THE UNIVERSITY of ADELAIDE

BY EMAIL: consumerlaw@treasury.gov.au

Director
Consumer Policy Unit
Market Conduct Division
Treasury
Langton Crescent
Parkes ACT 2600

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Dear Sir/Madam

Submission to Consultation on the Design of Proposed General and Specific Prohibitions with Respect to Unfair Trading Practices

Thank you for inviting submissions in response to the Treasury and Federal Government's 'Supplementary Consultation Paper', entitled *Unfair Trading Practices: Consultation on the Design of Proposed General and Specific Prohibitions* (November 2024). This initiative follows the Unfair Trading Practices Consultation opened on 31 August 2023 and closed on 29 November 2023.

The views expressed below are my own and do not necessarily reflect the views of the Research Unit on the Regulation of Commerce, Corporations, Insolvency and Taxation (ROCCIT), the Adelaide Law School, or the University of Adelaide.

General comment

As mentioned in my initial submission in response to the *Protecting Consumers from Unfair Trading Practices Consultation Regulation Impact Statement* ('Consultation RIS'), of the four policy options presented in that document, Option 4 (combined general and specific prohibitions) is the most favourable. It is the most comprehensive and targeted policy approach which readily distinguishes the proposed unfair trading practices provision from existing provisions of the Australian Consumer Law ('ACL') and aptly 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. Additionally, Option 4's 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).

Focus questions – general prohibition

> *Q1: Is the proposed general prohibition sufficiently clear to provide certainty regarding its application? If not, how could it be clarified?*
>
> *Q6: Does the proposed grey list provide adequate guidance for businesses and regulators regarding how the courts will interpret the prohibition? Are there any additional examples that should be listed?*

My first point addresses both Questions 1 and 6. I am in favour of the proposed inclusion of a non-exhaustive 'grey list' of behaviours which may, depending on the circumstances, satisfy the general prohibition test. This will provide useful guidance for the market and ensure that such types of unfair conduct are expressly caught by the proposed unfair trading practices prohibition. However, the Consultation RIS states (Page 14) that the list is intended to operate the same way that ACL s 25 does in providing examples of terms that may be 'unfair' for the purposes of the unfair contract terms provisions contained in Part 2-3 of the ACL. There are concerns with this approach given the differences in the way ACL s 25 and the proposed grey list are articulated.

Consider ACL s 25. There are obvious instances where the terms listed in that provision, though seemingly unfair on their face, may be perfectly defensible. For example, s 25(a) states that 'a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract' may be potentially unfair. But such clauses normally account for situations where the other party's performance has not been satisfactory or is entirely absent. By way of example, a gym might include a clause in its standard form membership agreement stipulating that if a member's fortnightly membership fee is not paid, the gym will not provide the member with access to its facilities and equipment. This is an example where the clause limits the gym's (but not the member's) performance of the contract though in a situation which is entirely acceptable. There might be an attendant right on the part of the gym, but not the member, to terminate the agreement for non-payment; unilateral termination clauses are another listed example in ACL s 25(b). Again, however, this might more easily be regarded as a substantial breach of contract justifying the gym's termination of the member's agreement.

Conversely, looking at some of the examples of proposed forms of conduct to feature on the grey list, it is hard to envisage a situation where it would *ever* be acceptable, for example, to provide 'material information to a consumer in an unclear, unintelligible, ambiguous or untimely manner, including the provision of information in a manner that overwhelms, or is likely to overwhelm, a consumer'. That is, unlike with the examples listed in ACL s 25, it is difficult to accept that there would be a time or situation in which it was appropriate to permit a party to mislead, confuse or overwhelm a consumer.

> *Q3: Are there any unfair practices that would not be addressed by the proposed elements and existing ACL protections?*

It is not clear whether price gouging would be caught by the proposed elements of the new general prohibition, and there is no doubt that it is not presently caught by existing ACL protections. Price gouging is not illegal, and the ACL does not provide for it.

I generally advocate for free enterprise and do not lightly suggest that the Federal Government imposes controls on the market and its participants. I acknowledge and accept the economic arguments against such intervention. However, the practice of price gouging 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.[1]

While price gouging would certainly be characterised as causing, or being likely to cause, material detriment (financial or otherwise) to the consumer, it is not at all clear if it can be classified as conduct which 'unreasonably distorts or manipulates, or is likely to unreasonably distort or manipulate, the economic decision-making or behaviour of a consumer'. This is because there is generally no trickery involved in price gouging but rather opportunism on the part of vendors, typically in settings where consumers are desperate for essential goods or services. The consumer is fully informed as to the upfront price payable and is compelled by circumstance, rather than by the actions of the vendor, to pay exorbitant prices for the goods or services sought. It is therefore unclear if price gouging would be addressed by the proposed elements of the general prohibition.

Q5: Is the requirement that detriment or likely detriment be 'material' appropriate?

This requirement is likely to cause confusion. It is problematic to qualify the requirement of detriment with a threshold of 'materiality'. The reasons are twofold.

First, a requirement of 'detriment' already exists as one of the three limbs constituting an 'unfair term' under s 24(1) of the ACL. This provision does not impose a materiality threshold but instead confirms that 'detriment' may be financial or otherwise. To now use the same term (detriment) in another context and add the adjective 'material' threatens to generate inconsistent jurisprudence. Having consistent definitions across equivalent terms within the ACL, where possible, is clearly favourable.

Second, and related to the first reason, imposing a requirement of 'materiality' threatens to raise the bar higher than intended for establishing detriment for the purposes of the new general prohibition. This is because the addition of this threshold suggests that more than mere detriment of the kinds described in ACL s 24 is required. For example, a negligible financial detriment would suffice for the purposes of ACL s 24(1)(c) but may not be seen as 'material' under the new general prohibition for want of 'materiality' (given the fiscal amount involved is not significant). It is unclear whether less orthodox forms of 'detriment' such as emotional or practical inconvenience or impact would be regarded by the courts as a *material detriment* as opposed to a mere *detriment*. These forms of inconvenience or impact are accepted forms of detriment for the purposes of ACL s 24.[2] However, according to the Oxford Dictionary, 'material' means 'of serious or substantial import; significant, important, of consequence'.[3] There is, accordingly, a danger that the courts will misconstrue the general prohibition and interpret it in an unintended manner. There is precedent for such uncertainty: the term 'consumer' is defined in various different contexts within the ACL, which has resulted in much judicial and academic confusion.[4]

According to the Consultation RIS, the purpose of imposing a threshold of materiality 'is to ensure that the proposed prohibition is directed at conduct that is sufficiently serious' and is said to provide 'more certainty for businesses about what practices will be in scope' (Page 14). The use of the term 'material' would have the converse effect for businesses, because while it is simple to understand if a detriment has been caused to a consumer, it is far more difficult to quantify the significance of that detriment, as the new general prohibition would essentially require the business to do. If it is desired that the concept of 'material detriment' remain a feature of the proposed new general prohibition against unfair trading

[1] See Mark Giancaspro, 'Perilous Fires, Pandemics and Price Gouging: The Need to Protect Consumers from Unfair Pricing Practices during Times of Crisis' (2021) 44(4) *University of New South Wales Law Journal* 1458. Available at 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.
[2] See for example *Australian Competition and Consumer Commission v Smart Corporation Pty Ltd (No 3)* [2021] FCA 347.
[3] Oxford English Dictionary (online), *'Material'*, <https://www.oed.com/>.
[4] John W Carter, 'The Commercial Side of Australian Consumer Protection Law' (2010) 26 *Journal of Contract Law* 221, 227.

practices, then it is advisable that the term ‘material’ or ‘material detriment’ be defined to eliminate any uncertainty as to how this is meant to be interpreted.

Thank you for accepting my submission. Please contact me via the details below if you have any questions or require further information.

Yours sincerely

Dr Mark Giancaspro

Em:
Ph:
Mb: