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To: Director
Consumer Policy and Product Safety Unit
Market Conduct and Digital Division
The Treasury

By email: consumerlaw@treasury.gov.au

RE: Protecting consumers from unfair trading practices

The Internet Association of Australia (**IAA**) thanks the of Treasury for the opportunity to respond to its *Unfair trading practices – Supplementary consultation paper* (**Consultation Paper**).

IAA is a member-based association representing Australia's Internet community. Our membership is largely comprised of small to medium sized Internet Service Providers (**ISPs**). We understand that although many of the issues outlined in the Consultation Paper have been raised in relation to digital platforms, any legislative reform that will be introduced to combat unfair trading practices will apply more broadly. Thus, our response is in representation of our members, most of which are small businesses, as well as to comment on the impact of the proposed policy options for the telecommunications sector and Australian industry more broadly. In addition, as a not-for-profit association, we are also greatly interested in the public good of the Internet, including its users and operators, and believe strongly in measured regulation that balances competing interests.

To that end, we are interested in the development of regulation that will provide greater protections for consumers and businesses, particularly small businesses from unfair trading practices. In general, we support the Treasury's efforts and acknowledge that as Australia's economy evolves, especially with increased digital activity, legislation needs to reflect such changes. However, we are simultaneously concerned about policy options that will impose too great a regulatory burden on industry that will stifle innovation and adversely affect industry's ability to operate in a competitive market. We especially note the disproportionate burdens placed on small businesses by new legislation due to entities' limited resources to navigate complex regulatory frameworks.

We therefore offer our response, having considered the proposed policy options and various factors relevant to the issue of unfair trading practices.

OUR RESPONSE

EXISTING PROTECTIONS

We understand that with the boom of the digital economy, the landscape of trading has changed, and has posed difficulties for government and regulators to regulate. In particular, Australia's increasingly data-driven economy and the pervasiveness of digital life has resulted in dark patterns and questionable data collection and use.

However, based on the examples of potentially unfair trading practices provided in the Consultation Paper, we are not convinced that the existing legislative and regulatory frameworks are not able to resolve many of the issues. This includes the prohibition against unconscionable conduct and existing specific prohibitions as well as frameworks that are not strictly under the Australian Consumer Law.

For example, we believe issues relating to individuals' data is best left to regulate under Australia's privacy protections framework. We especially note the ongoing privacy reforms that will strengthen Australia's privacy protections, especially when it comes to digital privacy. We are concerned that with the reform work underway, also introducing more prescriptive trade related legislation in respect of data use and sharing will result in duplications or potentially even conflicts that will only make it more confusing for both consumers, and industry, and in particular, small businesses.

Thus, we do generally support the proposed policy option to introduce a new general prohibition against unfair trading practices. However, we believe that less onerous mechanisms are available and will be more effective and efficient, as will be detailed below.

POLICY OPTIONS

Of the proposed policy options set out in the Consultation Paper, we support Option 2, the proposal to amend the existing prohibition of unconscionable conduct. However, we also propose that there are further policy options that should be considered.

We would propose that rather than a general prohibition alongside further specific prohibitions, reform could be effected to expand or lower the threshold of the unconscionable conduct prohibition (Option 2), while also introducing new specific prohibitions against certain unfair trading practices, where appropriate and/or necessary. We believe this to be an alternative to Option 4, that is more aligned with the existing framework, thereby less likely to cause the great costs associated with a new general prohibition, while also providing more protections and is therefore a more balanced approach.

In general, we believe that many of the considerations that a court may currently have regard to under section 22 of the Australian Consumer Law in determining whether conduct was unconscionable already captures the various factors that may make certain trading practices unfair. Otherwise, there are other provisions by way of the prohibition against misleading or deceptive conduct (Part 2-1 of Chapter 2 of the Australian Consumer Law) as well as the various specific prohibitions.

We also do not believe it is necessary to amend section 22 to provide the courts "must" and not "may" give consideration to the various factors set out under the provision. This is already implied by section 22, and in practice, courts do indeed consider these factors to determine whether conduct was unconscionable. However, more effective reform would be to add further factors that courts should consider to ensure greater protections.

For example, we consider that an amendment that could be made under Part 2-2 pertaining to unconscionable conduct would be to consider whether an entity took reasonable steps to ensure a consumer or counterparty was aware of the effect of any contractual term or condition that would substantially prejudice the consumer or counterparty's interest. This is a protection that already exists in NSW jurisdiction under the *Fair Trading Act 1987* (NSW) that could be included under the federal legislation that would not only provide greater protections for consumers (and businesses),

but would also harmonise State and federal legislation. Other examples could include an entity's practices with respect to its cancellation options, or use of dark patterns that results in outcomes that causes or is likely to cause substantial injury to consumers. However, simultaneously, the courts should also consider in determining whether practices were unconscionable, whether it is not outweighed by the benefits to the consumer or to competition.

Alternatively, further specific prohibitions could be introduced under Chapter 3, if deemed more appropriate. In addition, given many of the issues lie with digital platforms, an industry code applying to digital platforms could be introduced such as in relation to use of dark patterns. This would then have to be considered by way of section 22 in determining whether conduct was unconscionable or not.

Furthermore, we also note that in the majority of the international jurisdictions cited in the Consultation Paper as having a general prohibition against unfair trading practices, the manner in which these general unfair trading practice prohibitions seems to be implemented is very similar to the existing protections we have in Australian legislation, as set out below.

International Response	Australian Consumer Law
United States – FTC Act <ul style="list-style-type: none"> - General Prohibition 	Combination of: <ul style="list-style-type: none"> - Part 2-2: Unconscionable conduct; - Part 2-3: Unfair contract terms; and - Chapter 3: Specific protections
EU – UCPD: <ul style="list-style-type: none"> - Articles 6 and 7: Misleading actions and omissions - Article 8: Aggressive commercial practices - Article 9: Harassment, coercion and undue influence 	<ul style="list-style-type: none"> - Part 2-1: Misleading or deceptive conduct; and Division 1 of Part 3-1: Unfair practices - subsection 22(1): factors that court may have regard to in determining unconscionability; - Section 50: Harassment and coercion; and paragraph 22(1)(d): Consideration of undue influence or pressure in determining unconscionability.
UK – CPR: <ul style="list-style-type: none"> - Similar to EU 	Similar to EU
Singapore – CPTFA <ul style="list-style-type: none"> - Misleading or deceptive conduct - False claims - Taking advantage of consumers 	<ul style="list-style-type: none"> - Part 2-1: Misleading or deceptive conduct - Division 1 of Part 3-1: False or misleading representations etc - Part 2-2: Unconscionable conduct

In addition, we believe that the issues with unfair practices currently going unaddressed pertains more to issues with enforceability of the existing prohibitions, rather than the nature of the prohibitions themselves. Thus, we would recommend greater consideration of the ACCC's powers and functions. Moreover, we strongly urge for increased education and awareness campaigns for both consumers and industry to provide more guidance on existing rights and responsibilities as a consumer or business, with particular focus on small businesses and engagement with the smaller

entities within the digital platform economy. We believe this to be fundamental in order to ensure actual improvement and compliance.

CONCLUSION

Once again, IAA appreciates the opportunity to contribute to the Treasury's consideration of Australia's legislative framework that protects consumers from unfair trading practices. As outlined in our response, we are committed to ensuring a balanced and measured approach that will improve protections while also not being onerous for government to introduce or industry to implement. We look forward to engaging further with the Treasury as well as other stakeholders as this work continues.

ABOUT THE INTERNET ASSOCIATION OF AUSTRALIA

The Internet Association of Australia (IAA) is a member-based association representing the Internet community. Founded in 1995, as the Western Australian Internet Association (WAIA), the Association changed its name in early 2016 to better reflect our national membership and growth.

Our members comprise industry professionals, corporations, and affiliate organisations. IAA provides a range of services and resources for members and supports the development of the Internet industry both within Australia and internationally. Providing technical services as well as social and professional development events, IAA aims to provide services and resources that our members need.

IX-Australia is a service provided by the Internet Association of Australia to Corporate and Affiliate members. It is the longest running carrier neutral Internet Exchange in Australia. Spanning six states and territories, IAA operates over 30 points of presence and operates the New Zealand Internet Exchange on behalf of NZIX Inc in New Zealand.

IAA is also a licenced telecommunications carrier, and operates on a not-for-profit basis.

Yours faithfully,

Internet Association of Australia