

Submission to The Treasury – Strengthening protections against unfair contract terms

20 September 2021

David Pearl
Assistant Secretary
Market Conduct Division
Treasury

By email: UCTprotections@treasury.gov.au

Dear Mr Pearl

The Consumer Policy Research Centre (CPRC) welcomes the opportunity to contribute to the consultation on '*Strengthening protections against unfair contract terms*'.

CPRC is an independent, non-profit consumer research organisation. Our mission is to improve the lives and welfare of consumers by producing evidence-based research that drives policy and practice change. Data and technology issues are a research focus for CPRC, including emerging consumer risks and harms and the opportunities to better use data and technology to improve consumer wellbeing and welfare.

The CPRC generally supports the proposed amendments in *Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair contract term reforms* (the Exposure Draft), which we believe specifically assists in moving the onus away from consumers and small businesses to the businesses that engage in setting unfair contract terms. It is also positive to note that the Exposure Draft includes provisions for the court to order that a ruling on an unfair term be applied to the same or similar term in all other contracts regardless of whether parties of those contracts were part of the court proceedings or not. It is provisions such as these that create better safeguards for consumers to actively participate in a market with confidence.

However, we take this opportunity to highlight that while these changes to the unfair contract terms law are a positive step forward, they are still not adequate in effectively protecting consumers who are now navigating through a hybrid market comprising both physical and digital transactions. The contract terms' landscape for consumers, needs to be one that supports accessibility, transparency, and informed decision-making.

Proactive surveillance and enforcement of unfair contract terms

We support the introduction of a pecuniary penalty in the Exposure Draft for proposing, relying, or purporting to apply or rely on an unfair contract term. The pecuniary penalties proposed in the Exposure Draft must be implemented as the current framework is completely inadequate in protecting consumers and small businesses. Without penalties, the law thus far has offered little to no incentive for businesses to ensure terms are fair and reasonable or to course correct their current business practices.

Holding parties accountable with comparable consequences for engaging in the practice of setting unfair contract terms will assist in creating a fairer market for consumers. However, for this to be effective, the onus cannot remain on consumers alone to identify and report unfair contract terms. Effective and regular surveillance and enforcement by regulators is needed to steer the market away from the practice of incorporating unfair contract terms in the first place. This becomes especially critical for terms and conditions for digital products and services where practices such as “click-wrap” agreements nudge people to automatically accept digital contracts for service access without reviewing or considering the terms within the contract.¹ We continue to see more frictionless processes that are geared towards acceptance, causing contractual arrangements to be automatic and ubiquitous.²

Our 2020 Consumer and Data Survey confirmed that terms and conditions continue to be ineffective in engaging Australians, as 94% of consumers are not reading such information all the time and 33% of consumers never read these documents. Of the 67% who had read terms and conditions at some point in the 12-month period, 69% reported accepting terms even though they were not comfortable with them, with the majority (75%) accepting them as it was the only way to access the product or service.³

Our research in the *‘Day in a Life of Data’* report noted an example of a case study analysing the terms and conditions of the Nest ecosystem where a purchase of a particular thermostat would require the review of nearly a thousand contracts. Customers refusing to agree to Nest’s terms of service were warned that the operations and security of the thermostat would be deeply compromised.⁴ Qualitative research conducted by CPRC between June and August 2021 also found that consumers are “...*continuously having to blindly accept terms and conditions and make purchase decisions without full understanding*” and how this practice “...*generates consternation – a deep frustration at always feeling slightly under-informed and feeling that this is ‘on them’*”.⁵

Proactive surveillance and regular enforcement of the unfair contract terms law where consequences lead to comparable pecuniary penalties will assist in deterring businesses engaging in such rogue practices that compromise consumer choice and wellbeing.

Urgent reforms to complement unfair contract terms

For the proposed changes to unfair contract terms law to be effective, it is imperative that urgent progress be made on unfair trading prohibitions and reforming the outdated Privacy Act to strengthen the consumer protections in an online setting.

Our Consumers and COVID-19 survey data found that consumers continue to experience problems when shopping online, noting a range of issues, including unclear or unfair terms and conditions.⁶ This is no surprise as our research into privacy policies and general terms and conditions revealed that majority of policies would take over 10 minutes to read with a minimum Grade 10 education level⁷. A more recent study by an online marketing firm in the United Kingdom revealed that user agreements of some of the major digital companies

¹ Richmond, B, “A Day in the Life of Data”, CPRC (2019), [Research Report: A Day in the Life of Data - CPRC](#).

² *Ibid*.

³ CPRC, “CPRC 2020 Data and Technology Consumer Survey”, (December 2020), [CPRC 2020 Data and Technology Consumer Survey - CPRC](#).

⁴ Study by Zuboff S. *The Age of Surveillance Capitalism*, New York: Hachette Book Group, quoted in Ross, A. “How Big Tech Built the Iron Cage,” New Yorker, noted in [Research Report: A Day in the Life of Data - CPRC](#).

⁵ CPRC, “Consumer Wellbeing Report: Phase 1”, Draft, Unpublished.

⁶ CPRC, “Unfair Trading Practices in Digital Market: Evidence and Regulatory Gaps”, (March 2021), [Unfair Trading Practices in Digital Market: Evidence and Regulatory Gaps - CPRC](#).

⁷ Day in a life of data reference

worldwide would need up to 90 minutes each to read.⁸ Dr Katharine Kemp, from the University of New South Wales has specifically raised the unacceptability of placing the onus on consumers to dedicate the extensive number of hours per year to read such policies. Kemp states, “*Under our current law, if you don’t have time to read the thousands of words in the policy, your consent can be implied by your continued use of the website which provides a link to that policy*”.⁹ This becomes even more poignant when just under half (44 per cent) of all Australians are deemed to have low literacy levels (i.e. below what is considered enough to get by in everyday life).¹⁰ These elements combined place consumers in extremely unsafe and unfair scenarios where they are expected to navigate on their own. In a digital environment, often these lengthy contract terms include a range of data collection and sharing arrangements with third parties, so once such a contract term may be identified as unfair, it becomes difficult to ascertain the extent of the damage to the consumer.

In addition, the unfair contract terms law does not capture practices where a contract is absent between parties. Our ‘*Unfair Trading Practices in Digital Markets*’ report states that this practice, “...*often occurs in the digital environment where third parties can knowingly deal with consumer’s personal data without any awareness on the part of the consumer, let alone a contractual relationship with the consumer.*” These opaque practices further shift the power imbalance creating a market that is far from being safe, fair or inclusive for consumers.

Australians have been early adopters of engaging in a digital environment, with COVID-19 only fast-tracking Australia’s engagement online:

- Our research in 2019 found that 97.3% of Australians had already engaged in some form of online shopping.¹¹
- Our 2020 consumer data survey revealed that the frequency of engagement in online shopping is also steadily increasing with 61% of respondents visiting online shopping websites on a monthly basis.¹²
- The trend towards online shopping was further echoed in our Consumers and COVID-19 survey data which indicated that by September 2020, 28% of consumers were spending more time online shopping for personal items in comparison to a pre-COVID month.¹³

To complement the proposed unfair contract terms law, urgent reforms are needed to protect consumers from data extraction and manipulation in an online setting, including:

- introducing an unfair trading prohibition
- reforming the Privacy Act to give consumers more control and agency over their data, including:
 - introduction of a direct right of action
 - requirement to gain consumer consent for data collection
 - procedures and processes that safeguard personal and sensitive information
 - implementing pro consumer defaults

⁸ LA Times, “Why does it take so long to read tech company user contracts?”, (August 2021), [Why does it take so long to read tech company user contracts? - Los Angeles Times \(latimes.com\)](https://www.latimes.com/technology/story/2021-08-05/why-does-it-take-so-long-to-read-tech-company-user-contracts/).

⁹ Kemp, K, “94% of Australians do not read all privacy policies that apply to them – and that’s rational behaviour”, (March 2018), [94% of Australians do not read all privacy policies that apply to them – and that’s rational behaviour \(theconversation.com\)](https://www.theconversation.com/94-of-australians-do-not-read-all-privacy-policies-that-apply-to-them-and-thats-rational-behaviour).

¹⁰ O’Neill, E, “Exploring regulatory approaches to consumer vulnerability” (November 2019), [Exploring regulatory approaches to consumer vulnerability - CPRC](https://www.cprc.gov.au/research-and-policy/exploring-regulatory-approaches-to-consumer-vulnerability).

¹¹ Ben Martin Hobbs, “Online Reviews: A guide not a gospel”, Consumer Policy Research Centre, (December 2019), [Online reviews: a guide not a gospel - CPRC](https://www.cprc.gov.au/research-and-policy/online-reviews-a-guide-not-a-gospel).

¹² CPRC, “CPRC 2020 Data and Technology Consumer Survey”, (December 2020), [CPRC 2020 Data and Technology Consumer Survey - CPRC](https://www.cprc.gov.au/research-and-policy/cprc-2020-data-and-technology-consumer-survey).

¹³ CPRC, “Unfair Trading Practices in Digital Market: Evidence and Regulatory Gaps”, (March 2021), [Unfair Trading Practices in Digital Market: Evidence and Regulatory Gaps - CPRC](https://www.cprc.gov.au/research-and-policy/unfair-trading-practices-in-digital-market-evidence-and-regulatory-gaps).

- strengthening privacy notice requirements
- greater transparency of data collection practices
- right to erasure
- mandatory deletion of information that leads to risk.

We call on the Australian government to urgently move away from a patchwork approach to consumer reforms, especially those reforms that cut across data and digital markets and move towards a more coordinated approach that puts citizens and consumers at the centre of change.

Further engagement

We would welcome the opportunity to work with Treasury and share further insights from our consumer research projects. For further discussion regarding our research and the contents of this submission, please contact Chandni Gupta, Policy and Program Director at chandni.gupta@cprc.org.au.

Yours sincerely



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