



13 December 2024

Director, Consumer Policy Unit
Market Conduct Division, The Treasury
Langton Crescent, PARKES ACT 2600
by email: consumerlaw@treasury.gov.au

Dear Sir/Madam,

Submission to the Department of Treasury Consultation on the design of proposed general and specific prohibitions (unfair trading practices)

We are writing in response to the invitation for comments and feedback on the Treasury's proposal to address unfair trading practices impacting Australian consumers (**Proposal**). We have collaborated to provide feedback representing a collection of businesses who, while occupying different segments of the market, with key differences in our operations and customer base, share an important commonality, being that we each employ a direct-to-consumer subscription model, to varying degrees, and do so in order to facilitate the delivery of physical products to our customers on a regular basis.

We welcome the opportunity to provide commentary on proposed reforms to the Australian Consumer Law, and we appreciate the efforts to outline the proposed options in a clear and concise manner. We are supportive of the work being done to further the cause of consumer protections regarding subscription-related practices in general. We ultimately seek to avoid a scenario where those dealing in physical, and particularly perishable goods, are subject to unintended consequences as a result of broad changes. The intention of this submission is not necessarily to provide exhaustive responses to, or arguments for or against specific elements of the Proposal, but rather to simply shine a light on the unique relationship between customers and their physical-product subscription providers, and the unique level of subscription transparency that comes with delivering goods to the doors of our customers on a weekly basis.

We note that in the Proposal's introduction to subscription-related practices, a distinction is drawn between subscriptions for digital products and services, such as apps, streaming services and software licenses, and offline products and services that operate on a subscription basis, including gym memberships, meal delivery and beauty treatment subscriptions. We contend that within offline subscriptions products and services, there is a further distinction to be made, between those who offer services or intangible products (gym memberships or mobile phone plans being examples), and those who deliver physical (and conspicuous) products directly to consumers on a recurring basis. The latter, being the space that we collectively operate in, is fundamentally different from service-based subscription offerings, and therefore would be impacted in different ways by elements of the Proposal, for reasons outlined further below.

The most obvious distinguishing characteristic, which is also the most significant, is the recurring delivery of a physical product; which in combination with our business models which allow for flexibility in the form of customers' abilities to cancel, pause or amend their orders on a frequent basis, leave comparatively little room for consumers to inadvertently remain subscribed to products without their knowledge or consent. While we appreciate that some practices identified as "dark patterns" or included on the grey list can obviously be employed by physical product-based subscription operators, in our experience, these are inherently much less effective than digital product or service offerings, and

therefore wide-reaching efforts to prevent them could be detrimental to us if applied on a one-size-fits-all basis.

Additionally, our respective models rely on often complex operational processes in order to be able to fulfil our customers' subscriptions, and those processes are often unique to us, as opposed to digital product or service providers. As an example, when delivering food, drinks or other household goods to customers, procurement, production, packing and distribution of those goods needs to be built into the recurring subscription timeline, and often these processes rely on some element of predictive capability that begins far in advance of the commencement or continuation of individual subscriptions. For this reason, we incur costs, or assume various operational risks that are mitigated by us having a level of predictability or stability in our subscription customer base, while also providing them with the highest practicable level of flexibility to ensure that they get only what they want, when they want it.

Among other things, we believe that the factors described above are worth consideration, in the context of the potential general prohibition described by the Proposal. While sympathetic to the proposed principles in general, we would be naturally interested to understand how the principles would apply to various categories of subscription businesses, and would be wary of situations where conduct is assessed equally across the board, without due consideration for the factors described above that already significantly mitigate the effects of any such conduct. As an example, practices that could be considered problematic, or that could be subject to new obligations or restrictions on the basis that they appear unnecessary in the context of a digital services product, may be more relevant or necessary in a physical product subscription business, in order to analyse customer behaviour or insights, in the interests of developing the predictive capabilities required to execute our various fulfilment processes. Additional data and information may be required for this purpose, as compared to other subscription providers, and could be justifiable for some subscription operators, but not others.

In relation to the Proposal's suggestions for specific prohibitions, we believe that these are more intuitive and straightforward for businesses to understand, and therefore the requirements and measurement of their impacts easier to implement. That being said, we hold concerns that certain proposed specific prohibitions could have the effect of disproportionately impugning the models employed by high-frequency, high touch point subscriptions, in a way that has less of an impact on the conduct that it intends to prevent. To provide an example, the proposed "Option 2" provides for a requirement for businesses to notify customers of various aspects of their subscription, including renewal periods, payment receipts etc. Businesses who are in constant contact with their customers, by virtue of sending reminders of weekly deliveries, product updates, operational notifications etc, would be at a significant disadvantage compared to those who offer subscriptions on an annual frequency, and therefore additional notifications such as those proposed could cause unnecessary nuisance, concern or confusion. We additionally maintain that the recurring delivery of the products themselves serve as a natural reminder.

As noted, the above commentary is not intended to be exhaustive, but rather illustrative of the due consideration that we believe should be afforded to businesses operating based on physical product subscription models, so as to not disadvantage them for either the flexibility offered to consumers, or the operational realities that set them apart from other subscription providers.

We would like to reiterate our support in general for measures aimed at providing flexibility and protection for consumers, and that contribute to a healthy marketplace across all goods and services in Australia. We would welcome the opportunity to discuss any further policy proposals with the Treasury in due course, and provide any additional information in relation to our businesses, as well as the expected benefits of any of the policy options provided, or any additional policy options that are considered in the future.

Yours sincerely,

Tom Rutledge
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Rolf Weber
CEO - Marley Spoon Australia

Anna Podolsky
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