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UNFAIR TRADING PRACTICES

SUBMISSION

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1. SUBMITTERS

Professor Justin Malbon, an Adjunct Professor, Griffith University Law School and a former Professor, Law School Monash University and Dean of the Griffith Law School. He is a former board member of the Financial Industry Complaints Service, and a former panel member of the Financial Ombudsman Service, a member of the Superannuation Complaints Tribunal and an ombudsman with the Australian Financial Complaints Authority. He has undertaken consultancies for the Ministerial Council for Consumer Affairs, Federal Treasury, AusAid and the United Nations Trade and Development Commission. He is the co-author or editor of 10 books, and the author of numerous book chapters and articles in academic journals.

Monica Gonzalez, delivers digital transformation programs, solutions in business performance monitoring and evaluation, and market-informed strategies in large B2C corporations. She represents Australian consumer interests on national and international standards committees in the areas of information technology, consumer privacy, and consumer policy.

Professor Malbon and Ms Gonzalez are both members of the Executive Committee of the Queensland Consumers Association.

2. BACKGROUND

Treasury seeks submissions regarding its paper *Unfair trading practices: Consultation on the design of proposed general and specific prohibitions* (the Treasury Paper). The Treasury Paper offers for discussion a proposal that there be a general statutory prohibition on unfair trading practices. We agree there should be a general prohibition.

Treasury proposes that there be a prohibition on conduct that:

- unreasonably distorts or manipulates, or is likely to unreasonably distort or manipulate, the economic decision-making or behaviour of a consumer, and
- causes, or is likely to cause, material detriment (financial or otherwise) to the consumer.

The proposal borrows and adapts a prohibition on unfair commercial practices in the EU's Unfair Commercial Practices Directive¹. It states that a commercial practice is 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 product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the

¹ Directive 2005/29/EC of The European Parliament

group when a commercial practice is directed to a particular group of consumers.

We have a number of concerns about the Treasury proposal. They are that:

- it unnecessarily requires a plaintiff to establish that the impugned conduct distorts or manipulates economic decision-making or behaviour;
- the requirement is likely to create confusion and uncertainty;
- the proposal sets the evidential bar too high by requiring that a plaintiff prove material detriment.

Conduct that distorts or manipulates economic decision-making or behaviour

Article 5 of the EU Directive prohibits business practices that cause a material distortion of the economic behaviour of a consumer with regard to a product. This focus on economic behaviour is largely because the EU's remit is to promote the proper functioning of the EU's internal market. This is underscored by Article 1 of the Directive, which states in part that the purpose of the Directive is to 'contribute to the proper functioning of the internal market'.

Thus, the EU tends to frame its Directives in terms of promoting the economic functioning and advancement of the EU internal market. This comes some way to explaining why the Unfair Commercial Practices Directive is concerned about the material distortion of economic behaviour within the EU market.

The Australian Consumer Law (ACL) does not share this focus on the economic functioning of the marketplace. Conversely, it states that 'the object of this Act is to *enhance the welfare of Australians* [emphasis added] through the promotion of competition and *fair trading* [emphasis added] and provision for consumer protection.' Indeed, Treasury's proposal would introduce an economic paradigm that is unfamiliar to the ACL. We submit this would add unnecessary confusion and uncertainty to the operation of an unfair conduct provision in the ACL.

Chapter 2 ACL sets normative standards for business conduct

Chapter 2 of the Australian Consumer Law (and its predecessor, Part V of the Trade Practices Act) evolved from primarily being about consumer protection to setting normative standards for business conduct.

Chapter 2 sets normative standards requiring a corporation in trade or commerce not to engage in conduct that is:

- misleading or deceptive (Part 2-1)
- unconscionable (Part 2-2).

Part 2-3 sets normative standards for consumer and small business contracts, which are designed to ensure the contract terms are not unfair.

The norms setting role of Chapter 2, and in particular the provisions dealing with unconscionability, is confirmed by Allsop CJ in *ACCC v Lux*. He said:

The task of the court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers. The content of those values is not solely governed by the legislature, but the legislature may illuminate, elaborate and develop those norms and values by the act of legislating, and thus standard setting. ... Values, norms and community expectations can develop and change over time. Customary morality develops "silently and unconsciously from one age to another", shaping law and legal values: These laws of the States and the operative provisions of the ACL reinforce the recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure. These considerations are central to the evaluation of the facts by reference to the operative norm of required conscionable conduct.²

The Chapter 2 provisions, as Treasury suggests, are not sufficiently comprehensive and do not capture unfair business practices such as 'newer, emerging forms of misconduct, such as "dark patterns", that distort or manipulate consumer choice online without being outright misleading'.³

We agree that there should be a general statutory prohibition of unfair business conduct. However, we submit that the prohibition should be situated in Chapter 2 of the ACL, which provides the normative settings for business conduct in the consumer marketplace. The prohibition should set normative standards of business conduct and not be aimed at dealing with potential or actual market distortions and the economic behaviours of consumers.

Inserting an unfair conduct provision in the ACL

We suggest the insertion of a new Part 2-4 to deal with unfair practices. The opening provision should adopt the kind of elegant simplicity found in section 18 (misleading or deceptive conduct). A suggested provision would provide that:

A person must not, in trade or commerce, engage in unfair conduct.

Part 2-4 would proceed to elaborate upon what is meant by unfair conduct. Again, we would propose simplicity in so far as is possible.

What is unfair conduct?

Setting a normative standard that requires a person in trade or commerce (a business) not to engage in unfair conduct requires setting the parameters of what is meant by 'unfair conduct'.

² *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 at paragraph 23.

³ Treasury Paper, page 4.

We propose a provision that states:

A person engages in unfair conduct if:

- (a) the conduct impairs, or would likely impair, the interests of a prudent consumer seeking to protect or advance their legitimate interests; or
- (b) with regard to a consumer, the conduct in all the circumstances is conduct that would not be engaged in by corporation in trade or commerce acting fairly and reasonably while protecting or advancing its legitimate interests.

The prudent consumer test

A proposed benchmark for determining whether business conduct is unfair is the requirement to consider whether the conduct would impair the interests of a prudent consumer. This is an objective test. Chapter 2 ACL is familiar with objective tests. For instance, the test for determining whether a business engaged in misleading or deceptive conduct involves asking whether a hypothetical reasonable consumer of the class of people to whom a representation is made would be led to error by the representation.⁴

We envisage the prudent consumer as being a person who takes reasonable steps in advancing or protecting their own legitimate interests. If a business the consumer is dealing with impairs the prudent consumer's ability to protect or advance their legitimate interests in making a decision about whether or not to purchase a product from the business, for instance through drip-pricing, this may be unfair conduct.

As another example, if the prudent consumer intends to enter into a subscription agreement for a service, the consumer would want to be in a reasonable position to terminate the subscription—taking account of all the circumstances; eg if it is a year's subscription, then a prudent consumer would want to be in a reasonable position to be able to positively decide whether or not to renew the subscription after the year ends.

Having an objective test that examines whether a business has, or is likely to, impair the interests of a prudent consumer echoes aspects of the European Union's Unfair Commercial Practices Directive. The Directive provides (in part) that:

- a practice is unfair if it materially distorts the economic behaviour of the *average consumer* (Article 5 – emphasis added), and
- a material distortion occurs if appreciably *impairs* the consumer's ability to make an informed decision (Article 2 – emphasis added).

⁴ *ACCC v TPG Internet Pty Ltd* [2013] HCA 54, at paragraphs [54] and [73].

Our proposal that unfair conduct include conduct that impairs the interests of a prudent consumer resonates with the Directive's reference to impairing the ability of an average consumer to make an informed decision. However, our proposal is broader in that the Directive refers to a material distortion of economic behaviour, whereas our proposal refers to an impairment of the legitimate interests of a prudent consumer.

Substantial impairment

In our submission, the proposal in the Treasury Paper that unfair conduct would occur if the conduct

- *unreasonably* distorts or manipulates, *and*
- *causes material detriment*

unduly restricts the operation, and unduly limits the scope and application, of the prohibition on unfair conduct.

The requirement for a plaintiff to prove unreasonableness and material detriment greatly limits the operation of the proposed prohibition. For instance, a number of the unfair practices the prohibition seeks to address have a relatively small financial impact on an individual consumer. However, cumulatively they could have a more substantial impact. For instance, a single subscription that keeps automatically renewing might not have a substantial financial impact on a consumer, but over time it could become more significant. And if there are a number of subscriptions with different businesses that keep automatically renewing, it could have a compounding financial impact on a consumer. Similarly, a single consumer transaction that involved drip pricing (arguably) might not of itself have caused material detriment to the consumer in the sense of the consumer's overall financial standing.

The Treasury proposal leaves it unclear as to whether the cumulative effect of a businesses' conduct on a consumer or a class of consumers can be considered. Even if it can, it is unclear whether the conduct must cause material detriment to the consumer's overall financial position.

In any event, proving material detriment over a relatively small amount transaction is likely to prove virtually insurmountable. In this way, systemic unfair conduct by a business can slip under the regulatory radar.

In any event, the addition of a substantial impact requirement does not apply regarding misleading or deceptive conduct and unconscionability, and it would seem is an unnecessary and unreasonable requirement for an unfair conduct prohibition.

The fair and reasonable corporation test

We propose that unfair conduct include:

with regard to a consumer, the conduct in all the circumstances is conduct that would not be engaged in by corporation in trade or commerce acting fairly and reasonably while protecting or advancing its legitimate interests.

This sets an objective standard measured against the conduct of a fair and reasonable corporation. The objective standard is set without prejudicing a businesses' interests in protecting or advancing its legitimate interests (that is for example, the business seeking to make a profit).

To use a sporting analogy, businesses may compete to win and do so actively and even aggressively, but it must do so fairly. This is just as a sporting team will play hard to win the game. But this is not to come at the expense of fair play.

A business that engages in sharp practices in a way that falls below community expectations of what constitutes fair play could amount to unfair conduct.

The EU Directive also sets an objective standard for business conduct. Article 5 of the Directive states a commercial practice shall be unfair if it is contrary to the requirements of 'professional diligence'. Article 2 defines professional diligence as meaning:

...the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity;

The standard set for business behaviour by the Directive is that businesses act honestly and according to the general principal of good faith. Our proposal is that the standard be that businesses act fairly and reasonably.

The fair and reasonable standard is well established in Australia. For instance, tribunals such as the Australian Financial Complaints Authority, the Telecommunications Industry Ombudsman and the State based energy ombudsman schemes determine whether a business has, with regard to a consumer, acted in a way that is fair and reasonable in all the circumstances. The fairness and reasonableness of a business's conduct is considered in the context of applicable laws, industry practice and any codes of conduct.

Further elaboration of the interests of a prudent consumer

We propose that the interests of a prudent consumer be further elaborated upon. For instance, a legislative provision could state:

- (3) In considering the interests of a prudent consumer mentioned [in subsection (2)(a)], regard may be had to the consumer's legitimate interests in:
 - (a) purchasing quality goods and services having regard to price;
 - (b) purchasing safe, durable and repairable goods;
 - (c) being able to access post-sales support for goods and services;

- (d) being well positioned to make informed choices about the purchase, return, return or cancellation of goods and services;
- (e) the protection of the consumer's privacy; and
- (f) causing minimal harm to other people and individuals and the environment in the production and supply of goods and services to the consumer.

The proposed subsection would provide a degree of elaboration on what is understood to be the interests of a prudent consumer. The elements listed are not exhaustive and nor are they definitive. For instance, a prudent consumer may want to buy a low quality good because it is cheap. However, the prudent consumer would need to be placed in a reasonable position to become aware the product is not of good quality before making the purchase.

The inclusion of consideration of whether a prudent consumer has a legitimate interest in causing minimal harm by their purchase signals that the consumer is not only interested in attaining the lowest price for goods or services regardless of any other considerations.

This is not to say that a business must only sell goods or services that cause minimal environmental harm or cause minimal harm as contemplated by the *Modern Slavery Act*. Rather, the prudent consumer is not to be seen as simply a narrowly self-interested individual that cares nothing about the consequences of their purchase decision on the environment or other people. Broad societal expectations about consumer responsibility are likely to evolve over time. Therefore, the considerations under (3) are designed to be broad and flexible and capable of evolution over time according to general social norms.

We also propose further elaboration on the type of conduct that can be considered to be unfair. We propose a subsection stating:

- (4) In determining whether a corporation has engaged, or is likely to engage, in unfair conduct regard may be given to conduct mentioned:
 - (a) in the grey list;
 - (b) in the regulations.
- (5) Unfair conduct is not limited to conduct mentioned in subsection (4).

Access to justice considerations

An unfair conduct prohibition will only be effective in practice if consumers, regulators and other interested parties do not face unreasonable or unnecessary legislative barriers to bringing an action against a business. The onus of proving that a business has not engaged in unfair conduct should be on the business.

In addition, a plaintiff should not be required to prove financial or other detriment. There is no requirement, for instance, to prove detriment regarding misleading or deceptive conduct. There should be a policy assumption, for instance, that dark patterns cause harm without a plaintiff having to prove it.

However, a plaintiff will not receive compensation under the ACL unless the plaintiff can prove they have suffered loss from the unfair conduct. A civil penalty can be imposed in order to address a breach of the normative standards set under Chapter 2 without having to prove actual harm.

We propose that an unfair conduct provision include the following:

- (5) A corporation bears the onus of establishing it has not, or is not likely to, engage in unfair conduct.
- (6) A corporation may be found to have engaged in unfair conduct even if no financial or other detriment is established.
- (7) A person or individual has standing in proceedings even if the person or individual has no personal or other interest concerning the exercise or otherwise of the duty.

In summary, our proposed unfair conduct provision would provide as follows.

- (1) A person must not, in trade or commerce, engage in unfair conduct.
- (2) A person engages in unfair conduct if:
 - (a) the conduct impairs, or would likely impair, the interests of a prudent consumer seeking to protect or advance their legitimate interests; or
 - (b) with regard to a consumer, the conduct in all the circumstances is conduct that would not be engaged in by corporation in trade or commerce acting fairly and reasonably while protecting or advancing its legitimate interests.
- (3) In considering the interests of a prudent consumer mentioned [in subsection (2)(a)], regard may be had to the consumer's legitimate interests in:
 - (a) purchasing quality goods and services having regard to price;
 - (b) purchasing safe, durable and repairable goods;
 - (c) being able to access post-sales support for goods and services;
 - (d) being well positioned to make informed choices about the purchase, return, return or cancellation of goods and services;
 - (e) the protection of the consumer's privacy; and
 - (f) causing minimal harm to other people and individuals and the environment in the production and supply of goods and services to the consumer.
- (4) In determining whether a corporation has engaged, or is likely to engage, in unfair conduct regard may be given to conduct mentioned:
 - (a) in the grey list;

(b) in the regulations.

Unfair conduct is not limited to conduct mentioned in subsection (4).

(5) A corporation bears the onus of establishing it has not, or is not likely to, engage in unfair conduct.

(6) A corporation may be found to have engaged in unfair conduct even if no financial or other detriment is established.

(7) A person or individual has standing in proceedings even if the person or individual has no personal or other interest concerning the exercise or otherwise of the duty.