

02 September 2019

By email: DPIconsultation@treasury.gov.au

Structural Reform Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Madam/Sir

Final Report of ACCC Digital Platforms Inquiry

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide a submission on the Final Report of the Australian Competition & Consumer Commission (**ACCC**) Digital Platforms Inquiry (**DPI**).

This submission focuses primarily on Recommendation 21: prohibition against certain unfair trading practices. If adopted, this recommendation can help ensure the Australian Consumer Law (**ACL**) reflects the community expectation that consumers are treated fairly. Consumer Action considers it important that, if the provision is to have a normative effect on business practice, it should be drawn in a wide fashion, have an economy-wide effect, and not be constrained to applying to certain types of practice or business sectors. In this submission we set out the key reasons for adopting a prohibition on unfair platform, as well as provide comment on the scope of such a provision.

Other recommendations of the DPI Final Report particularly supported by Consumer Action, and commented on in this submission, are:

- Recommendation 3: Changes to search engine and internet browser defaults
- Recommendation 4: Proactive investigation, monitoring and enforcement of issues in markets in which digital platforms operate
- Recommendation 16: Strengthening protections in the Privacy Act
- Recommendation 17: Broader reform of Australian privacy law
- Recommendation 18: OAIC privacy code for digital platforms
- Recommendation 19: Statutory tort for serious invasions of privacy
- Recommendation 20: Prohibition against unfair contract terms

- Recommendation 22: Digital platforms to comply with internal dispute resolution requirements
- Recommendation 23: Establishment of an ombudsman scheme to resolve complaints and disputes with digital platform providers

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

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Prohibition against unfair trading practices

Why adopt a provision on unfairness?

Fairness is an important community norm

The Final Report of the Royal Commission into Misconduct in the Banking, Finance and Superannuation Industry (**Banking Royal Commission**) identified six norms of conduct, one of which was to 'act fairly'.¹ This is now a widely recognised norm of business practice in Australia.

Not only is fairness important to meet community expectations, treating customers fairly contributes to the long-term interest of firms and the economy more broadly. It is increasingly recognised both in Australia and internationally that firms need to be promoting not just the interests of shareholders, but the interests of the wider community, in particular customers to whom they supply goods and services.² An economy-wide prohibition on unfair trading practices will promote this global shift, and bring our laws more in line with those in other OECD countries. As recognised by the ACCC, comparable jurisdictions (including the European Union, the United Kingdom, USA, Canada and Singapore) all have provisions relating to unfair trading practices.

The norm of fairness is also recognised in the objective of the *Competition and Consumer Act 2010* (Cth) (**CCA**). The objective is 'to enhance the welfare of Australians through the promotion of competition and *fair trading* and provision for consumer protection' (emphasis added). Enacting an economy-wide prohibition on unfair trade practices will ensure the ACL (schedule 2 of the CCA) better meets the objective of the law.

Unfair business models and practices are incessant

Consumer harm continues in the face of existing consumer protections. Harmful business models and practices persist and, as outlined further below, case law confirms that practices that are unfair may not be unlawful. Harmful business models and practices that are lawful include not only those related to digital platforms or the digital economy, but those that operate far more broadly. These include but are not limited to:

- Services requiring provision of detailed personal information without a business or legitimate reason for that information, enabling the service to monetise that information through profiling and target marketing;
- Subscription traps, which include business models that are free upfront or for an initial period, but terms and conditions require ongoing payment³;
- Services, memberships or marketing emails that make cancellation difficult, or employ confusing or tricky questions to cancel⁴;
- Bundling products or services in such a way that prevents price comparison⁵;

¹ Royal Commission into Misconduct in the Banking, Finance and Superannuation Industry, Final Report, page 8.

² Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans', 19 August 2019, available at: <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

³ See, e.g., <https://www.choice.com.au/shopping/online-shopping/buying-online/articles/beware-subscription-traps-warns-acc>

⁴ See, e.g. Mathur et al, 'Dark Patterns at Scale: Findings from a Crawl of 11k Shopping Websites', July 2019, available at: <https://webtransparency.cs.princeton.edu/dark-patterns/assets/dark-patterns-v2.pdf>. Page 15-16 includes a frustrating example: "Are you sure you want to cancel your membership" You will no longer receive membership pricing: click "continue" or "cancel".

⁵ See, e.g., <https://www.darkpatterns.org/types-of-dark-pattern/price-comparison-prevention>

- Charging loyal customers far more for the same product compared to new customers, without a legitimate justification or economic reason⁶;
- Marketing practices or product disclosures that do not include clear, upfront and timely information that may lead the purchaser into error; and
- Business models that target consumer vulnerabilities or behavioural biases, distorting the consumer's free choice.

The operation of the free market in Australia has failed to deliver fair outcomes. The above list demonstrates this—the market has not prevented these substantive unfair practices from becoming widespread. Moreover, these unfair practices are more likely to impact disadvantaged or vulnerable groups. Consumers that are less savvy or less able to protect their own interests, for example due to factors like age, language, health or capacity, are more likely to experience detriment associated with unfair practices.

It is sometimes suggested that more effective competition will incentivise suppliers to meet customer needs. Effective competition is indeed an important discipline on business conduct. However, it is now clear that competition has failed to deliver fair outcomes. Across regulated markets like energy, financial services and education, more and more competition has created new opportunities for consumer harm:

- In energy, the Independent Review of Electricity and Gas Retail Markets in Victoria found that competition had added additional costs to the market which have not been offset by benefits and that market practices had resulted in confusing contracts and pricing that even knowledgeable consumers find hard to navigate.⁷
- In financial services, the Productivity Commission found that competition has delivered a 'blizzard of barely differentiated products' and that huge product variety combined with price obfuscation provides latitude for exploitative price discrimination. The Productivity Commission was particularly concerned about existing customers that get a poor offer, that is, exploitation of customer loyalty.⁸
- In education, the promotion of competition in vocational training resulted in widespread unfair conduct in the marketing of training (including unsolicited selling and the use of inducements), inflated costs, and a severe reduction in quality.⁹

The DPI Final Report confirms problems with competition in the context of digital platforms, and market power held by the big platforms such as Facebook and Google. However, it is highly unlikely that more competition will deliver fairer outcomes. As identified by the ACCC, harmful practices relating to data collection (including location tracking, online tracking for targeted advertising purposes, and the disclosure of data to third parties) are common in businesses beyond the big digital platforms. The business incentives created by competition and free market orthodoxy serve to embed these practices of concern, rather than deliver on community expectations relating to fairness. It is for this reason that consumer law has a very important role to play.

⁶ See, e.g., Competition and Markets Authority, Loyalty Penalty Super-Complaint, available at: <https://www.gov.uk/cma-cases/loyalty-penalty-super-complaint>

⁷ Independent Review of Electricity and Gas Retail Markets in Victoria (Thwaites Review), Final Report, August 2017, available at: <https://engage.vic.gov.au/review-electricity-and-gas-retail-markets-victoria>.

⁸ Productivity Commission, Competition in the Australian Financial System, August 2018, available at: <https://www.pc.gov.au/inquiries/completed/financial-system/report>

⁹ Senate Standing Committee on Education and Employment, The operation, regulation and funding of private vocational education and training (VET) providers in Australia, October 2015, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/vocational/Final_Report

There are gaps in our consumer law when it comes to fairness

The Final Report of the Banking Royal Commission stated that while fairness as a norm of conduct is reflected in existing laws, 'the reflection is piecemeal'.¹⁰ A key gap is that the ACL does not prohibit unfair trade practices. Instead, it prohibits misleading and deceptive conduct, unconscionable conduct and unfair contract terms.

(i) Misleading and deceptive conduct

The prohibition against misleading and deceptive conduct in section 18 of the ACL is a powerful provision, but it has some weaknesses. Many of the previously mentioned practices may be claimed to be deceptive. However, it has proven almost impossible to prove 'deceptive' conduct against large, modern companies. As argued by Elise Bant, deception requires there to be deliberate dishonesty and knowledge on those who are the 'directing mind and will' of the company.¹¹

'In large corporations, where roles and responsibilities are dispersed between a huge array of managers, employers and agents, attributing knowledge and dishonesty to defined and "leading" individuals is incredibly challenging and expensive for regulators and victims.

Faced with the almost impossible difficulty of proving fraud in corporate contexts, private litigants and regulators instead focus on conduct that is "misleading... or likely to mislead" rather than "deceptive".'

The prohibition on conduct that is misleading or is likely to mislead also has gaps. Judicial interpretation confirms that this prohibition does not require a business to be upfront in its communication. There have been divergent approaches for determining whether omissions (that is, a failure to disclose information) may be misleading. One approach is to analyse the conduct viewed as a whole and to determine whether it conveys a representation that is misleading.¹² Another approach is to analyse whether the circumstances give rise to a 'reasonable expectation' that if some relevant fact existed, it would be disclosed to the person who claimed to be misled.¹³ In any event, examples abound where customers are lawfully not informed of material information such that they incur detriment.

An example can be found in the decision *Australian Competition & Consumer Commission v AGL South Australia Pty Ltd*.¹⁴ In this case, the energy provider AGL had signed certain residential customers up to energy plans in 2012. In mid-2013, the rates for these customers were increased, but the customers were informed that there was no change in the discount they would continue to receive under their energy plan. This representation was found to be not misleading, and there was no obligation on AGL to inform its customers that the underlying rates had increased. This practice made it more likely that the customers did not shop around and were thus paying a higher price than was reasonable.

Another example is the decision of *Australian Competition & Consumer Commission v LG Electronics Australia Pty Ltd*.¹⁵ In this case, LG Electronics made statements outlining what it was prepared to offer a customer as a remedy for a defective appliance, where a manufacturer's warranty had expired. These statements were found not to be misleading. This is despite the consumer guarantee provisions of the ACL providing the customer with remedies greater than what was being offered by LG Electronics. The court held that these were mere 'offers', as part of a 'negotiation', and were not considered to be representations of the consumers' statutory rights. The findings in

¹⁰ Above n 1, page 9.

¹¹ <https://pursuit.unimelb.edu.au/articles/misleading-conduct-so-what>. See also section 139B(1) of the CCA.

¹² *Miller & Associated Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31 at [23].

¹³ *Demagogue v Ramensky* [1992] FCA 557.

¹⁴ [2014] FCA 1369.

¹⁵ [2018] FCAFC 96.

this case put the onus on the customer to know their consumer guarantee rights and, if they don't, they are likely to suffer detriment by agreeing to a remedy less than those rights.

These cases might be contrasted with the European Union and United Kingdom laws relating to unfair commercial practices, which covers misleading omissions. This provision prohibits conduct that 'hides or provides [material information] in an unclear, unintelligible, ambiguous or untimely manner'.¹⁶

(ii) Unconscionable conduct

The statutory prohibition on unconscionable conduct similarly fails to address conduct that has a harsh or unfair impact on consumers.

The case of *Australian Competition & Consumer Commission v Medibank Private Ltd*¹⁷ (*Medibank decision*) is an example. In this case, the private health insurer Medibank failed to notify its members about a decision to limit benefits for certain services, despite previously representing across a number of its communication and marketing materials that it would provide such benefits. The Federal Court held Medibank acted harshly and unfairly but found this did not pass the threshold of statutory unconscionability.

The recent High Court decision in *Australian Securities & Investments Commission v Kobelt*¹⁸ (*Kobelt decision*) provides a further example. This case involved the provision of credit known as 'book up' which targeted Indigenous consumers in the Anangu Pitjantjatjara Yankunytjatjara Lands (APY Lands) in remote South Australia. The scheme involved the operator of a general store withdrawing significant amounts of money from his customer's accounts for current and future purchases, depriving them of the independent means of obtaining the necessities of life and creating a dependence upon the store. The majority of the High Court found that unconscionable conduct requires the wrongdoer taking unconscientious advantage of another, determining that the operator of the general store had not engaged in undue influence, pressure or trickery.

This approach aligns the statutory prohibition on unconscionable conduct with equitable notions of unconscionability, requiring a high degree of moral wrongdoing on behalf of the trader. As discussed further below, it fails to adequately consider the harm conditioned on the consumer nor the fairness of the outcome of the transaction.

(iii) Unfair contract terms

Unfairness does already exist in the ACL, in the guise of the prohibition on unfair contract terms. This prohibition, however, relates specifically to the terms of a regulated contract, and the prohibition doesn't deal with other harmful practices beyond the contract terms. This could include unfair marketing or information provision (that does not amount to misleading conduct), as well as aggressive practices like using a customer's personal information in ways that the consumer does not understand or expect to influence product or service design or pricing.

¹⁶ European Commission, Directive 2005/29/EC on Unfair Commercial Practices, [2005] OJ L 149/22, available at: http://ec.europa.eu/consumers/consumer_rights/unfairtrade/unfair-practices/index_en.htm. Implemented in the UK through the Consumer Protection from Unfair Trading Regulations 2008.

¹⁷ [2018] FCAFC 235.

¹⁸ [2019] HCA 18

(iv) Licensing schemes

As extolled by the Banking Royal Commission, fairness forms part of several industry-specific regulatory regimes. The general obligations on financial services licensees and credit licensees include an obligation to 'do all things necessary to ensure services covered by the licence are provided efficiently, honestly and fairly'.¹⁹ However, these provisions only operate in relation to licensees. Given these existing obligations, it should not be seen to be a stretch to extend a provision relating to fairness across other firms in the economy.

Judicial interpretation of the meaning of 'efficiently, honestly and fairly' in this context is not voluminous, but several judgments have identified the following principles in cases related to licensees that offer investments:²⁰

- The words 'efficiently, honestly and fairly' must be read as a compendious obligation meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.
- The words connote a requirement of competence in providing advice and in complying with relevant statutory obligations. They also connote an element not just of even handedness in dealing with clients but a less readily defined concept of sound ethical values and judgment in matters relevant to a client's affairs.
- The word 'efficient' refers to a person who performs their duties efficiently, meaning the person is adequate in performance, produces the desired effect, is capable, competent and adequate. Inefficiency may be established by demonstrating that the performance of a licensee's functions falls short of the reasonable standard of performance that the public is entitled to expect.
- It is not necessary to establish dishonesty in the criminal sense. The word 'honestly' may comprehend conduct which is not criminal, but which is morally wrong in the commercial sense.
- The word 'honestly' when used in conjunction with the word 'fairly' tends to give the flavour of a person who not only is not dishonest, but also a person who is ethically sound.

These principles may be helpful in considering the scope of a provision relating to fairness, as described further below.

An unfair provision can promote a focus on consumer outcomes

A particular benefit of a prohibition against unfair trade practices is that it can help focus on outcomes, rather than process or actions that a firm might take to comply with the law. Rather than prescribe rules, a principle that promotes fair outcomes for consumers may be more likely to deliver on the community norms relating to fair dealing.

As described above, a key disadvantage associated with the prohibition on unconscionable conduct is that it focuses on the conduct of the wrongdoer, rather than the impact or outcome for the customer or marketplace. The judgments of Justices Gaeglar and Keane, which each formed part of the majority in the *Kobelt* decision, demonstrate this focus. Justice Keane asserted that for conduct to be unconscionable it had to exhibit a high level

¹⁹ Section 912A(1)(a) *Corporations Act 2001*; section 47(1)(a) *National Consumer Credit Protection Act 2009* (Cth)

²⁰ *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* [2-12] FCA 414; *Australian Securities and Investments Commission v Avestra Asset Management Ltd (in liq)* [2017] FCA 497.

of moral obloquy consistent with predatory conduct.²¹ Justice Gageler, while admitting that the concept of moral obloquy was not helpful, nevertheless maintained that for conduct to be condemned as unconscionable it should be conduct that falls well outside societal norms of accepted commercial behaviour.²²

This focus on the conduct of the wrongdoer can be also seen in the judgment of Justice Perram in the *Medibank* decision, where his honour said:²³

'[T]he fact that conduct may be said to have had harsh consequences on a class of members does not in and of itself establish that it was unconscionable. To repeat, neither unfair conduct nor harsh conduct nor both are sufficient to establish unconscionable conduct.'

This focus on the wrongdoer rather than the impact or outcome of conduct is a key reason why the prohibition on unconscionable conduct has not delivered on the community expectation associated with fair dealing.

In other areas of law, where it has been recognised that a law focusing on conduct rather than impact did not meet community expectations, reform has been enacted. For example, in the context of corporations law, reform occurred in relation to minority shareholder rights following recognition that the remedy of oppression imposed too high a bar because it focused on conduct of the majority rather than the impact on the minority.²⁴

Parliament intended to encourage a more liberal interpretation of the prohibition on statutory unconscionable conduct, but the courts have read down the provision by focusing on conduct rather than impact. This was described by Justice Edelman in the *Kobelt* decision, when he emphasised the fact that there are two provisions relating to unconscionable conduct—section 20 of the ACL which prohibits unconscionable conduct within the meaning of the underwritten law (thus drawing on equitable notions of unconscionable dealing) and section 21 which prohibits conduct which, in all the circumstances, unconscionable. The latter was intended to be broader, with the second reading speech stated that the intent was 'to extend the common law doctrine of unconscionable conduct'.²⁵

In 2010, after concerns that the law was not being interpreted broadly enough, further changes were made to the provision in recognition that the 'current interpretation sets the bar too high'.²⁶ Two years later, further amendments were adopted to clarify that the prohibition was not to be limited to equitable or common-law doctrines of unconscionable conduct.²⁷ Interpretive principles were also inserted to make clear that the proscription can apply to a system of conduct or a pattern of behaviour and a specific person with a special disadvantage need not be identified,²⁸ and that unconscionable conduct 'can extend beyond the formation of the contract to both its terms and the way in which it is carried out'.²⁹

But as stated by Justice Edelman:³⁰

'This legislative history clearly demonstrates that although Parliament's proscriptions against unconscionable conduct initially built upon the equitable foundations of that concept, over the last two decades Parliament has repeatedly amended the statutory proscription against

²¹ [2019] HCA 18 at [119-120].

²² [2019] HCA 18 at [91].

²³ [2018] FCAFC 235 at [349].

²⁴ Jennifer Hill, 'Protecting Minority Shareholders and Reasonable Expectations', (1992) 10 *Company and Securities Law Journal* 86-104.

²⁵ Australia, House of Representatives, Parliamentary Debates (Hansard), 30 September 1997 at 8800.

²⁶ Australia, Senate, Standing Committee on Economics, The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974 (2008) at 32 [5.6]

²⁷ Section 21(4)(a), ACL.

²⁸ Section 21(4)(b), ACL.

²⁹ Section 21(4)(c), ACL.

³⁰ [2019] HCA 18 at [49]

unconscionable conduct in continued efforts to require courts to take a less restrictive approach shorn from either of the equitable preconditions imposed in the twentieth century, by which equity had raised the required bar of moral disapprobation. In particular, statutory unconscionability permits consideration of, but no longer requires, (i) special disadvantage, or (ii) any taking advantage of that special disadvantage. Like other open-textured criteria, such as "unfair" or "unjust", there is no clear baseline moral standard for what constitutes "unconscionable" conduct within [the provision]. Nevertheless, the history of development of that statutory proscription demonstrates a clear legislative intention that the bar over which conduct will be unconscionable must be lower than that developed in equity even if the bar might not have been lowered to the "unreasonableness" and "unfairness" assessments in the various categories in nineteenth century equity'

Ultimately, Justice Edelman suggests that if there is to be a lowering of the bar, it 'may only be possible if "unconscionable" is replaced with "unjust" or "unfair"'.³¹

Others also have supported replacing the statutory provision relating to unconscionable conduct with one focused on unfair conduct. Such an approach may make the law more accessible to those in business.³² This argument was recently affirmed by President of the Victorian Court of Appeal, Justice Maxwell, in his Victorian Law Oration, stating that if the law is:³³

'to promote and encourage moral awareness and moral agency in the market place', then 'it would certainly promote better understanding by all concerned—and, it might be hoped, higher standards of conduct—if we had a prohibition on conduct which was "in all the circumstances, unfair"'.

Consumer Action strongly supports this reasoning. Not only is it a problem that the courts have read the existing provision too narrowly, it is a problem of the term 'unconscionable' itself. It is a term that is not understood by the general community (including the business community) so it is overlooked, even by legal advisers to business. Replacing it with fairness will encourage businesses to consider the impact of their conduct on consumers and can thus play a role in contributing to cultural change in Australian industry.

Conceiving fairness: the scope of a provision on unfairness

As outlined above, an economy-wide provision prohibiting unfair trade practices should ensure that not only the practices of firms are fair in terms of the processes followed but in terms of the outcomes delivered. This would include, for example, the prices consumers pay. This supports a move towards outcomes-based regulation and a focus on good culture within firms. Such an approach can also mitigate harms associated with unequal outcomes among different classes of consumers in market, particularly consumers experiencing vulnerability.

Consumer Action considers that this can be achieved through a simple principles-based provision prohibiting unfair trade practices, including practices that are likely to have an unfair outcome. The detail of the provision can be left to guidance from regulators about expectations of firms, as well as later interpretation of the courts. In this way, a prohibition on unfair trade practices can complement the other principles-based provisions in the ACL. To

³¹ [2019] HCA 18 at [311].

³² Paterson and Brody, "'Safety Net' Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models" (2015) 38 Journal of Consumer Policy 331 at 352.

³³ Hon Justice Chris Maxwell, President, Victorian Court of Appeal, 'Equity and good conscience: the judge as moral arbiter and the regulation of modern commerce', Victorian Law Foundation Oration, 14 August 2019, available at https://www.victorialawfoundation.org.au/sites/default/files/attachments/victoria_law_foundation_law_oration_2019_-_equity_and_good_conscience_final.pdf

operate as a community norm, in both a preventative and remedial fashion, we consider it unnecessary for the scope of the provision to be restricted or limited in the legislation itself.

That said, it is helpful to conceive the scope of such a provision to understand its import and impact. In conceiving the scope of a provision prohibiting unfair trade practices, we consider that it is helpful to consider the life course of a consumer transaction or service: covering sales and marketing; product design & pricing; as well as service elements, including post-sale customer service. It is also useful to draw upon the analytical framework that already exists for unfair contract terms, that is, whether there is a legitimate business purpose associated with the particular practice and whether it results in an imbalanced outcome for the consumer.

Marketing: addressing manipulation

Marketing that impacts or restricts the freedom of choice of a consumer (without good reason) might be considered manipulation and an unfair trade practice. Manipulation also involves consumer harm that is not reasonably avoidable by a consumer.

The widespread digitation of commerce has given firms an enhanced ability, not only to compile detailed customer profiles, but also exploit consumers' cognitive biases and individual vulnerabilities. The collection of a greater amount of intimate and personalised data creates the opportunity to target market, and even subvert or manipulate reasonable decision-making by consumers.

A provision that enables consideration about the impact on the consumer (i.e. was, or is it likely, that harm is incurred) will improve the operation of consumer law; compared to unconscionable conduct which focuses on the conduct of the firm and whether it is against some sort of social norm.

Core product purpose: design and pricing

Clearly identifying a core product purpose is an important aspect of fairness, as it provides a yardstick for assessing consumer outcomes. A consumer product or service needs to have a reason for existing (other than a customer paying for and using it, and the firm supplying it).

A related aspect of fairness involves ensuring that the commercial returns to the firm associated with the product arise predominantly from consumer outcomes that are consistent with the product's purpose. This analysis would then help identify unfair practices—such as, offering discounts to new customers that aren't replicated for loyal/ongoing customers (a problem in insurance, mortgages, energy) or paying intermediaries (brokers, advertisers, comparison websites) rebates or commissions, creating risks associated with misaligned incentives.

This analysis builds on existing rules around fitness for purpose but has a greater focus on fair outcomes, that is, is the product or service likely to meet a consumer need. A key limitation of the existing ACL provisions relating to fitness for purpose is that they generally only apply if the consumer discloses their purpose for purchasing a particular product or service.³⁴ In most instances, consumers do not disclose a specific purpose.

Addressing vulnerability: universal design

Fairness is also about ensuring consumers experiencing vulnerability do not experience worse outcomes than more capable consumers. Where consumers have limited ability to maximise their wellbeing, or have difficulty in obtaining or assimilating information, due for example to age, disability or background, they are less able to buy, choose, or access suitable products.

³⁴ Sections 55 and 61, ACL.

A requirement around fairness can require a better balance between business and customer responsibilities—it can help address the incessant problems caused by long and impenetrable terms and conditions by ensuring that businesses are more upfront with their customers. It can also require businesses to identify potential consumer harm caused by their products and service systems, adopting a ‘prevention is better than cure’ approach. Importantly, it can also address problems in the area of customer service and complaints processes, which can commonly be designed for those have capability rather than those who experience vulnerability. An unfair trade practice may be one that incorporates unnecessary barriers to service assistance.

Fairness can also help establish a universal approach to addressing vulnerability, moving away from a policy approach that focused solely on specific areas of disadvantage.³⁵ In this way, a regulatory focus on fairness would improve the position of all consumers, including those who need more support due to their vulnerable characteristics or circumstances.

RECOMMENDATION 1. Address unfair trade practices through a simple, principles-based, outcomes-focused new provision in the Australian Consumer Law prohibiting unfair trade practices, including practices that are likely to have an unfair outcome.

RECOMMENDATION 2. The scope of the provision should not be limited, but regulatory guidance can be provided to help businesses understand what is meant by unfair conduct or practices, including in the areas of:

- Marketing and sales, particularly addressing harm associated with consumer manipulation;
- Product or service design and pricing, drawing on the concepts of a legitimate business purpose and fitness for purpose; and
- Customer service and complaints processes, ensuring service is responsive to customer vulnerability.

Other recommendations

Smart regulation—use of defaults

Consumer Action is not convinced that enhancements to privacy law alone will be effective in preventing consumer harm associated with the digital economy.

While we do support **recommendation 16** and **recommendation 17**, protections based in privacy law necessarily suffer from some key weaknesses if the goal is to limit harm. This is because privacy law is largely based on the concept of consumer consent, and the incentives remain on industry to distort consent processes. Particularly for business models where data is the currency, it will remain difficult to ensure compliance as businesses find new and tricky ways to gain consent.

Requiring consent as a condition of accessing a service is a common way in which businesses distort consumer preferences. More subtle methods of distorting consumer choice include using means like urgency (‘opportunity ends soon’), social proof (‘others like you have made this choice’) or interference (a good example of this is ‘confirm-shaming’: framing a choice in a way that makes it seem dishonourable or stupid not to choose it). Reliance

³⁵ Consumer Action, Submission to ABA Guideline on Customer Vulnerability, June 2019, available at: <https://consumeraction.org.au/20190613-vulnerable-customers/>.

on consent is also likely to negatively affect more vulnerable consumers; those who lack capability may be more easily swayed by businesses.

Furthermore, strengthening privacy law does little to address harm associated from problematic algorithms or decision-making processes involving personal data. Nor does it make these processes fully transparent. It is the use of consumer information that can cause harm, and it is disappointing that there is not a proposal for greater oversight of algorithms to restrict discrimination or unfair bias.

It is for this reason that we strongly support greater use of pro-consumer defaults. If there is one lesson from behavioural psychology, it is that consumers can be 'sticky'. In particular, we support **recommendation 3** which requires Google to enable Australian users of Android to choose their browser and search engine. Furthermore, we strongly support **recommendation 16(c)** which proposes that any settings for data practices relying on consent must be pre-selected to 'off' and that different purposes of data collection, use or disclosure must not be bundled.

We would urge that regulatory design more consistently and more often adopt defaults which promote good consumer outcomes. This should be considered, for example, in the development of an enforceable code for digital platforms, as proposed by **recommendation 18**.

RECOMMENDATION 3. Reform privacy law (including any codes regulating digital platforms) in a way that promotes greater use of consumer defaults, recognising the limitation of consent mechanisms.

Strengthen regulators

Consumer Action supports recommendations of the DPI Final Report relating to the strengthening of regulators, particularly **recommendation 4** which proposes establishing a specialist digital platforms branch within the ACCC to undertake proactively investigation, monitoring and enforcement issues in markets.

A well-designed regulatory scheme with robust rules will likely be ineffective in addressing industry or market-wide problems unless there is an active regulator engaging in investigation, monitoring and, importantly, enforcement. Digital platforms are a central part of the Australian community and economy, playing an important role in the sharing of information and community connectedness. In this context, it is necessary that regulators are empowered and resourced to perform their duties effectively.

A key priority for this specialist unit should be to investigate consumer implications associated with increased data collection, including online profiling, target marketing, and price discrimination. While enforcement action should be considered where consumer laws have been breached, monitoring of market practices by the specialist unit (including publication of its findings) will help community understanding about potential harms.

RECOMMENDATION 4. The new specialist digital platforms branch of the ACCC should prioritise investigations into business practices and risks for consumers associated with profiling, target marketing and price discrimination. The unit should publish its findings regularly to aid consumer understanding about potential harms.

Compliance incentives

Consumer Action strongly supports the proposals by the DPI Report to strengthen penalties and provide individual with private rights of action including damages for non-financial harm. There is little point in having laws unless

there is a meaningful deterrent associated with breach. The community expects that where breaches of consumer and privacy laws occur, this is treated seriously and with sufficient consequence.

We particularly support **recommendation 20** which proposes amendments to the ACL so that unfair contract terms are prohibited, meaning that civil penalties apply for the use of an unfair contract term in a standard form contract. We agree that this would more effectively deter businesses from leveraging their bargaining power to include unfair terms in their contracts in the first place.

Similarly, we support **recommendation 16(e)** and **recommendation 16(f)** which propose individual rights of action for interference in privacy and aligning penalties for breaches of the Privacy Act with that of the ACL. In particular, penalties should not be seen as a 'cost of doing business' and their substantial increase is long overdue.

We also support the development of a statutory tort for serious invasion of privacy as proposed by **recommendation 19**. Like individual rights of action under the Privacy Act, a statutory tort would create a greater incentive to comply with privacy expectations. Reliance on the Office of the Australian Information Commissioner alone, which has demonstrated little enforcement appetite, is insufficient to ensure people have control over their privacy and personal information.

RECOMMENDATION 5. Penalties for use of unfair contract terms and breaches of privacy law should align with the penalties for breach of the Australian Consumer Law.

RECOMMENDATION 6. There should be robust individual rights including actions for damages associated with breaches of privacy.

Dispute resolution

Consumer Action strongly supports **recommendation 22** and **recommendation 23** relating to dispute resolution.

We agree with the DPI Final Report that technology-related scams cause considerable social and community harm, and there is currently little incentive for digital platforms to restrict or remove scams from their platforms. We consider that a prohibition on unfair trade practices should require digital platforms to adopt a level of professional competence to not only remove scams when they are complained about, but to take proactive action to prevent consumer scams and fraud.

We also agree with the ACCC that there is substantial room for improvement in the internal dispute resolution processes of digital platforms. It is commonly very difficult for a consumer to find the correct channel to make a complaint, and there is little recourse if the complaint is not dealt with effectively.

We support ACCC's suggestion that internal dispute resolution standards for digital platforms could be modelled on the Australian Securities and Investments Commission's (ASIC) Regulatory Guide 165: Licensing internal and external dispute resolution which incorporates the relevant Australian Standard. Consumer Action has recently made a submission to an ASIC consultation paper seeking to update its regulatory guide.³⁶ This submission proposed that the regulatory guide be strengthened to require firms' internal dispute resolution processes to deliver fair outcomes. We also supported ASIC's proposal to make the core requirements of the regulatory guide enforceable.

³⁶ Consumer Action, Submission to ASIC Consultation Paper 311, Internal Dispute Resolution: Update to Regulatory Guide 165, August 2019, available at: <https://consumeraction.org.au/20190826-idr-rg165/>

As part of establishing an internal dispute resolution regulatory framework for digital platforms, we would urge the concept of transparency be adopted. Data about complaints should be published to incentive digital platforms to improve their dispute resolution processes and provide insight for consumers.

We also strongly support the establishment of an ombudsman scheme for digital platforms and agree that consideration be given to whether the Telecommunications Industry Ombudsman (**TIO**) be this ombudsman. The Productivity Commission has found that industry-based ombudsman schemes play a key role in promoting access to justice by overcoming power imbalances, providing easy-to-use processes and resolving both individual and systemic issues.³⁷ We agree; without ombudsman schemes, hundreds of thousands of people are left without an avenue for redress given courts involve significant cost and other access barriers.

In adopting this recommendation, we urge application of the Treasury Benchmarks for Industry-based Ombudsman Schemes,³⁸ which have widespread support from consumer organisations. The benchmarks are accessibility, independence, fairness, accountability, efficiency and effectiveness. We note that they have been adopted as part of the implementation of the new Australian Financial Complaints Authority.³⁹

Another key success factor of ombudsman schemes has been the involvement of consumer advocates in their development, governance and review. To this end, we urge consideration of the *Good Practice Principles for consumer advocate involvement and expectations of development and reviews of industry codes and external dispute resolution (EDR) schemes* published by the Consumers' Federation of Australia.⁴⁰ These principles, focused on ensuring independence, evaluation of impact, effective engagement and accountability, offer practical guidance to industry or government entities establishing ombudsman schemes.

RECOMMENDATION 7. Standards for internal dispute resolution for digital platforms should align with those that apply in financial services.

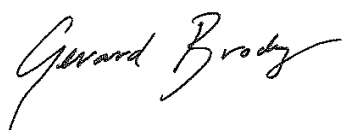
RECOMMENDATION 8. Data about complaints should be published to incentive digital platforms to improve their dispute resolution processes and provide insight for consumers.

RECOMMENDATION 9. In establishing an ombudsman scheme for digital platforms, adopt the Treasury Benchmarks for Industry-based Ombudsman Schemes and the Consumers' Federation of Australia Good Practice Principles.

Please contact **Consumer Action Law Centre** on 03 9670 5088 or at info@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody | Chief Executive Officer

³⁷ Productivity Commission, Access to Justice Arrangements, Inquiry Report, volume 1, pages 315-16, available at: <https://www.pc.gov.au/inquiries/completed/access-justice/report>.

³⁸ Treasury, Benchmarks for Industry-based Customer Dispute Resolution, 2017, available at: https://static.treasury.gov.au/uploads/sites/1/2017/06/benchmarks_ind_cust_dispute_reso.pdf

³⁹ *Corporations Act 2001* (Cth), section 1051A, added by Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018.

⁴⁰ Consumers' Federation of Australia, Good Practice Principles for consumer advocate involvement and expectations of development and reviews of industry codes and external dispute resolution (EDR) schemes, available at: <http://consumersfederation.org.au/wp-content/uploads/2018/05/Guidelines-Codes-EDR-Schemes.pdf>

APPENDIX A - SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1. Address unfair trade practices through a simple, principles-based, outcomes-focused new provision in the Australian Consumer Law prohibiting unfair trade practices, including practices that are likely to have an unfair outcome.

RECOMMENDATION 2. The scope of the provision should not be limited, but regulatory guidance can be provided to help businesses understand what is meant by unfair conduct or practices, including in the areas of:

- Marketing and sales, particularly addressing harm associated with consumer manipulation;
- Product or service design and pricing, drawing on the concepts of a legitimate business purpose and fitness for purpose; and
- Customer service and complaints processes, ensuring service is responsive to customer vulnerability.

RECOMMENDATION 3. Reform privacy law (including any codes regulating digital platforms) in a way that promotes greater use of consumer defaults, recognising the limitation of consent mechanisms.

RECOMMENDATION 4. The new specialist digital platforms branch of the ACCC should prioritise investigations into business practices and risks for consumers associated with profiling, target marketing and price discrimination. The unit should publish its findings regularly to aid consumer understanding about potential harms.

RECOMMENDATION 5. Penalties for use of unfair contract terms and breaches of privacy law should align with the penalties for breach of the Australian Consumer Law.

RECOMMENDATION 6. There should be robust individual rights including actions for damages associated with breaches of privacy.

RECOMMENDATION 7. Standards for internal dispute resolution for digital platforms should align with those that apply in financial services.

RECOMMENDATION 8. Data about complaints should be published to incentive digital platforms to improve their dispute resolution processes and provide insight for consumers.

RECOMMENDATION 9. In establishing an ombudsman scheme for digital platforms, adopt the Treasury Benchmarks for Industry-based Ombudsman Schemes and the Consumers' Federation of Australia Good Practice Principles.