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The Treasury
By Email: consumerlaw@treasury.gov.au

Protecting consumers from unfair trading practices: Consultation Regulation Impact Statement

About us

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About this Submission

We are grateful for the opportunity to make a submission on the Consultation Regulation Impact Statement *Protecting consumers from unfair trading practices*. Our submission reflects our views as researchers; they are not an institutional position. This submission can be made public.

We have only provided answers to the questions on which we have research expertise. Our main points relate to:

- Defining and scoping an unfair trading practices prohibition;
- The impact of an unfair trading practices prohibition on digital consumer manipulation;
- The adequacy of an unfair trading practices prohibition in mitigating harm to consumers; and
- Remedies and penalties.

Note that while our answers are provided in one document, we are responding as individual researchers. Therefore each response is headed by the name of the researcher making that

response, and does not indicate that every researcher agrees in whole or in part with every response.

Key focus questions

2. How do you think unfair should be defined in the context of an unfair trading prohibition? What, if any, Australian or overseas precedent should be considered when developing the definition? Are there things which you think should be included, or excluded, from the definition?

May Fong Cheong[1]

This submission supports the introduction of a new provision to the *Australian Consumer Law* (ACL) containing a general prohibition on unfair trading practices. The submission recommends the adoption of the unfairness test in the *Unfair Commercial Practices Directive* (UPCD)[2] which was implemented in the UK *Consumer Protection from Unfair Trading Regulations 2008* (CPR).[3] The Directive has the objective to provide a high level of protection against unfair commercial practices between business and consumers in the internal market and to promote market integration in Europe.[4] The European Commission's most recent Guidance in 2021 to its Unfair Commercial Practices Directive, replacing its previous Guidance in 2016, clarifies what amounts to unfair commercial practices in the digital world.[5] The submission notes the wider purpose that the Consultation Regulation Impact Statement seeks to achieve,[6] that is, to protect consumers and small business from harms emanating from digital patterns and digital engagement practices.

On the one hand, a general prohibition is warranted due to the increasing sentiment that existing prohibitions such as misleading and deceptive conduct, unconscionable conduct, and unfair contract terms may not offer adequate protection to consumers affected by unfair practices particularly through services provided by digital platforms.[7] On the other hand, any such prohibition on unfair commercial practices should be proportionate and sufficiently certain to take into account the interests of traders/suppliers. Whether or not the new provision adopts the EU/UK terminology of "*commercial practices*", an unfair trading practices prohibition (UTP prohibition) would align with the ACL's references to conduct "in trade or commerce" which has already been the subject of extensive caselaw.

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[1] Associate Professor, School of Private and Commercial Law, UNSW Law & Justice.
[2] Directive 2005/29/EC.
[3] See the Guidance on the CPR issued by the Office of Fair Trading, 2008. After its closure on 1 April 2014, the responsibility of the OFT for the CPR was passed to the Trading Standards and the Competition & Markets Authority.
[4] Stephen Weatherill and Ulf Bernitz, 'Introduction' in Stephen Weatherill, Ulf Bernitz and Stefan Vogenauer (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart Publishing, 2007) 1, 5–6.
[5] See European Commission, Guidance on the interpretation and application of Directive 2005/29/EC (C/2021/9320) [2021] OJ C-526/1, '4.2.7 Data-driven practices and dark patterns' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC1229%2805%29&qid=1640961745514>.
[6] The Treasury, *Protecting consumers from unfair trading practices*, Consultation Regulation Impact Statement, 8-9 (CRI Statement).
[7] Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 26, discussing recommendation 21. See also Nicholas Felstead and Cordelia Egerton-Warbuton, 'A New Regulatory Regime to Address Digital Harm' (2023) 50 *Australian Business Law Review* 374; JM Paterson and E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading: Responding to Exploitative Business Systems in Person and Online' (2021) 44(1) *Journal of Consumer Policy* 1; Kayleen Manwaring, 'Will emerging information technologies outpace consumer protection law? — The case of digital consumer manipulation' (2018) 26 *Competition and Consumer Law Journal* 141.

The **scope and definition** of an UTP prohibition should be broad and should encompass activities outside of a contractual transaction or transaction leading up to the making of a contract. It should also include commercial practices during and after a contract is made which will cover the "examples of potentially unfair trading practices" identified in the CRI Statement.[8] The UTP prohibition should apply to any act or omission of the trader when dealing directly with the consumer, as well as indirectly when there are multiparty dealers in the supply chain. The prohibition should apply to the supply of goods or services and extend to intangible rights such as the right to withdraw from subscriptions.[9]
The submission proposes that the **test** for the UTP prohibition should follow the approach of the general prohibition in the UPCD/CPR that comprises two tests: first, the "*professional diligence*" of the conduct of the trader and second, "*material distortion of the economic behaviour*" of the consumer. The tests focus on the effect of the conduct rather than the forms of conduct which impairs the informed consent of the consumer. The concern is whether the autonomous decision-making and freedom of choice of the consumer has been impaired.[10] In the EU context, the notion of distortion contains an objective component, as to "whether the commercial practices distort the 'outward freedom' of action (*äußere Handlungsfreiheit*)" of a consumer.[11] It does not involve a subjective notion, importing individualistic standards such as fault or good faith. Rather, its ultimate goal is to address market failures resulting from the use of unfair practices, such as where "[c]onsumers buy unwanted products, accept terms and conditions that they would not have accepted, or turn to products that, absent the unfair practice, they would have regarded as inferior substitutes."[12]

Professional diligence is defined (in Article 2(h) of the UCPD and Regulation 2(1) of the CPR) as "the standard of 'special' skill and care that which a trader may reasonably be expected to exercise towards consumers which is commensurate with either — (a) honest market practice in the trader's field of activity, or (b) the general principle of good faith in the trader's field of activity". The standard of skill and care expected of the trader is an objective standard judged by a reasonable person. In view of the broad scope proposed, this definition offers a balanced approached to limit a trader's accountability to conduct where "special" skill is expected of the trader "within the trader's field of activity". The expectation of this standard which is commensurate with "honest market practice" aligns with the upholding of community values endorsed by Australian courts in evaluating statutory unconscionable conduct. In view that the proposed UTP prohibition is aimed at protecting

[8] The Treasury, *Protecting consumers from unfair trading practices*, Consultation Regulation Impact Statement, 9.
[9] "Subscription traps" in the digital world is one of the many examples of dark practices. See Consumer Policy Research Centre, *Duped by Design: Manipulative Online Design* (Report, June 2022) 19–20, 21.
[10] Geraint Howells, Hans-W Micklitz and Thomas Wilhelmsson, *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate, 2006) 102–3.
[11] Geraint Howells, Hans-W Micklitz and Thomas Wilhelmsson, *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate, 2006) 104.
[12] Giuseppe B Abbamonte, 'The UCPD and its General Prohibition' in Stephen Weatherill and Ulf Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart Publishing, 2007) 11, 23.

consumers and small business from harm of (manipulative) online practices, it is timely to consider including the general principle of good faith in this new regime.[13]

The second test employs the notion of "*material distortion*" of a consumer's behaviour. Under Article 5(2) of the UCPD, a commercial practice is unfair where it "materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer". A material distortion occurs where a commercial practice may "appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise". The focus of the concept of "material distortion" is on the consumer's ability to make an informed decision and whether the consumer would have otherwise made a different decision. The material distortion of a consumer's behaviour affects their 'transactional decision'. A "transactional decision" broadly includes 'any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting".[14] Accordingly, this allows "for the UCPD to apply to a variety of cases where a trader's unfair behaviour is not limited to causing the consumer to enter into a sales or service contract".[15]

The objective of a UTP prohibition is to protect consumers and small business from the conduct of traders that impair their ability to make an informed decision that they would not have taken otherwise. The CPR uses the term "*transactional decision*" and the concept of "*material distortion of the economic behaviour of consumers*". The threshold of "materiality" is familiar within the requirements of inducement and reliance in misrepresentation[16] and is appropriate for procedural unfairness in relation to UTP. "Material distortion" in a UTP prohibition may be compared to the "*significant* imbalance" threshold for evaluating substantive unfairness of unfair contract terms in section 24 ACL. While concepts such as "*economic behaviour*" has not been explicitly adopted in the ACL, its introduction in this new proposed UTP prohibition is warranted for a provision which is intended to be "a safety net" clause to fill the gap that the provisions of misleading conduct, unconscionable conduct and the UCTL had left a vacuum. These concepts expressed in economic terms may be introduced in the ACL in view that Australian cases support an economic approach seen in the methodology used by the courts in applying the relevant tests in the ACL.[17]

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[13] Noting that ss 22(1)(l) and 22(2)(i) of the ACL adopted a good faith element in considering whether there was a contravention of unconscionable conduct in s 21 of the ACL. Cf, in relation to the UCTL's use of 'good faith', which the UK incorporated in *Unfair Terms in Consumer Contracts Regulations 1999*, this was not adopted in s 24 of the ACL: see also *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204 at [42].

[14] Directive 2005/29/EC, art 2(k).

[15] European Commission, Guidance on the interpretation and application of Directive 2005/29/EC (C/2021/9320) [2021] OJ C-526/1, Guidance 2.4, referring to Case C-281/12, *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. Arl v Autorità Garante della Concorrenza e del Mercato*, 19 December 2013, at [35], [36] and [38].

[16] See *Gould v Vaggelas* (1985) 157 CLR 215; *Nicolas v Thompson* [1924] VLR 554.

[17] Brenton Lee Worth, "Are We There Yet? A Return to the Rational for Australian Consumer Protection: (2016) 24(1) *Australian Journal of Competition and Consumer Law* 33 *Australian Competition and Consumer Commission v Trivago NV* [2020] FCA 16; (2020) 142 ACSR 338 at [156]–[160], [218].

Importantly, the "material distortion" test in the UCPD employs the standard of the "average consumer", which considers social, cultural, and linguistic factors.[18] It further provides for the "average member of a targeted group of consumers" (which includes young children and the elderly) and the "average" member of a vulnerable group of consumers. In relation to the latter, while there is concern that this approach "risks reducing the state of vulnerability to a simplistic all or nothing inquiry", [19] it has been observed that such a provision is useful to respond to marketing practices of products that may be "misunderstood by inexperienced and therefore "credulous" consumers.[20] The cases cited by the authors support the adoption of these differing thresholds which are cognisant of "the needs of particular disadvantaged or vulnerable groups" and "the reality of consumer behaviour."[21]

Kayleen Manwaring[22]

I believe a general prohibition with a non-exhaustive schedule of specific conduct (with a timely update process) would be the best way to 'define' the prohibition.

My own research has concentrated on 'digital consumer manipulation' (defined below), and the inadequacy of current ACL regulation to properly regulate all egregious types of this conduct.[23] I define 'digital consumer manipulation' as:

> *the use of personalised consumer data collected, processed and/or disseminated by digital technologies, combined with insights from behavioural research, to exploit consumers' cognitive biases, emotions and/or individual vulnerabilities for commercial benefit.*[24]

The analysis I undertook in my research established that digital consumer manipulation (particularly when enabled or facilitated by connected devices) could potentially cause outcomes that conflict with some of the goals of the ACL and of consumer protection generally, including protecting consumers from practices that are unfair, meeting the needs

[18] Directive 2005/29/EC, recital 18.
[19] Jeannie Marie Paterson and Gerard Brody, '"Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models' (2015) 28 *Journal of Consumer Policy* 331, 350 citing *Australian Competition and Consumer Commission v Lux Pty Ltd* [2013] ATPR 42-447 which presented a combination of factors besides the consumers' age and lack of experience that created the condition of vulnerability and citing also J Trzaskowski (2013) 'The unfair commercial practices directive and vulnerable consumers' (Paper presented at 14th Conference of the International Association of Consumer Law, 2013, Sydney, Australia).
[20] Jeannie Marie Paterson and Gerard Brody, '"Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models' (2015) 28 *Journal of Consumer Policy* 331, 351 citing *Australian Competition and Consumer Commission v The Cash Store Pty Ltd (in liq)* [2014] FCA 926.
[21] Stephen Weatherill, 'Who is the 'Average Consumer'?' in Stephen Weatherill, Ulf Bernitz and Stefan Vogenauer (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart Publishing, 2007) 136, 138.
[22] Senior Research Fellow, UNSW Allens Hub for Technology, Law & Innovation; (from 2024) Associate Professor, School of Private and Commercial Law, UNSW Law & Justice; Deputy Chair and NSW Coordinator, IEEE Society on Social Implications of Technology.
[23] Particularly Kayleen Manwaring, 'Will emerging information technologies outpace consumer protection law? The case of digital consumer manipulation' (2018) 26(2) *Competition and Consumer Law Journal* 141; Kayleen Manwaring, 'Surfing the third wave of computing: Consumer Contracting with eObjects in Australia' (PhD Thesis, University of New South Wales, 2019).
[24] Kayleen Manwaring, 'Surfing the third wave of computing: Consumer Contracting with eObjects in Australia' (PhD Thesis, University of New South Wales, 2019), 198.

of those consumers who are most vulnerable or at the most disadvantage,[25] and maintaining informed and autonomous choice for consumers.[26]

However, potential conflict with these goals does not automatically imply that all forms of digital consumer manipulation must be prohibited, as the interests of businesses and the economy in general also need to be taken into account.

Some form of attempted influence by sellers has been a normal part of commercial life for many years. Therefore, very broad prohibitions of any form of digital consumer manipulation are both unrealistic and likely unwarranted. One of the questions to be asked – and hopefully will to some extent be answered by submissions to this consultation - is what types of conduct would be most harmful to consumers. Is it personalised discrimination in pricing? Is it searches for and specific targeting of known vulnerabilities? Is it attempts to *create* vulnerabilities? Are there particular cognitive biases that society generally agrees should not be exploited, while others are fair game for advertisers? All of these areas should be considered as part of an unfair conduct provision, but it seems that some of the most urgent questions arise in relation to attempts to manipulate *vulnerable and disadvantaged groups*, for example children,[27] people with disabilities, the elderly, people with mental health issues, the uneducated, people on low incomes and people with addictions. I submit that the developed law on unconscionable conduct is inadequate in this regard.

Policy Option 3 - Introduce a general prohibition on unfair trading practices

3.5 Should a general prohibition on unfair trading practices define what is considered unfair? If so, what elements should be incorporated? Should a definition of unfair be similar to the recent unfair contract terms amendment under section 24 of the ACL?

May Fong Cheong

Coherence with existing ACL consumer protection provisions particularly section 24 of the ACL

The principle of coherence must guide a (new) unfairness test proposed for a UTP prohibition in view that there is an existing unfairness test in section 24 of the ACL. Using the words of Joseph Raz, the proposed UTP prohibition must not be "self-contradictory, fragmented, disjointed"[28] in relation to existing consumer protection provisions in the ACL including provisions on unconscionable conduct and misleading conduct.

[25] Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) [23.7]–[23.8].
[26] Natali Helberger, 'Profiling and Targeting Consumers in the Internet of Things: A New Challenge for Consumer Law' in Reiner Schulze and Dirk Staudenmayer (eds), *Digital Revolution: Challenges for Contract Law in Practice* (Hart Publishing 2016) 140; United Nations Guidelines for Consumer Protection, GA Res 70/186, UN Doc A/RES/70/186 (adopted 22 December 2015). The Guidelines were first adopted by the General Assembly in resolution 39/248 of 16 April 1985, later expanded by the Economic and Social Council in resolution 1999/7 of 26 July 1999, and revised and adopted by the General Assembly in resolution 70/186 of 22 December 2015: 5, 8, 10.
[27] Kayleen Manwaring and Siddarth Narrain, '41 US states are suing Meta for getting teens hooked on social media. Here's what to expect next' *The Conversation*, 9 November 2023, https://theconversation.com/41-us-states-are-suing-meta-for-getting-teens-hooked-on-social-media-heres-what-to-expect-next-216914.
[28] Joseph Raz, 'The Relevance of Coherence' (1992) 72 *Boston University Law Review* 273, 276.

In relation to the **unfairness test**, it is submitted that adopting the UPCD/CPR unfairness test for the UTP prohibition in the ACL is not "incoherent" with the existing unfairness test in section 24 regulating unfair contract terms. The two tests work differently and are specific to the aims of each of the provisions. The UTP prohibition targets trading *practices* utilising a wide test striking at the core concerns of procedural unfairness, while section 24 addresses core substantive concerns of unfair *terms*.

In relation to the ACL provision on **unconscionable conduct**, the advantage of the proposed UTP prohibition is that it departs from the underlying values underpinning the concept of unconscionability. The standards for the unfairness test for the UTP prohibition does not require the (high) level of moral wrongdoing which has been applied to cases on statutory unconscionability. This is among other reasons rendering the unconscionable conduct provisions inadequate to protect against unfair trading practices.[29] The focus in the UTP prohibition as to whether a commercial practice "materially distorts" the economic behaviour reorients the analysis away from moral conduct to a more economic and marketplace analysis.[30]

In relation to the ACL provision on **misleading conduct**, the UPCD/CPR approach of "the average consumer" should be distinguished from the Australian courts approach in section 18 of the ACL to identify the class of consumers where the target audience is the public.[31] In this regard, the search for the 'hypothetical consumer', [32] permits broad consideration of all relevant circumstances 'including the astute and the gullible, the intelligent and the not so intelligent, the well-educated as well as the poorly educated, men and women of various agers pursing a variety of vocations'.[33] The two different approaches within the ACL ("the average consumer" for the proposed UTP prohibition and the "hypothetical consumer" for section 18) is justifiable for the different aims intended for their use in each provision.

Policy Option 4 – Introduce a general and specific prohibition on unfair trading practices

4.4 Do you consider a specific prohibition on unfair trading practices in the form of a list or schedule of unfair conduct would be an adaptable policy option for technological change?

Kayleen Manwaring

My research since 2012 has concentrated on the legal implications for consumers in the face of sociotechnical change brought about by emerging technologies. Based on that research, I support the introduction of a general and specific prohibition on unfair trading practices, to offset the growing power of digital service providers.

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[29] Nicholas Felstead, 'Beyond Unconscionability: Exploring the Case for a New Prohibition on Unfair Conduct' (2022) 28 *University of New South Wales Law Journal* 285; Kate French 'Unconscionable Conduct: An Unconscionably High Standard? An Assessment of Whether an Unfair Trading Practices Prohibition Should Be Introduced to Capture Conduct Engaged in by Digital Platforms' (2021) 29 *Australian Journal of Competition and Consumer Law* 241.

[30] Jan Trzaskowski, 'Lawful Distortion of Consumers' Economic Behaviour – Collateral Damage Under the Unfair Commercial Practices Directive' (2016) 27(1) *European Business Law Review* 25.

[31] Noting however that the concept of "the average consumer" applies to UPCD/CPR provisions on misleading practices.

[32] *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [37], [42]–[43], [81] referring to "the need to have regard to the attributes of the hypothetical reader or viewer".

[33] *Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd* (1980) 31 ALR 73 at 93.

My previous research analysing the utility of existing general provisions around misleading, deceptive and unconscionable conduct in the context of digital consumer manipulation has indicated that 'technologically neutral' or generally applicable legislation, even when combined with the 'flexibility' of a common law precedent system, is not adequate to address many problems of regulatory disconnection and reconnection in the face of sociotechnical change.[34] Consequently, the adoption of a general 'unfair conduct' approach, without more, may be insufficient to deal with this problem.

When sociotechnical change occurs, legislatures and courts, and doctrinal scholars tend to rely heavily on judicial interpretation of existing common law and general legislative principles, at least those that are prima facie 'technologically neutral'. This approach is often preferred because it:

- is less conceptually challenging than a *sui generis* approach;[35]
- sits more comfortably with a common law system; and
- does not single out particular sectors for special treatment.

Development of specific principles from very general statutory formulations is then left up to the judiciary.[36]

Judicial interpretation of statutory principles is an essential part of the process of law 'keeping up' with sociotechnical change. However, there are limits with this approach in the context of sociotechnical change, and it is not a complete substitute for necessary and active intervention by legislative and regulatory authorities.

It is often *uncertain* how general legislative or judicial principles will apply in the face of sociotechnical change. In particular, businesses and consumers may suffer from a lack of *ex ante* guidance as to what constitutes acceptable business conduct in a rapidly changing environment**.** This has been particularly the case in relation to statutory unconscionable conduct under the ACL.[37]

Additionally, there is a danger that attempts to continually expand the interpretation of general legal principles to emerging sectors, where those principles emerged in reaction to a vastly different context, can have the effect of overstretching existing doctrines beyond manageability or sense.[38] Overly strained interpretations of common law principles or broad statutory provisions designed for a significantly different sociotechnical landscape may in their turn lead to doctrinal distortion and subsequent degradation of relevant norms. I

[34] Particularly Kayleen Manwaring, 'Will emerging information technologies outpace consumer protection law? The case of digital consumer manipulation' (2018) 26(2) *Competition and Consumer Law Journal* 141; Kayleen Manwaring, 'Surfing the third wave of computing: Consumer Contracting with eObjects in Australia' (PhD Thesis, University of New South Wales, 2019)

[35] For a discussion of the benefits and risks of *sui generis* rules in dealing with sociotechnical change, see Lyria Bennett Moses, 'Sui Generis Rules', in Gary E Marchant, Braden R Allenby and Joseph R Herkert (eds), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight: The Pacing Problem* (Springer 2011) 77 - 94.

[36] *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186 per Allsop CJ [58].

[37] Manwaring, 'Will emerging technologies outpace consumer protection law?' (n 34); Manwaring, 'Surfing the third wave of computing' (n 34).

[38] Manwaring, 'Surfing the third wave of computing: Consumer Contracting with eObjects in Australia' (n 34).

submit that the greatest example of this in the Australian consumer protection context can be seen in the various problems surrounding the ACL provisions on unconscionable conduct (notably ss 20-22).

However, greater specificity leads to problems with an appropriately *timed* response to sociotechnical change. It is essential that any framework containing significant specificity must consider mechanisms for swifter responses by legislators and regulators, in forms amenable to quick review and assessment to keep the response up to date.

Any solution must then deal with the too general/too specific problem, and the timing problem. My research suggests a structure along the lines of:

1. a general prohibition supported by a 'denylist',[39] or examples of specific unfair conduct (such as seen in Annex I to the EU provisions on 'unfair commercial practices'[40], or the specific examples of unfair contract terms provided in section 25 of the ACL) **PLUS**
2. stop-and-review powers,[41] combined with the use of rule-making capabilities by regulators to make changes to the 'denylist'; **PLUS**
3. funded technology assessment panels; **PLUS**
4. enforced disclosure of corporate practices.[42]

The 'denylist' should include specific examples of conduct by suppliers that is considered unfair: eg in the context of digital consumer manipulation, it has the effect or purpose of impairing a consumer's autonomy or decision-making capabilities, or attempts to exploit or create a particular vulnerability.

This solution may aid in speeding up responses to sociotechnical change in general, and manipulative practices specifically. The legislative provisions could provide as much *ex ante* guidance as is practically possible, and the disclosure of new corporate practices as they emerge could be responded to more quickly under rule-making capabilities of regulators. As an alternative to direct changes to the ACL, co-regulatory initiatives[43] such as *enforceable* statutory Codes of practice may also be helpful, at least where the views of stakeholders beyond industry and government are appropriately integrated.[44]

The use of technology assessment panels or specialist agencies to assist regulators in this exercise or to act as stand-alone review panels (including a 'stop-and-review'[45] power) for

[39] Formerly known as a 'blacklist'.
[40] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market 2005 ('Unfair Commercial Practices Directive (EU)').
[41] Similar to ASIC's powers to issue stop orders on fundraising under section 739 of the *Corporations Act 2001* (Cth).
[42] Manwaring, 'Surfing the third wave of computing: Consumer Contracting with eObjects in Australia' (n 23). This analysis was developed further in a conference presentation: Kayleen Manwaring, 2020, 'Digital consumer manipulation and alternatives to consent', presented at Consent and Consumer Manipulation - Principles and Rules for a Fairer Platform Economy (Paper Workshop, ANU HMI/UniMelb CAIDE), Virtual, 16 September 2020.
[43] Australian Communications and Media Authority, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements* (Occasional Paper, June 2015) 10–11; Australia, Department of Prime Minister and Cabinet, *The Australian Government Guide to Regulation* (March 2014) 28.
[44] Roger Clarke and Lyria Bennett Moses, 'The Regulation of Civilian Drones' Impacts on Public Safety' (2014) 30 *Computer Law and Security Review* 263, 278.
[45] Derek Morgan, 'Technology in the Age of Anxiety: The Moral Economy of Regulation' (2009) 29 *Legal Studies* 492, 508.

new uses of technology or data may also assist.[46] The utility of such bodies would also be assisted where they are granted power to **compel detailed disclosure by individual corporate entities of their confidential practices**. On 9 March 2019, the House of Lords Select Committee on Communications recommended the establishment of a 'Digital Authority' in the UK that would have the following functions (amongst others):

- to continually assess regulation in the digital world and make recommendations on where additional powers are necessary to fill gaps;
- to establish an internal centre of expertise on digital trends which helps to scan the horizon for emerging risks and gaps in regulation;
- to help regulators to implement the law effectively and in the public interest…;
- to inform Parliament, the Government and public bodies of technological developments;
- to provide a pool of expert investigators to be consulted by regulators for specific investigations;
- to survey the public to identify how their attitudes to technology change over time, and to ensure that the concerns of the public are taken into account by regulators and policy-makers;
- to raise awareness of issues connected to the digital world among the public;
- to engage with the tech sector;
- to ensure that human rights and children's rights are upheld in the digital world.[47]

The horizon-scanning,[48] expertise location, and awareness-raising functions of such a body are likely to be helpful.[49] Australia has no such central body, but some of its functions are exercised, albeit usually ad hoc by bodies commissioned to undertake such research.[50] Additionally, law reform bodies should consider whether the current behavioural experimentation undertaken by commercial entities be subject to the same ethics review procedures that are currently required by research involving human subjects in university settings.[51]

4.5 Do you consider a specific prohibition on unfair trading practices would sufficiently deter businesses from engaging in conduct that is considered unfair, harmful or detrimental to consumers?

[46] Daniel J Solove, 'Introduction: Privacy Self-Management and the Consent Dilemma' (2013) 126 *Harvard Law Review* 1880, 1902; Roger Brownsword, *Rights, Regulation, and the Technological Revolution* (Oxford University Press, 2008) 288–90; Brad A Greenberg, 'Rethinking Technology Neutrality' (2016) 100(1495) *Minnesota Law Review* 1495-1562, 1547; Lyria Bennett Moses, 'Regulating in the Face of Sociotechnical Change' in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *Oxford Handbook of Law and Regulation of Technology* (Oxford University Press, 2017) 590–91. A recent example of the functions of such a committee can be found in the UK discussion on the establishment of a Digital Authority: see House of Lords Select Committee on Communications, *Regulating the Digital World* (2nd Report of Session 2017–19, HL Paper 299, 9 March 2019) [238]. Such a body is somewhat reminiscent of the now-defunct US Office of Technology Assessment.

[47] House of Lords Select Committee on Communications, *Regulating the Digital World* (2nd Report of Session 2017–19, HL Paper 299, 9 March 2019) [238]. Such a body is somewhat reminiscent of the now-defunct US Office of Technology Assessment.

[48] See also David Rejeski, 'Public Policy on the Technological Frontier' in Marchant, Allenby and Herkert (eds), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight: the Pacing Problem* (n **Error! Bookmark not defined.**) 51-53.

[49] Centre for Data Ethics and Innovation (CDEI) <https://www.gov.uk/government/groups/centre-for-data-ethics-and-innovation-cdei> accessed 9 May 2019.

[50] For example, ACOLA's horizon scanning role for particular projects. Australian Council of Learned Academies (ACOLA), 'ACOLA Receives ARC Funding to Undertake Two New Horizon Scanning Projects on AI and IoT' (Media Release, 21 May 2018) <https://acola.org/artificial-intelligence-internet-of-things/> accessed 12 September 2019.

[51] This was suggested in a slightly different context in Lyria Bennett Moses et al *Submission to the Office of the National Data Commissioner on the Data Sharing and Release Legislative Reforms* (8 Oct 2019), 2-3.

Kayleen Manwaring

The prohibition by itself will be insufficient as many unfair practices are currently being engaged in by powerful multinational digital platforms.[52] To be effective, it should be supported by a well-resourced, informed and activist regulator, cooperating with other regulators in other countries. To be properly informed, the enforced disclosure of corporate practices regarding potential manipulative practices (see suggestion (4) above in para 4.5) (which is also currently under consideration in the EU in their draft AI Regulation regarding high-risk AI systems) must be considered.

Additionally, see 4.5 below regarding remedies against **individuals.** (eg directors) knowingly concerned in or reckless in relation to unfair trading practices should be considered, if real change is to be made in the face of unfair practices by multinational platforms with deep pockets.

4.7 Should civil penalties be attached to a combined prohibition on unfair trading practices? Please provide reasons for your response.

Mark Brady[53] and Kayleen Manwaring

We agree that civil penalties should be attached to an unfair trading practices provision. However, while civil penalties applied to corporate entities are important, they are not the whole story.

If real change is to be made in the face of unfair practices by multinational platforms with deep pockets, civil penalties that lift the corporate veil (ie apply to directors and officers and others knowingly concerned) should also be imposed in serious and repeated cases.

Yours sincerely,
May Fong Cheong, Kayleen Manwaring, Mark Brady

[52] Eg Kayleen Manwaring and Siddarth Narrain, '41 US states are suing Meta for getting teens hooked on social media. Here's what to expect next' *The Conversation*, 9 November 2023, https://theconversation.com/41-us-states-are-suing-meta-for-getting-teens-hooked-on-social-media-heres-what-to-expect-next-216914.
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