiting price gouging, several of its provinces have emergency management statutes which accomplish the same aim. Most recently, in March 2020, Ontario introduced *Ontario Regulation 98/20* which prohibits persons from selling (or offering to sell) necessary goods at an unconscionable price, being a price that 'grossly exceeds the price at which similar goods are available to like consumers'.[65] Though the Regulation's inclusive list of 'necessary goods' is primarily focussed on medical and sanitary supplies, section 7 of Ontario's *Emergency Management and Civil Protection Act* defines 'necessary goods' as including other basics such as food, water, clothing and equipment.[66]

There has also been legislative action in many European countries which either directly or indirectly addresses price gouging. Section 18 of the United Kingdom's *Competition Act 1998* (UK), for example, prohibits abuse of a dominant market position. Such abuse may occur by the imposition of unfair selling prices.[67] This legislation is also interpreted against the backdrop of European jurisprudence.[68] Unfair Commercial Practices Directive 2005/29/EC of the European Parliament, applying to all member states within the European Union, contains a general article (article 5) which renders a commercial practice unfair if

> (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the

63 Conn Gen Stat § 42-230 (2002). The provision also contains an important exception: 'Nothing in this section shall prohibit the fluctuation in the price of items sold at retail which occurs during the normal course of business'. See also Conn Gen Stat § 42-232 (2013).

64 Republic of South Africa, *Consumer and Customer Protection and National Disaster Management Regulations and Directions*, No 43116, 19 March 2020.

65 *Prohibition on Certain Persons Charging Unconscionable Prices for Sales of Necessary Goods*, O Reg 98/20, reg 2.

66 *Emergency Management and Civil Protection Act*, RSO 1990, c E-9, s 7.

67 *Competition Act 1998* (UK) s 18(2)(a). A price is unfairly excessive if it 'has no reasonable relation to the economic value of the product supplied', taking into account actual supply costs incurred: *United Brands Co and United Brands Continentaal BV v Commission of the European Communities* (C-27/76) [1978] ECR 207, 301 [250], [252]. For another case in which excessively high pricing was deemed to violate this provision, see *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1. As Riefa notes, however, within the context of certain crises (such as pandemics), 'the ability to charge exploitative prices may not correlate with dominance', potentially making broad application of provisions premised upon abuse of dominant market position difficult: Christine Riefa, 'Coronavirus as Catalyst to Transform Consumer Policy and Enforcement' (2020) 43(3) *Journal of Consumer Policy* 451, 457.

68 *Competition Act 1998* (UK) s 60. Of course, the situation will likely change following the United Kingdom's withdrawal from the European Union.

> product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.[69]

Some commentators suggest this article of the Directive could certainly be used to control price gouging.[70] Indeed, some European states, such as Croatia,[71] have interpreted the article to do just this. Other countries, such as France,[72] have introduced laws specifically designed to limit price gouging.

Legislative approaches to controlling price gouging clearly vary significantly between jurisdictions. This article now seeks to address the broader question of whether such laws are actually necessary or desirable.

IV THE CASE FOR (AND AGAINST) REFORM

The arguments favouring and opposing the idea of statutory regulation of price gouging generally fall into two categories: moral and economic. The moral arguments tend to support the notion of proscriptions against this controversial practice. These arguments draw strength from a variety of sources. Some scholars, for example, highlight the historical condemnation of sellers taking advantage of consumers in times of crisis. Chen observes that the fundamental doctrines and tenets of most major religions and civilisations throughout history regard excessive pricing and exploitation of those in need as reprehensible.[73] The Australian legal system, as with many in the Western world, has distinctly Judeo-Christian, Roman and Greek foundations,[74] and many laws and philosophies from these regions and/or religions appear to forbid (or, at the least, admonish) price gouging. Price gougers were regarded as abhorrent and savage under the Ancient Roman *Edict on Maximum Prices* issued in 301 AD by the Emperor Diocletian.[75] Price gouging was deemed a crime between citizens, 'the act of one devoid of human feeling'.[76] In ancient Greece, a special board of inspectors was tasked with ensuring the price of grain – an essential import of the

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69 *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council* [2005] OJ L 149/22, art 5.

70 Riefa (n 67) 457.

71 See Croatian Government, *Odluku o Iznimnim Mjerama Kontrole Cijena za Određene Proizvode* [Decision on Exceptional Price Control Measures for Certain Products] (672, 15 March 2020).

72 *Décret n° 2020-197 du 5 mars 2020* [Decree No 2020-197 of 5 March 2020] (France) JO, 6 March 2020, 13. It should be noted, however, that this law specifically relates to alcohol-based sanitising gels which fell into short supply at the onset of the COVID-19 pandemic. This is likely to be a temporary price control.

73 Andy CM Chen, 'A Market-Based and Synthesised Approach to Controlling Price Gouging' (2011) 4(1) *International Journal of Private Law* 128, 129–30.

74 Patrick Parkinson, *Tradition and Change in Australian Law* (Thomson Reuters, 5th ed, 2013) 29.

75 Judith Evans Grubbs, 'Making the Private Public: Illegitimacy and Incest in Roman Law' in Clifford Ando and Jörg Rüpke (eds), *Public and Private in Ancient Mediterranean Law and Religion* (De Gruyter, 2015) 115, 134.

76 Ibid 134–5.

time – remained reasonable and was not inflated by avaricious millers and bakers.[77] Even biblical scripture forbids doing wrong against your counterparty when making a sale.[78] The fact that intolerance of price gouging has been an ingrained feature of many different religions and societies for centuries bespeaks the suggestion that it is universally regarded as an unfavourable commercial practice.

Aside from religious perspectives, it is well-known that broader social attitudes also condemn price gouging. In a secular legal system such as ours, these perspectives are perhaps more significant. Popular sentiment favours regulation of this practice because there is a perception that merchants will otherwise be enriched by the exploitation of consumers struggling to access basic necessities during times of crisis.[79] Gougers are seen to be flouting the unwritten rules of society which delineate good people from bad. In overcharging consumers when they are at their most vulnerable, they position themselves within a different 'moral tribe'.[80] Commentators observe that these negative connotations are reflected in the very term for the practice. The term 'gouging' is a verb which intrinsically implies the infliction of harm on another.[81] Anti-price gouging statutes therefore carry symbolic value by preventing the hapless from being 'harmed'. The federal government is constitutionally bound to create only those laws which facilitate the 'peace, order, and good government' of the nation.[82] If society condemns a commercial practice, there is good reason to prohibit it.

As Zwolinski points out, however, the moral dimension to this debate goes both ways. For example, it is arguably immoral to expect vendors to absorb increased supply or transport costs during times of crisis, or to prevent them from factoring the risk of supply into their prices.[83] It might even be seen as immoral to discourage trade through excessive price controls and disincentivise the introduction of new market entrants.[84] If vendors cannot maximise profits or, at the least, offset increased supply costs during times of crisis without being branded a heretic and having to defend their reasons in court, they may see no benefit in going to the effort

77 Joint Association of Classical Teachers, *The World of Athens: An Introduction to Classical Athenian Culture* (Cambridge University Press, 2nd ed, 2008) 235.

78 *The Holy Bible*, Leviticus 25:14. This passage has been interpreted by some scholars as prohibiting overcharging: Hershey H Friedman, 'Biblical Foundations of Business Ethics' (2000) 3(1) *Journal of Markets and Morality* 43, 48.

79 Bae (n 19) 79. As Culpepper and Block note, people 'view price gouging as opportunistic pricing on the part of the "evil" capitalists in order to enrich themselves at the expense of the consumer': Dreda Culpepper and Walter Block, 'Price Gouging in the Katrina Aftermath: Free Markets at Work' (2008) 35(7) *International Journal of Social Economics* 512, 513.

80 Dwight R Lee, 'Making the Case Against "Price Gouging" Laws: A Challenge and an Opportunity' (2015) 19(4) *Independent Review* 583, 589. Brewer aptly observes that people regard there as being some objectively 'fair' price which accurately reflects the true value of the goods or services in question: Brewer (n 57) 1106.

81 Brewer (n 57) 1103; Matt Zwolinski, 'The Ethics of Price Gouging' (2008) 18(3) *Business Ethics Quarterly* 347, 349. The *Macquarie Dictionary* (5th ed, 2009) defines 'gouge' as 'to dig or force out with or as with a gouge: *to gouge out an eye*' (emphasis in original). 'Gouging' is also defined in the sporting context as 'the offence of poking one's finger in an opponent's eye'.

82 *Commonwealth Constitution* s 51.

83 Zwolinski (n 81) 350–1.

84 Ibid.

of attempting to source and sell essential goods. A law prohibiting price gouging might therefore injure the interests of consumers and in this way be conceptually *immoral*.[85] Naturally, if morality is ignorant to inconvenient truth, then consumers will still see price gouging as profoundly wrong and support its prohibition. Little wonder, then, that politicians and the media play on this ignorance and passionately rebuke price gougers: the former for votes and the latter for ratings.

From a practical perspective, a law which prohibits price gouging would easily sit within the existing *ACL* framework and align with its objectives. This framework was, among other reasons, introduced to 'make life easier for consumers',[86] and to capture, clarify and preserve their rights while offering an appropriate redress system for infringements of the same.[87] The parent Act, the *CCA*, states that its object is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.[88] Preventing prices for goods and services soaring uncontrollably (and for reasons entirely unrelated to supply costs) during times of crisis is sure to lessen the pain for stricken consumers. Moreover, chapter 3 of the *ACL* contains a suite of protections against 'specific' types of commercial conduct, many of which concern illegitimate pricing practices.[89] A statutory prohibition upon price gouging would sit comfortably among these existing provisions. It is a 'natural fit' and aligns with the moral undertones of the consumer law. Finally, an explicit price gouging law would help the ACCC serve its objective of stamping out price gouging and avoid it having to rely upon other powers and doctrines to indirectly accomplish this aim.

The economic arguments concerning price gouging almost universally reject the idea that prohibiting price gouging is beneficial. For a start, a law which prohibits price gouging presupposes that the seller is exploiting consumers. As mentioned earlier, despite the name, price gouging may be perfectly defensible where the increase in price is due, for example, to increased supply costs.[90] These costs may be extreme. The seller may well be able to prove their conduct was not exploitative through the courts, but it seems incredibly burdensome to expect them to spend time, money and energy establishing innocence during an already stressful time of crisis. Such times invariably do see temporary increases in the pricing power of vendors. As described earlier, a crisis results in increased demand for and reduced supply of essential goods and services, shifting the equilibrium point and

85 Ibid 352.

86 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2009, 6982 (Craig Emerson, Minister for Competition Policy and Consumer Affairs).

87 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 2010, 2718 (Craig Emerson, Minister for Competition Policy and Consumer Affairs). See also Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) 4–6.

88 *CCA 2010* (Cth) s 2.

89 See, eg, *ACL* s 35, which prohibits 'bait advertising'. This practice, as defined, involves advertising goods or services at a specified price where the seller reasonably believes that they will not be able to offer those goods or services at the specified price for a period that is, and in quantities that are, reasonable.

90 Lee (n 80) 591.

sending prices skyward. Accordingly, what the general public may perceive to be price gouging may in fact be the natural economic function of the market at work.[91]

Economists also argue that permitting price gouging actually *serves*, rather than injures, the interests of consumers. Allowing prices to move in response to market demand and without restraint ensures the most responsible allocation of resources. Those who most value a good or service will pay the stipulated price, no matter how high that price is. If price increases for essential goods or services with inelastic demand are suppressed or prohibited altogether, supplies of those goods or services may be rapidly exhausted. As Brewer notes:

> In a market with an artificially low price, users who happen to be in a position to purchase … water … have no economic incentive to limit the amount of their purchases. If water can be obtained inexpensively, users might purchase water not only for drinking, but for less valued activities, like doing the dishes or watering a favourite plant. Allowing the price to reflect the new realities of supply and demand ensures that the water will end up in the hands of those that value it the most, presumably those who are most in need of it.[92]

The unrestricted movement of prices and the free interplay of supply and demand also facilitates the construction of meaningful prices.[93] An anti-price gouging statute artificially suppresses or inhibits inflation during periods of crisis. This removes the capacity for market prices to serve as (imperfect) indicators of need.[94]

It is also noteworthy that the US experience with anti-price gouging statutes suggests that they are unnecessary in light of the market's tendency to swiftly correct itself post-crisis.[95] The US Federal Trade Commission closely monitored fuel prices following Hurricanes Katrina and Rita in 2005 and found that they declined within months of having sharply increased in the wake of the devastation.[96] While some service stations did inflate their prices beyond levels attributable to increased supply costs, they often regressed within a matter of days.[97] In many cases, those charging well above regular retail rates were found to have done so in response to 'station-level supply shortages and imprecise and changing perceptions of market conditions'.[98] More recently, US media reporting on retail prices for common and high-demand food items such as eggs observed that prices for such items declined within a month of surging.[99] Perhaps this response from the market can be credited to consumers making informed decisions. Buyers will undoubtedly be driven away

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91 Jeremy Snyder, 'What's the Matter with Price Gouging?' (2009) 19(2) *Business Ethics Quarterly* 275, 278.

92 Brewer (n 57) 1128–9. Snyder similarly suggests that higher prices for a good such as ice ensures that those purchasing it are doing so for valuable uses such as 'preserving medicine and scarce food' as opposed to 'keep[ing] their beer cold' following a crisis: Snyder (n 91) 278.

93 Culpepper and Block (n 79) 513.

94 Bae (n 19) 81.

95 Wilson (n 21) 65.

96 Ibid 65–6.

97 United States Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* (Report, 2006) 81, 97.

98 Ibid 113.

99 Samantha Masunaga, 'Why Are Eggs Getting So Expensive? Blame Coronavirus Demand', *Los Angeles Times* (online, 8 April 2020) <https://www.latimes.com/business/story/2020-04-08/egg-prices-rising-coronavirus>.

by exorbitant prices, which will ultimately force sellers to lower prices closer to market equilibrium.[100]

Research published by the US Public Interest Research Group ('PIRG'), however, paints a bleaker picture and suggests that the market may react differently to different types of crises. On 11 March 2020, the PIRG released a report detailing its investigation into the prices of essential goods sold on popular online platform Amazon during the onset of the COVID-19 pandemic in the US.[101] The report found that the prices for one in six products sold online – including, but not limited to, food and medical supplies – spiked by between 50% and 166% compared to the 90-day average.[102] The PIRG's follow-up report released on 9 September 2020 found that, despite the pandemic crisis in the US having improved, prices for the same products 'were as much as two to 14 times' common retail prices.[103] Whereas fuel price decreases following a hurricane might be anticipated as travel slows or even ceases, demand for essentials such as food and medical supplies during a pandemic is likely to remain constant and provide fertile ground for price gouging. As such, the market might not be as reliable at self-regulation as critics of anti-price gouging laws might believe, strengthening the case for statutory controls.

It is clear, on balance, that the bulk of the economic arguments concerning price gouging do not support the idea of statutory intervention. It is supposed that such intervention would negatively affect the flow of resources and inhibit the capacity for prices to indicate need. It is also seen as presumptuous given it effectively assumes drastic increases in price to be driven by a desire to exploit when it might actually be associated with increased supply and other costs. Innocent sellers may be caught in the crossfire, and, as has been the experience in the US where many varieties of anti-price gouging legislation operate, statutory controls which aim to catch racketeers may be very difficult to enforce.[104] Notwithstanding potential issues with design and enforcement, such laws are crafted to serve the interests of consumers, and if you were to ask them whether they would still prefer anti-price gouging measures, they would almost certainly say 'yes'.[105]

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100 Geoffrey C Rapp, 'Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation' (2006) 94(3) *Kentucky Law Journal* 535, 552: 'Prices naturally rise – but a seller who charges above the new adjusted market price will lose business to other rivals and be forced to lower prices back towards the market equilibrium. Laws to combat gouging are, in this view, unnecessary, because the market will punish overcharging on its own'.

101 United States Public Interest Research Group Education Fund, *Price Gouging on Amazon During the Coronavirus Outbreak* (Report, 11 March 2020).

102 Ibid 1.

103 United States Public Interest Research Group Education Fund, *High COVID-19 Prices Persist on Amazon* (Report, 9 September 2020) 1.

104 Bae observes that the overwhelming majority of reported complaints of price gouging did not proceed beyond the investigative stage and that those that did were typically 'settled' through agreement between the impugned vendors and the regulatory authority (usually involving the payment of a nominal fine and/or a pledge to reduce prices): Bae (n 19) 83–92.

105 As Lee comments, for most consumers, the underlying *intent* of anti-price gouging laws to achieve desirable outcomes, even if they ultimately injure the economic interests of those consumers, is more important than actually achieving those outcomes: Dwight R Lee, 'The Two Moralities of Outlawing Price Gouging' (2014) 37(1) *Regulation* 28, 28.

Having acknowledged the diversity of views as to the benefit of anti-price gouging laws, this article advocates for such a control and in the next part suggests a model for integration within the *ACL*.

V A SUGGESTED MODEL FOR AN AUSTRALIAN ANTI-PRICE GOUGING LAW

Of the three basic kinds of anti-price gouging laws described in Part II – (1) price freezes; (2) capped price increases; and (3) broad proscriptions on 'unconscionable', 'excessive' or similarly worded increases – it is submitted that a law of the third kind is most appropriate. There are three reasons for this. First, both price freezes and price caps present a unique set of issues. Suppressive measures such as these prevent prices from signalling need. Moreover, if prices are frozen or capped to a limit too low to disincentivise bulk buying or hoarding, demand will quickly outstrip supply. Finally, price freezes or caps clearly prevent sellers from profiting to the extent they would have without such measures. This may have the unfortunate ramification of driving sellers to the black market. While the third kind of anti-price gouging law (based on an 'unconscionability' standard) might arguably have some of the same effects, the fact they would not be as prescriptive suggests they would be the least problematic.

Second, the courts are familiar with applying normative standards such as unconscionability, particularly in the context of consumer protection laws. As discussed in Part III of this article, the *ACL* prohibits unconscionable conduct of two kinds: that which falls under one of the equitable doctrines, and that occurring in the specific context of the supply or acquisition of goods or services. The courts have also routinely applied the equitable doctrine of unconscionability to prevent the vulnerable from being exploited in commercial transactions.[106] While it has not always been the easiest of exercises to clearly define the limits of the concept,[107] the doctrine is an ingrained feature of Australian law and would not be foreign to the courts if used as the yardstick for price gouging.

Finally, and most importantly, a price gouging law using an unconscionability standard as its measure offers flexibility that price freezes or caps do not. The courts will have greater scope to evaluate the pricing practices of sellers. Rather than be hamstrung by a rigid numerical restraint upon prices, which makes any price increase an offence of absolute liability, a restraint prohibiting *unconscionable* price increases invites a normative evaluation of all relevant facts and circumstances. This allows for consideration of the underlying motivations

106 See, eg, *Amadio* (1983) 151 CLR 447; *Bridgewater v Leahy* (1998) 194 CLR 457; *Thorne v Kennedy* (2017) 263 CLR 85.

107 See, eg, Kelly Godfrey, 'Unconscionability: Better Described than Defined' (2001) 81(1) *Australian Construction Law Newsletter* 5; Charles Rickett, 'Unconscionability and Commercial Law' (2005) 24(1) *University of Queensland Law Journal* 73; Gabrielle Golding and Mark Giancaspro, 'To Moral Obloquy or Not to Moral Obloquy?: That is the Judicial Confusion Surrounding Statutory Unconscionable Conduct' (2020) 34(1) *Commercial Law Quarterly* 3.

behind the seller's price increases, which may well be legitimate and not driven by a desire for exorbitant profit.

It is conceded that this preference for an unconscionability standard is a double-edged sword. Greater flexibility in the wording of an anti-price gouging law means greater potential for uncertainty. The use of terms such as 'unconscionable' or 'unreasonable' are notoriously hard to define with any confidence and specificity, meaning that consistency in decision-making is likely to suffer.[108] However, what a price gouging law based upon such a standard would lack in clarity it would make up for in its inherent flexibility; the courts would be able to consider a variety of relevant factors – rather than an arbitrary numerical threshold – in determining if a significant and unorthodox price increase was acceptable in a given case or not.[109]

Of course, the courts are also strongly averse to becoming regulators of price in commerce.[110] In line with the bargain theory of consideration underlying contracts, the courts do not inquire into the values that parties have placed upon the subject matter of their agreements.[111] Kirby P explained in *Woolworths Ltd v Kelly*:

> In the marketplace, in the myriad of situations which lead to contracts, different participants will put different values upon the bargain they are getting. The subject of a bargain may be specially important to a party. It may be valued for idiosyncratic, sentimental, ethical and other reasons as well as economic reasons. That is why it has been said so often that it is impossible for the law to indulge in an evaluation of the equivalence of the promises exchanged by parties to a contract.[112]

There is certainly an argument that in being tasked with determining whether a seller's prices during a crisis are justifiable or amount to price gouging, the courts are effectively being asked to audit and set prices within the free market, rather than leaving the participants in that market to do so for themselves.

It is submitted that this is an overstatement. In policing price gouging, the courts are not being asked to say what prices are acceptable at any given time, but rather to say what prices are unacceptable during a time of crisis. As discussed earlier, unique external forces influence the movement of resources during these rare situations, with demand habitually outstripping supply and panicked buyers finding themselves at the mercy of sellers. A law which proscribes *unconscionable* price increases during such times does not stop sellers charging what they want for goods and services, nor does it stop buyers from paying whatever rates the market dictates. But it does set boundaries where there are good reasons for those boundaries to exist. Even if one rejected this view, they cannot ignore the fact that Australia's competition and consumer laws permit scrutiny of prices, making the concept especially familiar. Part VIIA of the *CCA*, for example, empowers either

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108 'Laws which prohibit "unconscionable" or "unreasonable" exchanges, for instance, present serious problems of interpretation and predictability given the difficulty of assigning clear and shared meanings to these terms': Zwolinski (n 81) 350.

109 '[D]efining an "unconscionable" price as any price which grossly exceeds the former price is hardly a model of clarity, but it does have the virtue of allowing some room for judicial flexibility not available in other iterations of price gouging statutes': Brewer (n 57) 1115.

110 See the comments of Allsop CJ in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 283 [347].

111 *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87.

112 (1991) 22 NSWLR 189, 193.

the relevant Minister or the ACCC to initiate price inquiries and review or restrict proposed price increases in uncompetitive markets.

The ACCC was also given broad statutory powers and tasked with policing the market for instances of price gouging when the Goods and Services Tax ('GST') was introduced in 1999.[113] The Commission investigated approximately 7,000 GST-related matters, obtaining refunds of around AUD21 million on behalf of some two million consumers.[114] It also successfully instituted court proceedings in 11 GST-related matters, accepting 55 court-enforceable undertakings.[115] Those economists, appalled at the allegedly drastic notion of legislative control over pricing practices, are therefore reminded that the notion is far from exotic.

What, then, would the optimal anti-price gouging law look like? For a start, it would be ideally placed among the existing and similar consumer protection laws in the *ACL*. It would need to permit the ACCC and the courts to clearly differentiate between justifiable and unconscionable price increases for goods and services proffered during times of crisis. It is important that such a law applies only to *crisis* situations. Price gouging occurs in many other non-crisis contexts, such as popular sporting and social events. Any consumer would know that the price of food, beverages and merchandise at a professional sports match or music festival, or a movie screening at the cinemas, is always well above market retail. As has been this article's consistent position, the recommended anti-price gouging law should specifically protect consumers from exploitation in times of *great need*, rather than broadly punish sellers for setting exorbitant prices. The model law should therefore specifically apply to crisis situations – environmental, medical, financial, technological or the like.

Assessment of price increases against the unconscionability standard advocated by this article requires guidance. The assessment should be informed by a series of criteria specified in the *ACL*. This is important to ensure that a seller's prices are properly scrutinised against relevant criteria in the same way that general unconscionability in trade or commerce with respect to the supply or acquisition of goods or services is assessed by reference to a non-exhaustive list of factors.[116]

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113 The Commission's statutory powers in this regard were contained in part VB of the *TPA*. This part was repealed by section 32 of the *Statute Stocktake (Regulatory and Other Laws) Act 2009* (Cth). Price exploitation (gouging) under the now defunct section 75AU(2) of the *TPA* was defined as the imposition of 'unreasonably high' prices having regard to the effect of the then new Goods and Services Tax ('GST') laws, supplier costs, supply and demand conditions, and any other relevant matter.

114 Australian Competition and Consumer Commission, *GST Final Report: ACCC Oversight of Pricing Responses to the Introduction of the New Tax System* (Report, 30 January 2003) 14.

115 Ibid. A notable example was the litigation commenced against video rental chain Video Ezy Australasia Pty Ltd in May 2000. The company was alleged to have increased the cost of rental of new release videos from AUD6 to AUD7 and represented to customers that this was a consequence of the new GST. The matter was settled in April 2001, the Commission consenting to Federal Court orders to issue refunds and temporarily reduce prices and offer gratuities to affected customers: Australian Competition and Consumer Commission, 'ACCC and Video Ezy Settle Litigation' (Media Release 096/01, 27 April 2001) <https://www.accc.gov.au/media-release/accc-and-video-ezy-settle-litigation>.

116 See *ACL* ss 21, 22.

A perusal of leading and seasoned US anti-price gouging laws provides an idea of the sorts of factors that might be relevant. The influential New York model mentioned in Part III requires consideration of (1) whether the amount of excess in price is 'unconscionably extreme' or (2) whether there was 'an exercise of unfair leverage or unconscionable means' in the circumstances; or (3) a combination of both of these factors.[117] In contrast, the Massachusetts law, which applies only to petroleum products and not other goods and services, provides that a price is 'unconscionably high' if:

> (a) the amount charged represents a gross disparity between the price of the petroleum product and
>
> (1) the price at which the same product was sold or offered for sale by the petroleum-related business in the usual course of business immediately prior to the onset of the market emergency, or
>
> (2) the price at which the same or similar petroleum product is readily obtainable by other buyers in the trade area; and
>
> (b) the disparity is not substantially attributable to increased prices charged by the petroleum-related business suppliers or increased costs due to an abnormal market disruption.[118]

The Virginian law is one of the more expansive codes addressing price gouging. It requires consideration of the following four factors when assessing the alleged unconscionability of a post-crisis price increase:

> 1. Whether the price charged by the supplier grossly exceeded the price charged by the supplier for the same or similar goods or services during the 10 days immediately prior to the time of disaster, provided that, with respect to any supplier who was offering a good or service at a reduced price immediately prior to the time of disaster, the price at which the supplier usually offers the good or service shall be used as the benchmark for these purposes;
>
> 2. Whether the price charged by the supplier grossly exceeded the price at which the same or similar goods or services were readily obtainable by purchasers in the trade area during the 10 days immediately prior to the time of disaster;
>
> 3. Whether the increase in the amount charged by the supplier was attributable solely to additional costs incurred by the supplier in connection with the sale of the goods or services, including additional costs imposed by the supplier's source. Proof that the supplier incurred such additional costs during the time of disaster shall be prima facie evidence that the price increase by that supplier was not unconscionable; and
>
> 4. Whether the increase in the amount charged by the supplier was attributable solely to a regular seasonal or holiday adjustment in the price charged for the good or service. Proof that the supplier regularly increased the price for a particular good or service during portions of the period covered by the time of disaster would be prima facie evidence that the price increase was not unconscionable during those periods.[119]

117 NY General Business Law § 396-r(3)(a) (McKinney 2020).

118 940 CMR § 3.18 (2020).

119 Va Code Ann § 59.1-527 (2021).

The common factors appear to be framed around *unfairness in price* (through comparison with previous or average market prices), *seller conduct* (including the exploitation of any imbalance in bargaining power), and *situational pressures* (such as the effect of the crisis upon supply, and the regular movement of market prices depending on season etc).

Having regard to these factors, and to those contained in section 22 of the *ACL* and which are relevant to assessing broader unconscionability in trade or commerce with respect to goods and services, and against the backdrop of arguments canvassed in this article, it is suggested that a model Australian anti-price gouging law be introduced into the *ACL*. Such a law would simultaneously aim to ensure that consumers are not exploited during times of crisis (when they are at great risk of such exploitation due to abnormal market conditions) and that sellers are discouraged from engaging in such exploitation. The law would also provide affected consumers with avenues for redress for this specific and unscrupulous market behaviour. A law of this kind would therefore serve to fulfil the principal object of the *CCA* to preserve a fair and competitive market in which consumers are adequately informed and protected.[120] The model law could be drafted as follows:

Price Gouging

(1) A person must not, in trade or commerce occurring during a declared time of crisis, engage in the practice of price gouging with respect to goods or services.

(2) In determining whether a person (the 'supplier') has engaged in price gouging for the purposes of subsection (1), the courts will take the following factors into account:

(a) whether the increase in price was attributable solely, or predominantly, to additional costs incurred in connection with the supply of the goods or services;

(b) the nature, scarcity, and essentiality of the goods or services;

(c) the price at which the same goods or services were sold or offered for sale by the supplier in the 14 days immediately prior to the declared time of crisis (disregarding any reduced or 'special' prices, or 'seasonally adjusted' prices, offered in the ordinary course of trade or commerce and having regard instead to the 'usual' prices charged);

(d) whether and to what extent the relative strengths of the bargaining positions of the supplier and the consumer differed;

(e) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer (or any person acting on their behalf) by the supplier (or any person acting on their behalf) in relation to the supply of the goods or services;

(f) the nature, effect and actual or predicted duration of the crisis impacting upon the market;

120 See *CCA 2010* (Cth) s 2.

(g) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the supplier;

(h) whether the requirements stipulated by any applicable industry code were met by the supplier; and

(i) any other matters the court considers relevant.

For clarity, the term 'declared time of crisis' as used in this draft provision should be defined in section 2 of the *ACL* in words along the following lines:

> ***Declared time of crisis*** means any period of time for which the Commonwealth Government has declared that a time of crisis exists.

Such declarations might be made where a state or territory government has enacted statutory crisis management laws,[121] or otherwise at any time the Commonwealth considers it appropriate. The state and territory laws are primarily designed for natural disaster management and generally permit governments in those jurisdictions to control the movement of people, seize possession of property, forcibly evacuate locations, and direct persons or bodies to take particular actions.[122] There are no provisions to regulate price gouging, meaning there would be no constitutional conflict.[123]

It must be noted that this draft definition would conclusively assign the Commonwealth with statutory crisis management powers which it does not currently enjoy. However, it is argued this would merely embody its executive power. This power is captured in section 61 of the *Commonwealth Constitution* and has been interpreted as extending to the Commonwealth's 'inherent authority derived from the character and status of the Commonwealth as the national government'.[124] There is judicial support for the notion that the Commonwealth would be effectively exercising its executive power in declaring a national state of emergency. As the High Court observed in *Pape v Commissioner of Taxation*,[125] the executive government

> is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here. This power has its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the *Constitution* but in form today in Australia it is a power to act on behalf of the federal polity.[126]

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121 *Emergencies Act 2004* (ACT); *State Emergency and Rescue Management Act 1989* (NSW); *Emergency Man*agement *Act 2013* (NT); *Public Safety Preservation Act 1986* (Qld); *Disaster Management Act 2003* (Qld); *Emergency Management Act 2004* (SA); *Emergency Management Act 2006* (Tas); *Emergency Management Act 1986* (Vic); *Emergency Management Act 2005* (WA).

122 See generally Royal Commission into National Natural Disaster Arrangements, 'Constitutional Framework for the Declaration of a State of National Emergency' (Issues Paper 1, 8 May 2020) 7–8.

123 Even if there was, the *ACL*, as a Commonwealth law, would prevail under section 109 of the *Commonwealth Constitution*. To eliminate all doubt, it is suggested that the state and territory crisis management statutes and regulations be amended to explicitly accommodate the draft price gouging provision. Alternatively, the state and territory governments could refer their relevant powers to the Commonwealth pursuant to section 51(xxxvii) of the *Commonwealth Constitution*.

124 *Williams v Commonwealth* (2012) 248 CLR 156, 185 (French CJ).

125 (2009) 238 CLR 1.

126 Ibid 89 (Gummow, Crennan and Bell JJ).

Moreover, the Commonwealth can legislate with respect to matters falling within its executive power pursuant to section 51(xxxix). Accordingly, even without a statutory power, there would arguably be an implied authority on the part of the Commonwealth to intervene and impose controls to support the Australian people through a crisis situation. Nonetheless, a prescriptive law such as that suggested eliminates any doubt in this regard and provides a useful framework for policing price gouging.

It will also be observed that the model law does not restrict itself to goods or services traditionally regarded as 'essential'. This is intentional and is justified as follows. First, the market ultimately determines which goods or services are 'essential' at any given time. Attempting a definition, even one which is inclusive, is therefore hazardous given the potential for some goods or services to be inadvertently excluded. Second, a good or service may become essential only in light of the particular crisis at hand. Essentiality is a relative concept. For example, in this modern age, candles are hardly regarded as an 'essential' good. However, if some largescale electromagnetic disturbance destroyed a city's power grid and any battery-operated devices containing an electronic circuit (such as electric torches), candles would immediately become an 'essential' source of lighting. Finally, the conduct of sellers, as opposed to the nature of the goods or services being sold, is what price gouging controls are concerned with and so the focus of the model law is upon the former.

One final point to note is that violation of the draft provision must obviously have consequences. It is argued that the most appropriate penalty for contravention is a civil penalty. The purpose of such penalties is 'primarily if not wholly protective in promoting the public interest in compliance'.[127] Whereas punishment for breaches of the criminal law traditionally involves the elements of deterrence, retribution and rehabilitation,[128] it is only the first of these that is relevant in the context of economic regulation.[129] The civil penalty provisions imposed by the *ACL* are designed to 'put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act'.[130] Given the draft price gouging provision would, as discussed earlier, sit comfortably within the suite of similar offences contained in chapter 3 of the *ACL*, most of which are civil penalty provisions, it would be apposite for it too to be subject to civil penalty. The ACCC could also issue infringement notices to businesses who violate the price gouging law.[131]

Whatever the penalty, it must be sufficiently significant so that it exceeds the benefit of price gouging.[132] It must also be effectively enforced so that the fear

127 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, 506 (French CJ, Kiefel, Bell, Nettle and Gordon JJ), quoted in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25, 41 [57] (Jagot, Yates and Bromwich JJ).

128 These objectives are reflected in the various criminal sentencing statutes in operation in each Australian jurisdiction: see, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

129 *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076, 52, 152 (French J).

130 Ibid.

131 *CCA 2010* (Cth) pt XI div 5. This power applies to most of the offences covered by chapter 3 of the *ACL*.

132 *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076, 52, 152 (French J); Bae (n 19) 97.

of detection and prosecution gives the provision legitimacy and is genuinely effective in influencing market behaviour and, ideally, stamping out illegitimate price gouging.

If the draft provision was positioned in chapter 3 of the *ACL*, its contravention would also be potentially subject to other remedies such as actions for damages (*ACL* section 236), compensation orders (*ACL* section 237), or redress orders (*ACL* section 239). In the case of compensation orders, for example, claimants (any buyers who purchased goods or services from a seller deemed to have engaged in price gouging), or the ACCC in a representative action on their behalf, could seek compensation to offset the excessive prices they paid during a declared time of crisis. Quantification will clearly be difficult, though a feasible method might be to determine a reasonable market rate for the goods or services concerned (through, for example, review of prices among competitors and with allowance for fair margins and supply costs) and compare this to the accused seller's price, with the difference being refunded to affected buyers.[133]

VI CONCLUSION

The Black Summer and the COVID-19 pandemic devastated our nation. The latter, at the time of writing, continues to wreak havoc on the Australian people: medically, financially and emotionally. While our national desperation has inspired selfless acts of kindness ranging from donation of supplies to provision of healthcare in hazardous environments, it has also sadly brought out the worst in humanity.[134] Traders have engaged in price gouging, exploiting hapless consumers urgently seeking critical goods and services during such times of crisis. This article has considered the moral and economic arguments both for and against the introduction of anti-price gouging laws in Australia. It was argued, on balance, that the reasons *for* such laws were more convincing. There may be engineered impacts upon the ordinary vagaries of the market, which is something our governments and courts try to avoid, but this is ultimately for the greater good of protecting consumers when they most need support. The model law proposed would not only sit comfortably within the *ACL* and serve its objectives, it would provide an essential protection for Australian consumers when future crises strike.

133 Such an order would be possible under section 243(d) of the *ACL*.

134 'Desperate situations often dramatically illustrate the best in human nature, yet unfortunately they also sometimes show us at our very worst': Brewer (n 57) 1101.