Australian Competition and Consumer Commission, *Digital Platform Services Inquiry Discussion Paper for Interim Report No 5: Updating competition and consumer law for digital platform services*

Submission in response by Professor Kimberlee Weatherall, with Mr Barry Wang and Mr Jacky Zeng[1]
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We welcome this opportunity to provide comments in response to the *Digital Platform Services Inquiry Discussion Paper for Interim Report No 5: Updating competition and consumer law for digital platform services.* We are a team of researchers based at the University of Sydney Law School, led by Kimberlee Weatherall, Professor of Law and a Chief Investigator in the ARC Centre of Excellence on Automated Decision-Making and Society, and an expert in the regulation of technology and intellectual property law. We are happy to answer any questions or participate in further discussions in relation to the Discussion Paper and forthcoming Interim Report.

Summary

We argue that technological and economic shifts at the heart of the digital and platform economy challenge the foundations of the existing consumer protection and competition regime. As a result, a new regulatory approach is needed. The argument is based on three key observations:
1. The malleable, automated digital environments operated by platforms pose a fundamental challenge to the current regulatory model for protecting and promoting the interest of consumers. In the digital environment consumers no longer enter a common marketplace where they can compare product and service offerings, and select that which best suits their needs and resources. They confront a shifting, increasingly 'personalised' environment. Being informed that that is so will not empower them or create fair market conditions;
2. The two- or even multi-sided market structure in which platforms and other companies in the digital economy operate gives reason to doubt that adding more competition in platform services will significantly improve services for consumers or ensure their preferences are reflected in goods and services offered;
3. The shifting online environment poses diabolical challenges for the enforcement of standard consumer protection prohibitions, whether existing prohibitions (under ss 18, 21 of the *Australian Consumer Law*) or incremental additions like the proposed prohibition on unfair trading practices.

In this new environment, *ex post* enforcement of prohibitions on misleading, deceptive and unconscionable conduct, and even a new prohibition unfair trading practices **will not be adequate to empower or enable consumers or ensure a fair market**. This supports an argument for a **different regulatory framework** for promoting consumer (and human) rights and interests, and one which is

forward-looking and places the onus on platforms - which hold much of the relevant information, and much of the power – to improve the fairness of their offerings, to imagine how this can be done, and innovate in providing a better online environment. In short, it requires an approach to the regulatory framework - consistent with proposals increasingly seen overseas - to impose positive obligations on actors in the online environment, including platforms.

Chapter 5: Harms to competition and consumers arising from digital platform services

> **1. What competition and consumer harms, as well as key benefits, arise from digital platform services in Australia?**

Summary

Our response to this question is twofold: (1) we argue that a significant, but insufficiently acknowledged harm occurring in this digital platform space is that the features of the 'shifted environment' have eroded fundamental assumptions of existing legal structures, undermining consumer welfare and leaving no effective recourse or remedy for even classic (static) consumer harms, let alone for the multitude of ways that the digital environment and consumer markets can be rigged against consumers; and (2) we are sceptical that a focus on the promotion of competition in digital platform markets will address or reduce these or other consumer harms.

The act of defining harms and benefits arising from digital platform services is contingent on understanding the broader digital environment. The context provided in Chapter 3 and 4 of the Consultation Paper provides an overview of the anti-competitive state of play as to inform the consumer welfare harms identified by the Consultation Paper in Chapter 5.

We consider, first, that the ACCC should adopt a broad conception of relevant harms in considering any regulatory framework for Digital Platforms. The Digital Platforms are too deeply involved in the ways that people communicate and receive information; make social connections and engage with public discourse to be analysed in purely competition and consumer welfare terms. Decisions the ACCC makes about the digital platform services markets will impact on, increase, or mitigate a broad range of harms to individuals, society, and political discourse and political systems created, or exacerbated, by digital platforms, including psychological harms to users, as well as harms to political and social discourse.[2] These harms are intimately connected to questions of market structure and the business models

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[2] To take just one example, the Facebook Files investigation, based on internal documentation released by Facebook whistleblower Frances Haugen, alleged that Facebook knowingly used algorithms to target advertising at vulnerable children, and profits from misinformation and hateful content. The Facebook Files is a Wall Street Journal investigation: a collection of articles from the investigation is available here: https://www.wsj.com/articles/the-facebook-files-11631713039.

allowed under our regulatory framework. They flow directly from the underlying incentives that drive platforms – and other actors in the digital economy – towards greater intrusions into and monitoring of people's lives, and targeting and hypertargeting of content. The same systems that enable businesses to find consumers most likely to be interested in their commercial products (cars, handbags, insurance) are used to target political or other information content (including misinformation) to the most potentially receptive individuals, or exclude swathes of the population from seeing some content or opportunities.

To promote the benefits of commercial targeting while ignoring these broader harms is problematic. And to address the problems created by platforms through a narrow consumer welfare or competition lens is to miss much of the point and may not lead to action that remedies real harms experienced by Australians. And to dismiss or redirect concerns about broader personal, societal and political harms as being exclusively matters for other Australian regulators is to weaken Australia's regulatory framework, by dividing it.

In any event, even within a consumer welfare frame, we argue that there are important aspects to the changed environment that consumers face, which argue in favour of a change to the regulatory framework and its approach.

Consumers face a constantly shifting environment

The digital economy environments within which consumers engage with goods and services, and within which the digital platforms operate, are very different from the economic environments that operated even a decade ago, when the *Competition and Consumer Act 2010* (Cth) was enacted. The Discussion Paper recognises this and describes, and relies on past work by the ACCC, international regulators and government bodies and researchers others on dark patterns, choice architectures etc. The Discussion Paper also notes enforcement actions taken by the ACCC against uses of these mechanisms to achieve platform or advertiser goals: including dark pattern scenarios employed generally against consumers, such as those employed in *Trivago*[3] or *Google*.[4] We think, however, that the shifted environment has even more fundamental implications for consumer protection and competition law.

Online and "hybrid"[5] environments are malleable: adjustable in real time, and responsive to personal data and feedback. Each consumer interacts online with digital platform services, transmitting information and receiving content (information, or a service or product) through an interface: the medium through which content is presented. Like the lens of a camera, the interface provides an experience controlled and directed by the digital platform, which reveals, in a curated way, an inevitably incomplete set of all the information and content that could be shown or described to a consumer (see Figure 1). The interface, as the ACCC recognises, can be designed in ways that are helpful to the

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[3] *Trivago N.V. v Australian Competition and Consumer Commission* [2020] FCAFC 185; 384 ALR 496.

[4] *Australian Competition and Consumer Commission v Google LLC (No 2)* (2021) 151 ACSR 355.

[5] By 'hybrid environments' we mean environments involving both physical and digital elements: examples include transactions mediated through the internet of things (IoT), or physical stores that use digital elements to motivate or target consumers (eg, facial or emotion detection used in store).

consumer, or unhelpful: platforms can employ interface designs that exploit known weaknesses of human decision-making to prefer certain products (including the platform's own products), or pressure or manipulate consumers into making decisions that interface controller prefers - which may be quite opposed to the consumers' interests or preferences (as occurs with 'dark patterns'[6]). The interface is thus critical to appreciate as it is the "choice architecture" which, by intentional or unintentional design, influences consumer choice and actions.[7]
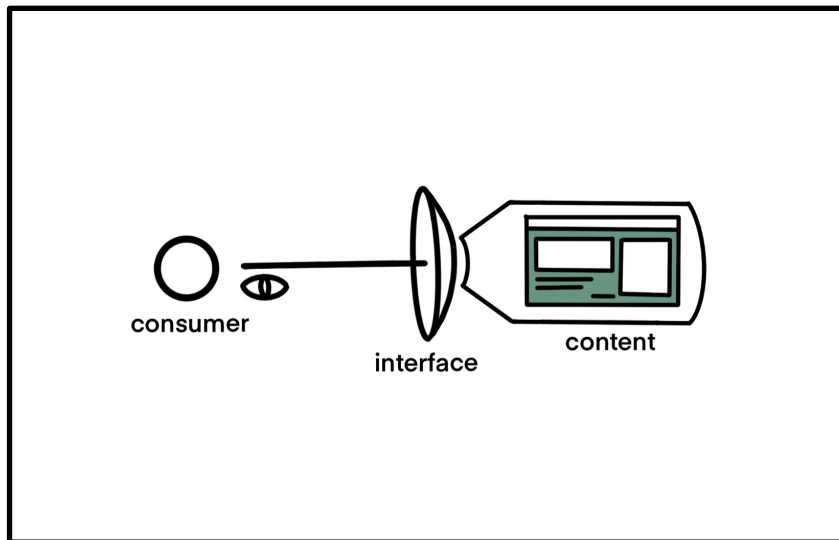

Figure 1. *The consumer experience in online environments: the consumer perceives content through digital interfaces acting as lenses which shape what is being shown.*

Unlike a camera lens, a digital interface can also 'look back' at the consumer - to gather information about them and their behaviour, and connect it to other information about the consumer; to run A/B testing that seeks to determine how people respond to different content or ordering. This gives interface designers (such as platforms) the ability to set up their systems to make automatic and real-time alterations based on platform goals (such as A/B testing) or based on inferences drawn from the individual's data. Digital platform services employ (proprietary) algorithmic recommender technologies to determine which content from the universal of possible content will be shown. These algorithms can

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[6] Mathur, Arunesh, Gunes Acar, Michael J. Friedman, Elena Lucherini, Marshini Chetty, and Arvind Narayanan. "Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites: Proceedings of the ACM on Human-Computer Interaction: Vol 3, No CSCW." In *Proceedings of the ACM on Human-Computer Interaction*, Vol. 3. ACM, 2019; Luguri, Jamie, and Lior Strahilevitz. "Shining a Light on Dark Patterns." University of Chicago Coase-Sandor Institute for Law & Economics Research Paper. Rochester, NY: Social Science Research Network, August 1, 2019; Gray, Colin M., Yubo Kou, Bryan Battles, Joseph Hoggatt, and Austin L. Toombs. "The Dark (Patterns) Side of UX Design." In *Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems*, 1–14. CHI '18. New York, NY, USA: Association for Computing Machinery, 2018.

[7] As ASIC has noted, 'Choice architecture' refers to features in an environment, noticed and unnoticed, that influence consumer decisions and actions. These features are present at every stage of product design and distribution. Examples include product bundling, default settings, and website and sales process design. ASIC Consultation Paper 325, *Product Design and Distribution Obligations*, December 2019, 19 [54].

be used to show content, through "personalised" advertisements and product recommendations, and also to hide content, through ranking and filtering results. "Personalised" is perhaps a misnomer here: more likely in most cases, services are not truly 'personalised' to a particular individual: rather, individuals are classified into groups based on characteristics and behaviour; inferences about that group are applied to other individuals that share similar characteristics.[8] Much of this will occur in an automated way. As figure 2 shows, information about an individual can be used to generate a profile (here, 'B') and used to determine what the individual is shown (content 'B') - which is not the same as the content (or the product, or the price) shown to someone classed in A, or C.
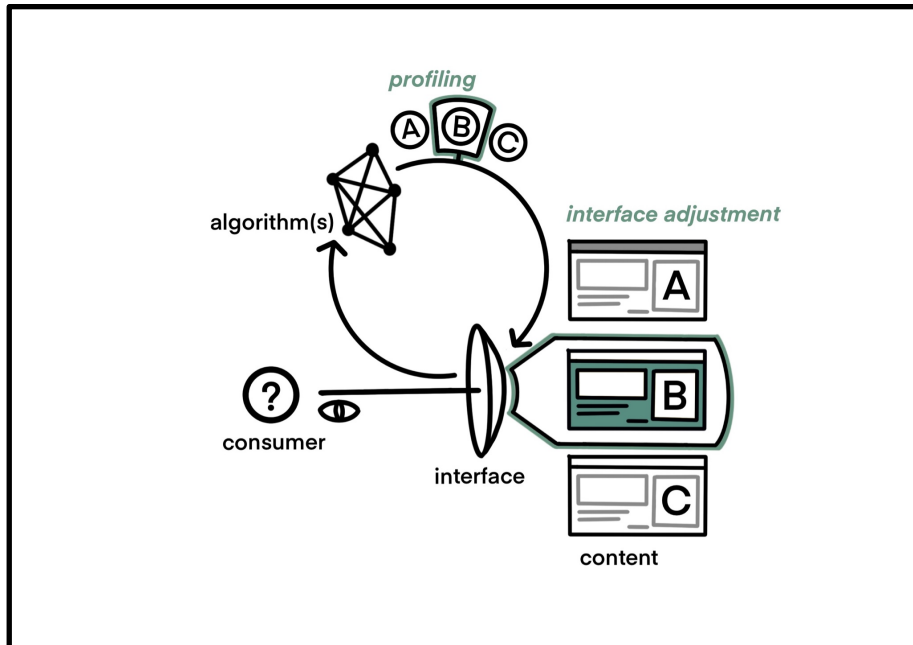

Figure 2: *Digital profiling: algorithms categorise consumers in real time through analysis of their interaction with the interface and external data sources. The interface - and in particular what of the content available it shows to people - is then adjusted accordingly. The operation of this process; what information it uses; what inferences are drawn, and how these are used sits in the background; unobservable to consumers*.

Critically, **as illustrated in Figure 2 - this malleable online environment splinters the market.** Different consumers are no longer receiving the same service, seeing the same offers, the same products, the same prices. Indeed, the same individual won't necessarily see the same options over time. Shopping in this context is not like going to a store, scanning the prices, and then going to another store and comparing the prices there, knowing that the same prices and products are being offered to anyone who walks in, and that shopping around – going to lots of stores, comparing prices – will give some assurance that the consumer is getting the best possible deal. In that simple scenario, a consumer can,

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[8] Characteristics can be demographic or behaviour data. Amazon's recommender systems is summarised as "customers who bought both items X and Y, accounting for multiple opportunities for each X-buyer to buy Y": full https://ieeecs-media.computer.org/assets/pdf/mic2017030012.pdf

with effort, shop around for the product and price that suits them, with some confidence that there exists some common market. In a malleable, shifting, automated, digital environment, a consumer cannot assume that everyone is shopping in the same market. It is - at least potentially - more like the supermarket shelves shifting, the content appearing and disappearing; all the prices changing, for each person, and each time that person or another person walks into the store.

The power to change and select the content shown to people, individually or in inferred groups, can of course have benefits, in terms of presenting more relevant material, and tailoring services. But that does not mean that everyone will benefit, or that people will benefit equally. 'Advertising' is not just about offering holidays, cars, or consumables: advertising is a means for notifying people of a range of opportunities, including job opportunities; study or scholarship opportunities; available accommodation, internships and other things. In those circumstances, we might have concerns about whether some people are not seeing the advertisements: ie whether the targeting systematically excludes some people. It can also could lead to discriminatory outcomes, many of which will not be regulated by (current) anti-discrimination law because the basis for distinguishing people is not a protected characteristic.[9] Even where a protected characteristic is involved, a case under anti-discrimination could be challenging to prove.[10]

Moreover, as research by Choice and others have shown,[11] the power to change the content shown to consumers includes the power to charge entirely different prices, for exactly the same good or service, to different people, perhaps based on age or some other protected characteristic; perhaps on some other, entirely idiosyncratic analysis that seeks to determine how much a person or people in some group, subgroup or subsubgroup may be willing to pay. Who will benefit in such a scenario? It depends on how the system is designed or how it develops over time (if machine learning is involved). But as a policy matter, we should be concerned if an outcome is that some groups in society systematically benefit more than others.

These are not problems of deception, or even of information asymmetry, although deception and information asymmetry exacerbates the problem for consumers. But solving the information asymmetry, for example, by telling people that different prices can be charged or different content shown to people will not give people tools to work out how that is affecting them, or to ensure they are being treated fairly or getting value from a good or service.

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[9] See ABC News online, 'Threat of "postcode discrimination" as credit scores skewed by where you live', 7 February 2022, available at https://www.abc.net.au/news/2022-02-07/threat-of-postcode-discrimination-in-credit-scores/100723574. Where you live is not a protected characteristic under anti-discrimination law.

[10] See the discussion in Australian Human Rights Commission, *Technical Paper: Using Artificial Intelligence to Make Decisions: Addressing the Problem of Algorithmic Bias* (Technical Paper, Australian Human Rights Commission, 2020).

[11] See Choice, *Tinder charges older people more*, 11 August 2020, available at https://www.choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/tinder-plus-costs-more-if-youre-older. See also the follow up global study by the Mozilla Foundation and Consumers International, *A consumer investigation into personalised pricing* (February 2022), available at https://assets.mofoprod.net/network/documents/Personalized_Pricing.pdf.

It is important to appreciate how much this shifted environment changes the assumptions on which consumer protection law is based, undermining its objectives, and its enforcement model (addressed further below). The primary objective of the ACL on enactment was "to improve consumer well-being through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly."[12] How is the consumer empowered, if different markets, different products, different prices, different services are offered to individuals, based on inferences drawn about their characteristics and their willingness to pay, and in ways that the consumer cannot interrogate? How can we even tell if markets are fair or unfair if we can only see the prices, services, or recommendations generated for *us*?

In short, the problems consumers face - and the challenge consumer protection law faces - are not only dark patterns, inconvenience, or manipulation, or classically misleading and deceptive conduct (online scams, fake reviews etc).[13] If we see everything that is going on at the interface as being about deception and manipulation (or, as Doctorow[14] or Hwang[15] would have it, 'mind control rays'), we risk missing much of what is objectionable, missing the way that markets and consumers' goals are undermined in ways that even rational consumers cannot overcome.[16] The problem, more fundamentally, is the way that malleable, and automated digital economy environments currently do, and/or increasingly will, undermine the existence of a relatively stable market in which motivated, rational consumers can seek out the best deals that suit their preferences.[17]

We return below to the question of what this means for reforming the regulatory framework.

More competition won't address key consumer harms, when the competitors are also competing in two sided markets, to better extract consumer data and consumer surplus

A second point of context should be noted. The Consultation Paper (in particular Chapter 5.1 and 5.2) appears to rely on an assumption - or perhaps hope - that increased competition will resolve key issues of consumer harm. We think this is unlikely, for a number of reasons.

A range of commercial players, and a range of motivations drive businesses in online and hybrid environments. Multiple specialised firms participate in online consumer markets, not every business

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[12] Intergovernmental Agreement for the Australian Consumer Law, Recitals para C.

[13] Discussion Paper Part 5.3.3.

[14] Doctorow, Cory. "How to Destroy 'Surveillance Capitalism.'" Medium, February 4, 2021. https://onezero.medium.com/how-to-destroy-surveillance-capitalism-8135e6744d59.

[15] Hwang, Tim. Subprime Attention Crisis: Advertising and the Time Bomb at the Heart of the Internet. New York: FSG Originals, 2020.

[16] The UK Competition and Markets Authority (UKCMA) has noted the extent to which the operation of markets depends on the existence of subsets of motivated, rational consumers: see UK Competition and Markets Authority, *Algorithms: How They Can Reduce Competition and Harm Consumers* (2021).

[17] For a more extended and scholarly discussion of the ways that platforms undermine the existence of markets, see eg Pistor, Katharina, 'Rule by Data: The End of Markets?' (2020) 83(2) *Law and Contemporary Problems* 24.

involved is trying to sell consumers a product or service, and importantly, even those that are offering a good or service to consumers may be serving other parties also, who may not have identical interests or even interests consistent with those of consumers. That is, in the digital economy marketplaces and actors are two-sided, or multi-sided markets. In this situation, a firm that serves two different groups of customers may have reduced incentives to serve one (or both). As the ACCC notes, platforms may not offer a privacy-enhanced service, because the tracking is necessary to offer behavioural advertising services to other business markets. Lower service quality can thus be attributed to the significance of data in the market, resulting in trends such as the tradeoff between privacy and service quality that aims to maximise the data collected.[18]

But the further point is that increasing competition between platforms (or reducing the ability of platforms to block the entry of competitors or acquire competitors, or allowing more interoperability and exchange of data between platforms) does not necessarily improve matters for consumers. On the contrary, it likely endorses and normalises platforms' drive to turn every aspect of Australians' lives into data that can be used to target messages, information, and advertising.[19] New platforms and actors in the digital environment will also be engaged in two-sided markets based, most likely, on similar behavioural advertising models; alternative models (such as subscription models) will likely struggle to establish themselves against rivals currently built on behavioural advertising models.

Competition will not benefit consumers if entities are merely competing to better exploit, extract data from, or influence the beliefs, desires or behaviour of consumers.

Alternatively, **competition could be directed at securing the most desirable customers**: who can be identified in a far more granular way due to data accumulation. This will benefit some consumers, at the cost of others, **heightening inequality and distributive harms, including by the selective distribution of benefits** (and not just exploitation, discrimination or exclusion). Disadvantage or inequality across society can be created, or exacerbated, as a result of targeted discounting and benefits.[20] This has been acknowledged especially in financial services, where "more accurate and more granular risk profiling methods... could result in ineligibility or unaffordability for customer groups for whom conventional approaches would have resulted in more favourable risk profiles".[21]

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[18] As observed in *Australian Competition and Consumer Commission v Google LLC (No 2)* (2021) 151 ACSR 355, [61]

[19] See Goldenfein, Jake and Weatherall, Kimberlee Gai and Parker, Christine, Online Privacy Bill Consultation Submission (December 6, 2021). Available at SSRN: https://ssrn.com/abstract=4015915 or http://dx.doi.org/10.2139/ssrn.4015915.

[20] See, for example, Choice, *Tinder charges older people more*, 11 August 2020, available at https://www.choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/tinder-plus-costs-more-if-youre-older. In that case Tinder justified the higher prices paid by older consumers as a result of discounting aimed at attracting younger consumers.

[21] Ostmann, F., and Dorobantu C. (2021). AI in financial services. The Alan Turing Institute. https://doi.org/10.5281/zenodo.4916041 (p.31) [4.1.1].

We are not arguing that increased competition cannot *mitigate* consumer welfare harms at all. Some harms identified in 5.1 may be mitigated by competition – in particular the quality of services of a similar kind, provided according to a similar business model. But the risk is that we will have more active participants adopting the practices that cause other, and broader harms to consumers and, as noted earlier, to society, and public and political discourse.

Chapter 6: Competition and consumer protection law enforcement in Australia

> 2. Do you consider that the CCA and ACL are sufficient to address competition and consumer harms arising from digital platform services in Australia, or do you consider regulatory reform is required?

We welcome the ACCC's recognition of enforcement challenges in regulating competition and consumer harms. However, in our view the Discussion Paper underplays the nuances of common law and the practical challenges encountered at litigation. Whether we are trying to mitigate the harms we have identified above, the consumer and competition harms identified by the ACCC, or harms identified by the CMA in their proposed code of conduct, there are practical legal challenges in proving, to the satisfaction of a court, that some online conduct or business practices of digital platform services are unacceptable.

These enforcement challenges add up, and so far as we can see, are only likely to increase. When these challenges are fully appreciated we think that the argument for employing different kinds of regulatory tools becomes stronger.

Challenges relating to liability

Establishing the ordinary or reasonable consumer

Establishing the ordinary or reasonable person underpins various legal doctrines, and is required when proving a claim for misleading and deceptive conduct under the ACL. However, the personalised and dynamic nature of Digital Platform services poses novel challenges to this legal principle which may hinder effective enforcement.

To determine whether conduct is misleading or deceptive in relation to a particular class of persons, the court must assess whether the conduct is likely to mislead or deceive by reference to the ordinary or reasonable members of that class.[22] In abstracting this hypothetical person, the Court must consider the

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[22] *Australian Competition and Consumer Commission* v Google LLC (No 2) [2021] FCA 367 at [87]; see also *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; at 199; *Campomar Sociedad, Limitada v Nike*

likely characteristics of the persons who comprise the relevant class then consider the likely effect of the conduct on ordinary or reasonable members of the class.[23] The characterisation of the ordinary or reasonable consumer is often contested as it directly affects the issue of liability. These characteristics are also flexible and often dependent on the evidence adduced by the parties to the proceeding. In *Trivago v ACCC*, the hotel comparison and booking site ranked results depending on how much commission it was paid, without clearly revealing that fact to consumers. The central emphasis in the appeal relied on the correct knowledge and assumptions attributed to the hypothetical, ordinary and reasonable consumer.[24] Trivago argued, unsuccessfully, that reasonable consumers would have behaved in a certain manner when interacting with the Trivago website, including paying attention to specific text and buttons on the website, and therefore would not have been misled by Trivago's conduct.[25]

As the contemporary digital experience becomes more personalised and more malleable, it becomes important to reconsider this principle: given its limited legal utility, and the evidentiary burden it poses, at least in some cases. The practical relevance of the 'ordinary and reasonable consumer' will inevitably vary depending on the circumstances of the case. In cases where personalisation itself is misleading, for example where a firm makes a representation to "guarantee the lowest prices" then through personalised pricing imposes higher prices on some people, the question remains the effect of the general representation (about the guarantee) on the hypothetical consumers. Similarly if the alleged misleading representation is a common element across personalised content or communications, then the effect of the common elements on a reasonable consumer is still relevant - that is in effect the *Trivago* case.

However, it is increasingly possible that different personalised content and interfaces are shown to each individual user. In 2017, Facebook's artificial intelligence systems could generate over 6,000 versions of a single ad, while the number of bespoke permutations of communications in modern advertising campaigns can be in the millions.[26] Here, significant enforcement challenges exist. Do you have to prove the objective attributes of *different* hypothetical consumers, then test the impact of *each* interface on each consumer it was sent to (or more accurately, the impact on a reasonable consumer of the class that it was sent to)? In this case, it is arguable the contestability of the specific objective attributes of each hypothetical consumer creates an unnecessary evidentiary burden for consumers and regulators in enforcement actions.

International Limited (2000) 202 CLR 45 at [102]; *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 at [7]; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2020) 381 ALR 507 at [23].

[23] Ibid (No. 2) at [97]; see also *Campomar Sociedad, Limitada v Nike International Limited* (2000) 202 CLR 45 at [101]-[105]; *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 at [7] per French CJ and Crennan and Kiefel JJ.

[24] *Trivago NV v Australian Competition and Consumer Commissioner* (2020) 384 ALR 496 at [184].

[25] Ibid at [189].

[26] See Tim Peterson, Facebook's Dynamic Creative Can Generate up to 6,250 Versions of an Ad, MKTG. LAND (Oct. 30, 2017, 8:30 AM), https://marketingland.com/facebooks- dynamic-creative-option-can-automatically-produce-6250-versions-ad-227250 [https://perma.cc/2L9P-LPLF].

Establishing the representative nature of particular transactions or events

The concept of a 'system of conduct or pattern of behaviour' is embedded in statutory unconscionable conduct provisions,[27] and has emerged from a legislative intent to address contravening business systems and practices rather than particular transactions or events.[28] While the main focus of legal scholarship in this area of law has largely been on the standards which inform statutory unconscionability,[29] another critical and recurring legal question has become apparent - that is, how do we establish the representative nature of particular events or transactions? This question arises out of practicality, as parties to a proceeding rarely have the resources to obtain and analyse evidence of every instance of conduct that may breach the law. Instead a subset of conduct is established to prove, or more accurately, infer the general system of conduct or pattern of behaviour.

The case law reveals uncertainty regarding what evidence and what circumstances satisfy the requisite representative nature sufficient to establish a system of conduct or pattern of behaviour. This uncertainty will only be compounded as online interactions become more tailored to each individual consumer. And resolving this uncertainty will likely be necessary to ensure the effectiveness of any legal reforms.

In *Unique v ACCC,* Unique College targeted disadvantaged consumers with financial incentives upon enrolment, the general principle outlined by the Court was that particular events must have a representative nature or character to infer that particular events are representative of a system of conduct.[30] However, the ACCC failed to prove that the six instances of misconduct, which it had evidence for, were representative of a system of misconduct which had affected over 3,600 individuals. Similarly, in *eDirect,* which involved a high pressure telemarketing scheme on vulnerable consumers, the Court found that the evidence presented, including call transcripts, did not establish enough features representative of 'a high pressure sale system'.

In both instances the Court provided little guidance as to what is necessary in establishing the representative nature of transactions or events, apart from emphasising that the more specific the class of consumer affected, the higher the scrutiny should be on the representative nature of particular events or transactions.[31] This guidance makes sense where classes of consumers affected can be intuitively described, for example Indigenous consumers in remote communities or financially disadvantaged students. However, the increased use of machine learning algorithms poses a logical challenge to the Court's reasoning when establishing the representative nature of a system of conduct

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[27] See *Competition and Consumer Act 2010* (Cth) sch 2 s 21(4) ('Australian Consumer Law'); *Australian Securities and Investments Commission Act 2001* (Cth) s 12CB(4)(b).

[28] ALRC Corporate Criminal Responsibility Report; Citing Jeannie Marie Paterson and Elise Bant, 'Unfair, Unjust and Unconscionable Conduct in Consumer Contracting: Designing Effective Law Reform in Australia' (Paper, Melbourne Law School Obligations Group Annual Conference, Melbourne, 5–6 December 2019).

[29] See Paterson, J., Bant, E. Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online. J Consum Policy 44, 1–19 (2021).

[30] *ACCC v Unique International College* [2017] FCA 727 at [104].

[31] Ibid at [153].

as consumers are often segmented into seemingly arbitrary groups based on patterns in data unintuitive to humans.

Without additional guidance relevant to the shifted online environment, it may become harder or even impossible to prove that particular instances of misconduct, whether unconscionable, deceptive, or unfair, are indicative that the whole system is unconscionable, deceptive, or unfair.

Establishing specific features of an algorithm or automated system

The proprietary nature of algorithms and automated systems operated by digital platform services poses an uneven evidentiary burden to consumers and regulators seeking to bring a claim. And this challenge will only scale proportionately with the complexity of algorithms, as additional knowledge of how the data was acquired, how the data was preprocessed, the underlying AI model, and the objective of the model are required to draw any reliable conclusions of legally relevant features.[32]

Recent case law has made apparent that an understanding of the inner workings of algorithms and automated systems is essential to the issue of liability in certain enforcement actions. In *Trivago v ACCC,* Trivago's algorithm functioned by allocating a score for each hotel listing based on a list of factors, hotel listings are then surfaced to consumers based on these scores.[33] The relevant evidentiary issue in the proceedings was how the score was calculated and the relative importance, or weight, of each input factor in determining the score. In essence, if this score was not calculated largely based on the lowest prices, Trivago would have made a misrepresentation to consumers. The main disagreements between the expert evidence adduced by both parties surrounded the methodology for calculating the input weights. The methodology was different because the applicant's expert did not have access to Trivago's algorithm and relied on select data points to reverse engineer the weights.

Although the difference in methodology was not consequential to the outcome in Trivago, as both parties agreed that advertiser commissions were a large factor in the final score, it reveals the simple fact that there is a disproportionate evidentiary burden placed on the party that does not have access to the underlying algorithm or automated system.

The role of intention

Although intention is not a necessary element in establishing a contravention of most provisions of the ACL, it is relevant when determining relief for the contraventions which have been established.[34] In *ACCC v Reckitt Benckiser*, the Full Court made clear that a proceedings for a penalty puts the respondent

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[32] See technical paper on *Addressing the problem of algorithmic bias,* Gradient Institute.

[33] *Trivago NV v Australian Competition and Consumer Commissioner* (2020) 384 ALR 496.

[34] See *Australian Competition and Consumer Commission v Google LLC* (No 3) [2021] FCA 971 (No. 3) at [8]; *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44 at [124]

on notice "that its state of mind, including that it might have acted intentionally or recklessly in carrying out the contravening conduct, was potentially in issue".[35]

In *ACCC v Google (No. 3),* the documents sought to determine penalty were categorised into "data categories", which reveals the number of consumers who may have been misled, and "knowledge categories" which related to the state of mind of Google.[36] The parties reached agreement on documents in the "data categories", but the "knowledge categories" is contested on legal issues relating to discovery, particularly whether the documents were "directly relevant" to the contraventions in question. Evidence was adduced in the liability judgement which suggest that Google was aware that its Location History and Web App Activity settings were misleading, specific reference was made to a meeting held between Google employees, internally referred to as the "Oh Shit" meeting. The meeting occurred in response to an article exposing the misleading nature of Google's location tracking setting. Mr Sundar Pichai, the chief executive officer of Google LLC, also became involved in the discussions.

In the above example, intention and state of mind can be inferred as the adduced evidence clearly points to Google's knowledge of its conduct. However, existing literature suggests that any number of problems can arise through the use of datafied technologies without any intention on the part of the creators, developers, deployers of the tech.[37] This poses a potential enforcement challenge in cases where automated systems unintentionally mislead or deceive consumers as it optimises for a specific business objective.

Chapter 7: Regulatory tools to implement potential reform

> If the Australian Government decided new regulatory tools are needed to address competition and consumer harms in relation to digital platform services: …
>
> 3. Should law reform be staged to address specific harms sequentially as they are identified and assessed, or should a broader framework be adopted to address multiple potential harms across different digital platform services?
>
> 4. What are the benefits, risks, costs and other considerations (such as proportionality, flexibility, adaptability, certainty and procedural fairness, and potential impact on incentives for investment

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[35] *Australian Competition and Consumer Commission v Reckitt Benckiser* (Australia) Pty Ltd (2016) 340 ALR 25 at [121]

[36] *Australian Competition and Consumer Commission v Google LLC* (No 3) [2021] FCA 971 at [2]-[3]

[37] See eg Hacker (on manipulation) and Ali, Muhammad, Piotr Sapiezynski, Miranda Bogen, Aleksandra Korolova, Alan Mislove, and Aaron Rieke. "Discrimination through Optimization: How Facebook's Ad Delivery Can Lead to Biased Outcomes." Proceedings of the ACM on Human-Computer Interaction 3, no. CSCW (November 7, 2019): 199:1-199:30. https://doi.org/10.1145/3359301 (on biased delivery of ads).

> and innovation) relevant to the application of each of the following regulatory tools to competition and consumer harms from digital platform services in Australia?
> a. Prohibitions and obligations contained in legislation.

The upshot of the analysis presented in response to questions 1 and 2 is that, in our view, new regulatory tools are required. We comment here on (1) current proposals for a prohibition on unfair trading practices, and (2) the need for something more.

Current proposal for a prohibition on unfair trading practices

We note the proposal already endorsed by the ACCC, to introduce a new legal prohibition on unfair trading practices. As we understand, the idea of this reform would be to extend liability for a category of manipulative behaviours that may be difficult to capture through our current private and commercial legal framework: those which are not actually misleading, and which either fall short of being 'so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience', or where would be difficult to prove they do.

We agree that prohibiting unfair commercial practices would improve the legal framework. We have some doubt, however, whether such a prohibition will significantly 'shift the dial'. First, we note that similar prohibitions already exist in major overseas jurisdictions: they have not, to date, made much of a dent in platform practices of the kind identified by the ACCC, and it is not clear why things would be different in Australia, without other legal reforms. We also suspect it will take too long to have any practical effect: We may not know the scope of any prohibition on unfair commercial practices for a decade. It has taken nearly that long to settle basic questions relating to the prohibition on unconscionable commercial conduct (ACL s 21). While we appreciate that guidelines could be developed to flesh out the prohibition further, such guidelines would be subject to developments in the court, and will, almost inevitably, be one step behind opaque online practices.

We also think that insufficient attention has been paid, to date, to the question of how such a prohibition will play out in the realm of litigation. There are the numerous challenges outlined above, involved in litigating to prove that deployment of an interface or an automated system has crossed some line of unacceptable behaviour: for example, how you prove what the system is doing, or whether the examples you have of system outputs are representative. Litigation of a prohibition on unfair commercial practices will not be straightforward, especially in those cases not already captured by prohibitions on misleading and unconscionable conduct. The whole point would be to encompass a more subtle set of business practices - precisely those which will be hardest to prove

We also have doubts about a consumer welfare-focused articulation of what counts as 'unfair trading practices'. To date, articulations of this standard in the literature have highlighted the unfairness of practices that either lack transparency or target the vulnerable/consumer vulnerabilities. Transparency in particular is not a meaningful standard: it is relatively easy for a firm to be formally transparent, without substantively changing their practices, and we can't be confident that consumers will change

their behaviour in response to more information.[38] We also noted above that transparency is no way to address some of the harms discussed above: *telling* people that dynamic pricing is being applied does not help consumers address its effect or achieve their objectives within a market. More recent articulations - based on references to 'manipulation' or such as in the EU Draft AI Act,[39] could be interpreted to require intentional or targeted action by a firm. In an era of increased automation, not all outcomes are necessarily intended, but unintended consequences can be harmful. More fundamentally, however, a focus on consumer welfare considerations for defining the scope of a prohibition on unfair trading practices potentially leaves unaddressed significant harms discussed above: including, for example, the potential of automated systems to distribute the benefits of product (and price) tailoring unevenly, and increase inequality and exclusion.

The need for something more

What the analysis above suggests is a need for something more than the reforms currently on the table. In a context where bad behaviour is hard to catch, and where harmful outcomes may be unintended, we think that it will be necessary to **put positive obligations on firms, with a view to ensuring that they behave towards consumers more fairly, and/or take steps towards that end goal**. While it might seem radical to require firms to act fairly towards their consumers, there are more foundations for such an obligation in the current law than is commonly appreciated: there are, in fact, a wide range of areas where that or a cognate obligation is imposed: examples include the obligations placed on financial services licensees to act efficiently, honestly, and fairly[40]) and developments like ASIC's Product Design and Distribution obligations.

A positive obligation to treat consumers fairly has potential advantages over a prohibition on unfair trading practices. Most obviously, it shifts the onus onto the commercial actors to incorporate concerns about fairness into their internal processes, rather than waiting until some activity is positively banned, or described or condemned by the regulator.

It is beyond the scope of this submission to offer a fully-fleshed out proposal for implementing a positive obligation to act fairly, or incorporate fairness considerations into platform design and operation. We do, however, think there are different ways this could be approached. One option would be to engage with the new EU model of regulation and consumer protection based on obligations to conduct **risk assessment** and **risk monitoring.** Their potential; how that potential could be realised; how it could be managed globally and what smaller countries might contribute to such a vision would be interesting to

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[38] UK Competition and Markets Authority, *Algorithms: How They Can Reduce Competition and Harm Consumers* (2021).

[39] See Draft AI Regulation, Art 5.1, prohibiting 'the placing on the market, putting into service or use of an AI system that deploys subliminal techniques beyond a person's consciousness in order to materially distort a person's behaviour in a manner that causes or is likely to cause that person or another person physical or psychological harm'. The requirement that techniques be deployed *in order to materially distort* behaviour could suggest a requirement of intention.

[40] *Corporations Act 2001* (Cth) s 912A.

consider. This is a positive obligation to take steps to consider, and incorporate concerns regarding the fairness of a platforms systems, but *not* an obligation to achieve fairness.

Alternatively, the ACCC could consider imposing a duty something like that which applies in financial services/insurance: a duty to provide services efficiently, honestly, and fairly (or some language along those lines). One advantage of considering a positive obligation of that kind is that there is some potential to build on work in the technical literature, and in standards organisations, to develop guidance on how to ensure more fair automated systems and artificial intelligence. That literature is dedicated, not to developing a list of what constitutes *unfair* treatment or an unfair system, but how an organisation can ensure that their system is fair (or more fair), including according to more distributional metrics.

These two approaches are obviously very different, and any reform of this kind would need to be considered in conjunction with other regulatory initiatives that may come out of the *Privacy Act Review*. We would be happy to discuss this further with the ACCC as development continues, and/or elaborate on the brief points made here.

Chapter 8: Potential new rules and measures: addressing data disadvantages

8. A number of potential regulatory measures could increase data access in the supply of digital platform services in Australia and thereby reduce barriers to entry and expansion such as data portability, data interoperability, data sharing, or mandatory data access. In relation to each of these potential options:
   a) What are the benefits and risks of each measure?
   b) Which data access measure is most appropriate for each of the key digital platform services identified in question 6 (i.e. which would be the most effective in increasing competition for each of these services)?
   c) What types of data (for example, click-and-query data, pricing data, consumer usage data) should be subject to these measures?
   d) What types of safeguards would be required to ensure that these measures do not compromise consumers' privacy?

9. Data limitation measures would limit data use in the supply of digital platform services in Australia:
   a) What are the benefits and risks of introducing such measures?
   b) Which digital platform services, out of those identified in question 6, would benefit (in terms of increased competition or reduced consumer harm) from the introduction of data limitation measures and in what circumstances?
   c) Which types of data should be subject to a data limitation measure?

10. In what circumstances might increasing data access be appropriate and in what circumstances might limiting data use be appropriate? What are the relative benefits and risks of these two approaches?

We have some concerns about the approach of the Discussion Paper in relation to data. In our view, the ACCC ought not adopt an approach that (as submitted by Weatherall and others in another inquiry[41]) "assumes the legitimacy of transparent, but almost unrestricted exploitation of Australians' data and attention. An alternative model could retain consumer choice alongside some collectively determined limits that protect people's basic privacy, and set some limits on commercial data flows and exploitation, in the interests of people, and Australian society."

The harms we have discussed above arise, in significant part, from the platform business model, in which there are strong incentives to "turn everything about people into data", with constant incentives to collect more, more detailed, data streams about individuals. In this environment, as the earlier submission pointed out, "no one actor can eschew data collection without incurring economic disadvantage and giving the advantage to competitors". This undermines, as we noted earlier, the ability of competition reforms to address consumer harms.

Again, as noted in the earlier submission,

> 'Regulation can change these incentives or limit their operation. In other jurisdictions, legislators are considering limiting the use of tracking technologies, third party cookies, and fingerprinting techniques (See e.g. EU Proposal for a Regulation on Privacy and Electronic Communications COM(2017) 10 final (10 January 2017)). Other overseas proposals would prohibiting some activities, and imposing additional limits on uses of data perceived to involve higher risk (for example, the EU's proposed Artificial Intelligence Act) and specifically regulate targeting of political messages (eg EU Proposal for a Regulation on the transparency and targeting of political advertising, COM(2021) 731 final (25 November 2021)). These initiatives reflect a growing realisation that ever-intensifying datafication of everything is incompatible with people's, and society's, well-being'.

We urge the ACCC to read, and take into account, the points made in the earlier submission: Goldenfein, Jake and Weatherall, Kimberlee Gai and Parker, Christine, Online Privacy Bill Consultation Submission (December 6, 2021). Available at
SSRN: https://ssrn.com/abstract=4015915 or http://dx.doi.org/10.2139/ssrn.4015915.

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[41] Goldenfein, Jake and Weatherall, Kimberlee Gai and Parker, Christine, Online Privacy Bill Consultation Submission (December 6, 2021). Available at
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