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By email: [consumerlaw@treasury.gov.au](mailto:consumerlaw@treasury.gov.au)

**Re: Submission to Australia's Treasury Further Consultation on 'Unfair Commercial Practices' (UCP)<sup>1</sup>**

1. A year ago I made a Submission supporting the addition of a general UCP to the Australia Consumer Law (ACL) for the Treasury's initial Consultation.<sup>2</sup> I appended an example of such an unfair practices, namely a 'subscription trap' by the Economist magazine that could not be resolved to my satisfaction despite approaching the ACCC.
2. Since then I have experienced further examples, including a subscription trap by Fitness Passport (see Appendix hereto).
3. I am persuaded by examples in other Submissions, the further Discussion Paper and related studies that the ACL should add UCP protections as re-proposed.
4. However, firstly, the proposed general prohibition's wording (at p12 of the Discussion Paper) is problematic (emphasis added):
  - a. unreasonably distorts or manipulates, or is likely to unreasonably distort or manipulate, the economic decision-making or behaviour of a consumer, and
  - b. causes, or is likely to cause, material detriment (financial or otherwise) to the consumer.
5. It differs unnecessarily and detrimentally from the EU law that seem to inspire this formulation, especially its UCP Directive (summarised at p12):
  - a. 'Article 5 of the European Union's Unfair Commercial Practices Directive (UCPD) defines a commercial practice as unfair if it is

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<sup>1</sup> <https://treasury.gov.au/consultation/c2024-602157>

<sup>2</sup> See my Submission now (somewhat belatedly) uploaded with the Discussion Paper at <https://treasury.gov.au/consultation/c2023-430458>

contrary to the requirements of professional diligence and materially distorts, or is likely to materially distort, the economic behaviour of the average consumer.<sup>3</sup> The EU's Digital Services Act prohibits online platform providers from designing, organising or operating their services in a way that deceives or manipulates recipients of their service or otherwise materially distorts or impairs recipients' ability to make free and informed decisions.<sup>4</sup>

6. Most disturbingly, the Treasury proposal refers to 'material detriment' (the consequence) but the Directive refers to material distortion (the trigger). Fewer practices can therefore be expected to be captured than under the EU Directive formulation.
7. The proposal adds reference to consumer 'decision making' but the EU Directive would include that within 'behaviour'.
8. The proposal also adds reference to 'manipulation', inviting future confusion and litigation over whether this qualifies 'distortion' as used (solely) in the EU Directive.
9. The proposal further requires the distortion to 'unreasonably' distort consumer behaviour. This seems to correspond to the EU Directive's requirement that the practice contravenes professional diligence. Although the proposed wording is simpler and perhaps goes to the
10. Overall, the additional ACL should simply replicate the EU Directive's core general prohibition. As mentioned in my original Submission, this would allow everyone to benefit from the case law, commentaries and the legislative history of that longstanding instrument – unless there is a very good reason to vary the wording added to the ACL.
11. Secondly, the 'grey list' proposed (also at p12) is a good idea in principle, but needs more reflection:

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<sup>3</sup> Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market (UCPD) (European Union), Article 5.

<sup>4</sup> Digital Services Act (European Union), Article 25 Online interface design and organisation. Article 25 also allows the Commission to issue guidelines on how this applies to specific practices, notably giving more prominence to certain choices, repeatedly requesting the recipient to make a choice where that choice has already been made, and making the procedure for terminating a service more difficult than subscribing to it.

- a. the omission of material information,<sup>5</sup>
- b. the provision of material information to a consumer in an unclear, unintelligible, ambiguous or untimely manner,<sup>6</sup> including the provision of information in a manner that overwhelms, or is likely to overwhelm, a consumer,
- c. impeding the ability of a consumer to exercise their contractual or other legal rights,<sup>7</sup> or
- d. use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision.<sup>8</sup>

The concept of a grey list is useful, and helps eg identify potential unfair terms under other EU law as eventually reflected in the ACL. But there the items are very simply (eg a unilateral variation clause) whereas here the wording captures a variety of potential practices. Again, to reduce uncertainties, the wording could refer more closely to EU law.

12. Thirdly, for the specific prohibitions, I recommend also picking the wording from legislation already adopted overseas, to minimise further confusion and disputation especially as these are enacted recently by some of Australia's major trading partners. For example, against subscription traps, the Discussion Paper mentions (at p19)

- a. 'The UK's *Digital Markets, Competition and Consumer Act 2024* will require traders offering a subscription contract to provide consumers with reminder notices at key points and provide arrangements for ending a contract that are straightforward and involve only steps that are reasonably necessary.'<sup>9</sup>

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<sup>5</sup> ACCC submission, page 16; Swetha Meenal Ananthapadmanaban and Jeannie Marie Paterson submission, page 6; CPRC Joint submission, page 27; Law Council of Australia submission, page 16; National Legal Aid submission, page 6.

<sup>6</sup> ACCC submission, page 16; Swetha Meenal Ananthapadmanaban and Jeannie Marie Paterson submission, page 6; CPRC Joint submission, page 27; Law Council of Australia submission, page 15; National Legal Aid submission, page 6.

<sup>7</sup> ACCC submission, page 16; CPRC Joint submission, page 16; Law Council of Australia submission, page 15.

<sup>8</sup> CPRC, 2022, 'Duped by Design', <https://cprc.org.au/report/duped-by-design-manipulative-online-design-dark-patterns-in-australia/>.

<sup>9</sup> The Act has received royal assent, but the subscription provisions are not yet in force.



- b. In October 2024, the U.S Federal Trade Commission adopted a final 'click-to-cancel' rule requiring businesses to make cancelling a subscription as easy as signing up. The FTC will also require businesses to provide important information about the terms of their subscription and obtain consumers' express informed consent before charging them.
  - c. Germany's *Fair Consumer Contracts Act 2022* mandates the inclusion of a cancellation button that is easily accessible and which allows consumers to submit a subscription cancellation request by clicking a further button'
13. Lastly, per pp24-5 and as stated already in my original Submission, I suggest starting with such general and specific UCP prohibitions being added to the ACL for individual transacting for non-business purposes, the definition of consumers generally adopted by the EU and most other economies (including eg around Asia). These are the most vulnerable and needing protection, even though there may be political pressure from 'small business' groups to extend such protections from them – perhaps cross-subsidised then by individual consumers in the form of higher prices generally charged by suppliers to cover potential additional liability exposure.
14. I am happy to elaborate on any of the points above.

Yours sincerely

Luke R Nottage

## APPENDIX: Another subscription trap (& deliberately poor customer service?)

Fitness Passport offers discounted memberships to hundreds of gyms to (a minimum large number of) employees of big organisations, such as the University of Sydney in recent years. However, the minimum term and conditions for cancellation are not prominently displayed before sign-up (which is done online involving the employer). Even after contracting it is hard to find and work out the applicable terms, although the FAQs include eg this summary:<sup>10</sup>

### How do I cancel?



There is a 30-day notice period required for membership cancellation requests. When you sign up with Fitness Passport you join for a minimum 12-month contract period. If you elect to withdraw from the program inside that 12-month period, you may be charged a cancellation fee (see matrix below). If you need further clarification you may get in touch with your workplace facilitator (if applicable) or contact us by clicking the "Send Us An Enquiry" button at the top of this screen.

Number of weeks since start of contract	Single Membership	Family Membership	Single Plus*	Family Plus*
Week 3 - 13	\$225.00	\$275.00	\$275.00	\$325.00
Week 14 - 26	\$175.00	\$225.00	\$225.00	\$275.00
Week 27 - 39	\$125.00	\$175.00	\$175.00	\$225.00
Week 40 - 45	\$75.00	\$125.00	\$125.00	\$175.00
Week 46 - 50	\$25.00	\$50.00	\$50.00	\$75.00

\*Plus Membership means your Membership, that also has a dependent child aged between 18 and 25 (an Additional Dependant Passport).

If you wish to cancel your membership, please contact us by clicking the "Send Us An Enquiry" button at the top of this screen.

The listed "penalties" for cancellation within 12 months and notice period of 30 days may be unfair terms (not legitimately need to protect the supplier's rights),

<sup>10</sup> <https://fitnesspassport.freshdesk.com/support/solutions/articles/43000669232-how-do-i-cancel->



now attracting the possibility of regulators issuing fines as well as such terms being void under the ACL. But a potential UCP is that the cancellation can not be done simply by logging to the members portal online. Instead, as indicated above, notice has to be given by contacting Fitness Passport – through their generic “inquiry” webpage. Such inquiries generate an automated response saying they will endeavour to respond within two business days but have a large volume of inquiries so do not so promise. I tried to cancel this way and am still waiting for any response after more than a week. I also want to check certain aspects of one of my two memberships. Yet Fitness Passport provide no telephone number even for members to use to speak to anyone there.