

Submission by Consumer Policy Research Centre to Australian Treasury consultation on the ACCC Digital Platforms Inquiry Final Report

12th September 2019

Submitted via [online portal](#)

Dear Secretariat,

The Consumer Policy Research Centre (CPRC) would like to thank you for the opportunity to respond to the Digital Platforms Inquiry Final Report.

CPRC is an independent, not-for-profit consumer research organisation. CPRC undertakes interdisciplinary and cross-sectoral research to inform policy reform and practice change. Our goal is to achieve a fair outcome for all consumers. Consumer data is a central research priority for the organisation due to the rapidly growing online marketplace, early adoption of digital technology by Australians, and the emerging benefits and risks to consumers of Big Data amalgamation.

CPRC has been heavily engaged in policy reforms and research into consumer data collection, sharing and use since early 2018.

CPRC began its work in this area after identifying the expansion of online markets, digital transformation and data's role in production created major gaps in Australia's consumer protection framework. Australia has been slow relative to our European and some US counterparts to respond with necessary reforms to ensure that the rights of consumers and citizens are not impinged upon due to the rapid technological advancement of the digital age.

This submission draws on our research and policy engagement including:

- The production of two independent consumer research reports: *Consumer Data and the Digital Economy* (2018) and *A Day in the Life of Data* (2019).
- Ongoing interactions with CPRC's Consumer Data Research Network of 50 members across Australia, undertaking research in the fields of machine-learning, AI, competition law, consumer law, consumer behavior and privacy.
- Submissions lodged over the past two years to the Review into Open Banking, establishment of a Consumer Data Right (legislation, ACCC Rules, Data61 Standards, Privacy Impact Assessment), Data Sharing and Release legislation and ACCC Digital Platforms Inquiry.
- Experience advising policymakers and regulators through the Open Banking Data Standards Body Advisory Committee and National Data Advisory Council.

In this submission we first provide general recommendations reflecting on the broader policy environment and needs of consumers in an increasingly digital marketplace. Second, we highlight some key aspects of an

integrated and effective policy framework. Third, we explore emerging trends that need adequate consideration by policymakers.

1. General recommendations

Consumers and citizens must be placed in control of their own data and information

CPRC has highlighted in previous submissions to the Digital Platforms Inquiry¹, establishment of a Consumer Data Right² and Data Sharing and Release legislation³ that data is now a major input to production. As this fuel for new machine-learning and AI technologies is forecast to grow significantly in scale and scope over the coming decade, policymakers and regulators globally must come to the terms with the fact that this rich resource is significantly different from other traditional raw resources to be extracted, processed and marketed. Consumer data as a resource is inextricably intertwined with personal information about who we are - our health, our family and friends, wealth, behaviours, interests, vulnerabilities and hopes. It is both necessary and urgent that careful consideration be given to the accumulation of this information and power, who holds it, uses it and whose interests are ultimately at the forefront of those decisions.

Our research has highlighted the need for consumers to be in the driver's seat when it comes to their data and information. This is essential for competition in data-driven services to flourish over time and for those services to ultimately benefit consumers and meet their needs and preferences, rather than the demand by businesses for an ongoing supply of data and information.

Fundamental to competition is the capacity for consumers to leave services that do not provide the kinds or quality of products and services they need (including their privacy and data security preferences), and to be able to identify and switch to providers who do meet those preferences.

Community sentiment is strong and clear. Australian consumers expect their data to be treated fairly⁴ and they expect the law to protect data from misuse. As one research respondent stated in discussing data misuse by companies *'I expect the law to deal with that'*⁵.

Steps towards commodification of data and personal information should be trodden extremely carefully. When we trade our data, human rights and privacy experts have also cautioned that we are also trading our human right to privacy.

It is far from clear whether the societal benefits of the trade of personal information outweigh the risks, and therefore taking a precautionary approach is necessary and prudent, including strong safeguards for people

¹ CPRC, 2018, *Submission to Digital Platforms Inquiry Issues Paper*, https://cprc.org.au/wp-content/uploads/CPRC_DigitalPlatformInquiry_updatedsubApril2018v2-2.pdf

² CPRC, 2018, *Submission to the ACCC Consumer Data Right Rules Framework*, <https://www.accc.gov.au/system/files/CDR%20-%20Rules%20-%20Submission%20to%20framework%20-%20Consumer%20Policy%20Research%20Centre%20-%20PUBLIC%20VERSION.pdf>

³ CPRC, 2018, *Submission to the Data Sharing and Release Legislation Issues Paper* <https://www.pmc.gov.au/sites/default/files/public-submissions/data-sharing-2018/20715.pdf>

⁴ CPRC, 2018, *Consumer Data & the Digital Economy Summary Report*, p3

⁵ CPRC, 2018, *Consumer Data & the Digital Economy Report*, p31

who may be more vulnerable, especially children who may be living in a very different world with very different technology being deployed than perhaps was first intended when the data was first collected.

The need for an economy-wide, principles-based protection framework to take Australia into the digital age

Technological transformation is moving at a rapid pace, with policymakers and regulators struggling to keep up. Attempting to draft specific rules and legislation for each potential data use or technology will lead to inevitable failure due to the inability to predict the potential future uses or applications that will come with innovation.

Instead, policymakers and regulators need to focus on the design and implementation of a broad, economy-wide, principles-based governance framework. This framework will be most effective when it explicitly acknowledges the need to take an integrated approach across competition law, consumer protection, privacy and human rights. This integrated approach has been recognized internationally and within the ACCC Digital Platforms Inquiry Final Report⁶ itself (as this relates to the overlap between data protection, competition and consumer protection).

The Fourth Industrial Revolution is not a decade away, it is upon us today. Data-driven AI technology is already being deployed across the Australian community without a coherent legislative protection framework in place. While the benefits may be significant, the risks also need to be mitigated.

Technology is not neutral, just as data is not neutral. Both can be used to enhance consumer and community welfare. Both can be used to detract from consumer and community welfare. What determines the ultimate impact of data-driven technologies will be the extent to which policymakers encourage socially beneficial innovation and design adequate protection frameworks.

Economy-wide data reforms are needed. Problematic and exploitative data practices are by no means contained to digital platforms. As Zuboff (2019) has extensively documented⁷, the ubiquitous collection of personal information now expands to almost every domain of life. CPRC research has also highlighted the expansion in Australian consumer data collection, sharing and use across a range of technologies, sectors and domains⁸. CPRC therefore strongly supports broader review of the adequacy of the Privacy Act and economy-wide reforms to enhance competition and consumer welfare.

A strong, economy-wide principles-based framework will provide greater certainty for businesses and consumers when engaging with data-driven products and services. We have highlighted in multiple submissions over the past two years the significant risks to the community and economy of an ongoing fragmented and piecemeal policy framework⁹. Urgent attention and investment are now required by Australian policymakers and regulators, reflective of the calls for international cooperation in establishing rules and enforcement to guide the operation of markets in the digital age.

⁶ ACCC, 2019, *Digital Platforms Inquiry Final Report*, p5

⁷ Zuboff, 2019, *The Age of Surveillance Capitalism*

⁸ CPRC, 2019, *A Day in the Life of Data*, p15, 25-33

⁹ CPRC, *Submission to Digital Platforms Inquiry Issues Paper*; CPRC, 2018, *Submission to the ACCC Consumer Data Right Rules Framework*; CPRC, 2018, *Submission to the Data Sharing and Release Legislation Issues Paper*

Greater policy coordination and leadership required within the Federal Government to implement necessary reforms

While ultimately the ACCC did not recommend the establishment of a new regulator or entity to manage *regulatory* oversight and enforcement functions for digital markets due to the adequacy of cooperation across the ACCC, OAIC and ACMA, the report falls silent on the appropriate integration or coordination of an Australian Government *policy* response to digital transformation, data and AI¹⁰.

The lack of clear responsibility to address the challenges and opportunities posed by the Fourth Industrial Revolution across the Australian Government may have been part of the reason that Australia has been slow to respond, with responsibilities siloed. Current Australian Government agencies that CPRC has engaged with over the course of our research and policy work over the past two years include:

- Office of National Data Commissioner
- Office of e-Safety Commissioner
- Treasury
- Australian Competition and Consumer Commission
- Office of the Australian Information Commissioner
- Department of Communications and the Arts
- Australian Communications and Media Authority
- Australian Energy Regulator
- Data61
- Attorney-General's Department
- Department of Prime Minister and Cabinet
- Digital Transformation Agency
- Standards Australia
- Department of Industry, Innovation and Science

As a small not-for-profit organisation, CPRC has engaged with no less than fourteen Australian Government agencies throughout the course of consultation and submission processes and meetings to discuss our research, highlighting the need for a strong and coordinated policy response to the next industrial revolution. The lack of a coordinated policy response from government has meant that piecemeal and parallel policy processes have been running in unison, without a strong overall governance framework in place to identify the potential benefits and risks to Australia and to establish an economy-wide reform process.

The lack of policy and governance coordination has also required civil society to expend extremely limited resources participating in multiple consultation processes with similar but slightly different focus areas. The consequence has been discussions with over fifty various departmental officers with responsibility for managing only minor aspects of the overall policy challenge.

Our experience highlights the importance of the Australian Government developing a governance framework with clear accountabilities and responsibilities at a Ministerial level for the coordination of an integrated policy response given the scale of the challenge and opportunities ahead.

¹⁰ ACCC, 2019, *Digital Platforms Inquiry Final Report*, p29

Data is fueling rapidly expanding AI and machine-learning technologies – fast-tracking effective governance and regulation of data will be central to sustainable growth of this field

As a major input to production of new and emerging technologies, data requires significant attention from policymakers.

If community expectations fall out of alignment with the way data is being used to fuel those technologies, or the way those technologies are being deployed to influence the welfare and experience of consumers and the community, the risk of ‘techlash’ grows. This, in turn, may in fact slow and detract from the socially beneficial uses of data and technology if the overriding perception and experience of consumers is one of data misuse, which has to date dominated the headlines.

Ensuring that growth in AI and data-driven technologies is sustainable and deployed in line with community expectations will be central to fostering medium to long term economic growth in these fields. Therefore, it is essential for policymakers to prioritise safety, protection and trust as consumers build greater familiarity and experience with these new technologies.

Sufficient funding of civil society to ensure balanced and inclusive policy discussion and reform

CPRC also hosts a Consumer Data Research Network of over 50 Australian academics working in the fields of competition law, consumer protection, AI and machine-learning, privacy, and consumer behavior. We provide regular information to both policymakers and academics about reform processes to ensure that the latest consumer research is best placed to inform policy development where appropriate.

This significant policy and research workload following on from the 2017 Productivity Commission *Data Availability and Use* report has not been accompanied by additional funds from the Australian Government to enable civil society to participate in, or become skilled in, these new fields.

If reform processes are to be balanced and genuinely inclusive, we strongly encourage adequate support and investment by the Australian Government in independent research and civil society to participate in policy and regulatory consultation processes.

2. Key elements of an effective policy framework

CPRC agrees with the conclusion of the ACCC that significant market and regulatory failures exist within Australia's digital consumer markets, including:

- information asymmetries that undermine a consumer's ability to assess whether services align with their privacy preferences
- bargaining power imbalances that prevent consumers from making genuine choices as to how their personal information is collected, used and shared
- behavioural biases that work against consumers' ability to select privacy options that better align with their privacy concerns
- a lack of effective deterrence under current consumer protection and privacy laws against certain data practices by digital platforms.

Transparency

Transparency is fundamental to building trust and enabling consumers to make informed choices and decisions in the digital age. Yet, significant amounts of research has repeatedly highlighted the ongoing opacity facing consumers and advertisers, especially in the delivery of online advertising via digital platforms.

Policymakers seeking to establish fair, sustainable and effective online markets need to be taking steps to improve transparency for consumers and advertisers across data collection and ad supply chains. The absence of effective transparency measures will only increase the likelihood of exploitation and manipulation of consumers in the medium to long term, eroding trust and sustainable growth in data-driven technologies.

This opacity problem, both for consumers trying to make informed choices when receiving online advertisements, and for advertisers trying to understand the factors influencing the display of advertising, are extensively documented in the ACCC Digital Platforms Final Report.¹¹

The CPRC *But Are They Any Good?* report¹² produced in 2018 explores the important role of service quality information in enabling informed choice by consumers. The report highlights the detrimental impacts of the absence of such readily available and actionable information on competition and the quality of the services delivered by the market.

In the delivery of digital and data-driven services and technologies, the lack of transparency as to the volume and scope of personal information being extracted from consumers prevents consumers from being able to make informed choices about which services meet their preferences; in particular, their privacy preferences.

¹¹ ACCC, 2019, *Digital Platforms Inquiry – Final Report*, p12

¹² CPRC, 2018, *But Are They Any Good?* <https://cprc.org.au/wp-content/uploads/CPRC-2018-But-are-they-any-good-1.pdf>

Opacity in privacy policies

Our research from 2018 and 2019 highlighted the significant levels of opacity and loose terminology used in privacy policies across every sector in the Australian economy. Common terminology identified included:

“we provide personal information to our affiliates or other trusted businesses or persons to process it for us¹³”

“for purposes other than marketing, we collect personal information from persons and entities that assist or partner with us in supplying goods and services... These entities include insurers, providers of publicly available sources of information, delivery service companies, possible business sellers, and buyers, third party data providers and our related bodies corporate”¹⁴

“trusted partners”¹⁵

“third parties”¹⁶

Collecting information from “public databases, strategic and joint marketing partners, social media pages and platforms, people with whom you are friends or otherwise connected in social platforms, as well as from other third parties”¹⁷

This lack of transparency has unquestionably frustrated consumers participating in our research:

“I don’t know how I can decipher where my data goes and how it’s used. It concerns me, but it’s not transparent to me” and

“I don’t see how or why they’re using the data and I’m more frustrated with this”¹⁸

CPRC strongly supports Recommendation 16(b) - Strengthen notification requirements.

Comprehension

It is not only the opacity of information about data collection, sharing and use that prevents informed decision-making. The extent to which information disclosed is *comprehended* by consumers is also a key factor determining the success of attempts to improve disclosure requirements placed on businesses.

CPRC research in partnership with Greater Than X highlighted the lack of comprehension by consumers of privacy policies due to vague terminology, excessively complex language and extremely long reading times. Indeed, most consumers (94%) didn’t read all of the privacy policies that applied to them in the last 12

¹³ CPRC, *Consumer Data & the Digital Economy Report*

¹⁴ Ibid 13

¹⁵ CPRC, *A Day in the Life of Data*

¹⁶ Ibid 15

¹⁷ Ibid

¹⁸ Ibid

months¹⁹. Most consumers give up due to the fact they are typically too long and complicated. As one research participant stated, “well you need to have a Masters degree to understand this”²⁰ and there is “too much technical information... the wall is too high.”²¹

It is clear that the way notice information is communicated can have a significant impact on effectiveness of disclosure and notification requirements. CPRC strongly supports regulations to require companies to produce simple and comprehensible notices that tell consumers what data is being collected, who it is being shared with, and the purposes for which it is used.

Choice and control

For consumers to make meaningful, informed decisions, transparency must be coupled with true choice and control. Information alone is not enough.

The Privacy Paradox often referred to as ‘evidence’ that consumers say their care about privacy but behave differently by signing up to data exploitative services is false because it is based on the premise that there is in fact a choice presented. The choice architecture in these experiments simply replicates the ‘take-it-or-leave-it’ bargain presented in the real world. Consumers are being provided with little or no clear information about what is happening with their data, they struggle to comprehend the information that is provided, and they are provided with no information about the quality of the service, i.e. the data protections and controls provided by the service.

Consumer choice and control are fundamental to effective competition. Without swift and effective reform to address these transparency, choice and control factors, Australian consumers will continue to be forced to navigate digital and other markets effectively blindfolded. The scope for data exploitation and consumer manipulation is significant and growing as technology advances into more AI and machine-learning deployment across the economy.

These challenges are not something that Australia can afford to take another five years to address.

Choice and control of data collection, sharing and use by consumers

As the ACCC Digital Platforms Inquiry Final Report states, consumers are better off when they are both sufficiently informed about the collection and use of their data and have sufficient control over their data.²² CPRC strongly supports this view.

A consumer survey conducted by Roy Morgan Research for the CPRC in 2018 found that Australian consumers do not feel that privacy policies offer consumers adequate control or power to change aspects of data collection and use. Of the 67% of those surveyed who had read a privacy policy in the past 12 months, two-thirds indicated that they signed up for services even though they did not feel comfortable with the

¹⁹ CPRC, *Consumer Data & the Digital Economy Report*

²⁰ CPRC, CPRC, *A Day in the Life of Data*, p19

²¹ Ibid p18

²² ACCC, *Digital Platforms Inquiry*, p22

policies. The most common reason (73%) for signing up despite not feeling comfortable was because it was the only way to access the service²³. This take-it-or-leave-it proposition places consumers in the position of either accepting all data uses or not accessing the product or service at all. Consumers simply have no power to bargain.

There is strong support from the Australian public for more control to be provided to consumers when it comes to how their data is being collected, shared and used. 95% of those surveyed wanted companies to provide options to opt out of certain types of information collected about them, how it can be used and /or what can be shared with others. 73% wanted government to intervene to ensure companies give consumers options to opt out of what data they provide, how it can be used and if it can be shared with others²⁴. This was reconfirmed by further ACCC research,²⁵ that found 90% of users wanted digital platforms to allow opt out of the collection of certain types of information. Consumer frustration is high, with one 2018 participant stating: “I’m not comfortable with them having any of my information, but if you want to be involved in whatever the site is about, you don’t get options.”²⁶

Community expectations are strong and clear in this regard. Urgent reforms are required to provide greater transparency, choice and control when it comes to the collection, sharing and use of consumer data. Consumers are increasingly frustrated, overwhelmed and in some cases concerned that they know companies are using data in ways that they don’t really understand and did not expect.

Consent

Giving consumers greater control over their data and personal information rests on their ability to:

- Be provided with transparent information about what data is being collected, shared with whom and used for what;
- Comprehend the information that they are provided;
- Be given a genuine and meaningful choice as it relates to that data and provide their express consent.

Australia has been slow to deliver consumers these critical factors to enable informed choices to be made as it relates to the use of their data. CPRC has consistently supported the introduction of a requirement for express consent to data collection, sharing and use economy-wide. As CPRC has raised in prior submissions²⁷ consent to data practices must be voluntary, express, informed, specific to purpose, time limited and easily withdrawn.

CPRC strongly supports recommendation 16(c) - Strengthened consent requirements and pro-consumer defaults.

²³ CPRC, *Consumer data and the digital economy – Summary Report*, p2,

²⁴ *Ibid*, p3

²⁵ Roy Morgan Research, 2018, *Consumer Views and Behaviours on Digital Platforms*

²⁶ *Ibid* 5 (p38)

²⁷ CPRC, *Submission to Digital Platforms Inquiry Issues Paper*; CPRC, 2018, *Submission to the ACCC Consumer Data Right Rules Framework*; CPRC, 2018, *Submission to the Data Sharing and Release Legislation Issues Paper*

The limitations of the notice and consent model

CPRC cautions against too much regulatory reliance on the notice and consent model in a world where consumers are engaging with potentially hundreds of different products and services each day. While important components of an effective consumer protection regime, notice and consent need to operate alongside other minimum protections. The capacity to make informed choices in this environment – with full responsibility placed on consumers to read, comprehend and act on each data collection, sharing and use consent notice – has already proven to have limitations across a range of markets. We note recent research from the EU²⁸ regarding the deployment of manipulative cookie notices to nudge consumers to the desired outcome of consenting to the data collection. The researchers found that while only 0.1% of consumers would actively choose to be tracked by cookies, the proportion of consumers nudged into accepting these notices is significantly higher.

First, this research highlights both a design challenge to ensure that regulations are effective at achieving the intended policy goals (transparency and meaningful choice), but also the need for sufficient resourcing of enforcement bodies to act on non-compliant and misleading consent notices.

Second, consumers are at a significant disadvantage when making choices about the trade when it comes to their data, because they cannot possibly foresee the potential future use, value or risk of that kind of data. Some data will be incredibly valuable with advancements in AI, other data may be less so. By forcing consumers into a situation where they ‘decide once’ but bear the consequences potentially for the remainder of their life is not a fair trade. The value of data is highly dependent on the technology of the day; therefore consumers should always be able to make decisions about their data relative to each point in time.

Third, some types of personal information and data may be highly valuable, sensitive and may simply not be something we are comfortable as a society with trading away. We restrict trade in other areas where we believe there to be significant scope for harm and discrimination, for example, human organ trade. There may well be a time when trade of certain kinds of data drives too much of a power imbalance or scope for discrimination, particularly for minors or other people experiencing vulnerability.

For these reasons, *CPRC strongly recommends the Australian Government undertake further research to establish what kinds of data collection, sharing and use practices may present more significant harm or risk of discrimination to consumers.*

CPRC also strongly recommends the Australian Government introduce a general safety provision into Australian Consumer Law, including consideration of data collection, sharing and use practices. The security of data and personal information presents all consumers with safety risks, especially children who have now grown up in the digital environment. The safety aspects of the collection, sharing and use of sensitive personal information are significant and should be investigated by agencies for their impacts in increasing fraud, susceptibility to exploitation by scams, cybersecurity attacks but also the future bargaining position of consumers. The rapid expansion of IoT devices in particular pose new risks for households, with an increasing number of channels currently exploiting data collection within the home, car and workplace.

²⁸ <https://techcrunch.com/2019/08/10/most-eu-cookie-consent-notices-are-meaningless-or-manipulative-study-finds/amp/#click=https://t.co/i7Q0WL3CDc>

Use of defaults

CPRC has highlighted in previous research the strong impacts of defaults and status quo bias that anchor consumers to certain activities or providers. The growing trend of bundling technology with particular platforms, apps or search engines presents significant issues for competition policy if consumers are anchored and defaulted to certain providers. We strongly support defaults for data sharing to be set to off to enable consumers to make active choices about data sharing.

CPRC strongly supports recommendation 16(c) - Strengthened consent requirements and pro-consumer defaults.

Erasure

CPRC has consistently recommended that consumers be given the right to erase their personal information and data. This is fundamental to addressing the current power and information imbalance, with firms collecting sharing and using vast amounts of consumer information for purposes which consumers are largely unaware of. As one 2018 research participant stated, "it should be my data, I should have rights to it"²⁹.

Without any capacity to require their data be deleted, consumers are not in a strong bargaining position with firms when it comes to the collection, sharing and use of their data. This is especially so when it comes to potential future uses of that data, because the value of data changes through time with the technology held by the firm. Therefore, consumers may sign up to a service expecting that their data is not high value; however, in five years' time that may be a very different scenario and consumers may have made a different choice with full knowledge of contemporary technologies and capabilities.

Without a right to erase data, consumers are also exposed to an increased likelihood of data breaches, fraud and scams due to the inability to reduce the volume of personal information available about them in the marketplace. This is not only an unacceptable risk for consumers, but also an added cost to business.

For firms to effectively compete on the basis of privacy, consumers need an ability to move their data to the firm that meets their preferences. Consumers should not be beholden to the data collection and sharing terms of an agreement that was made with a retail outlet for a coupon more than a decade ago, forever providing the firm with an ability to continue to use that personal information as they see fit. This is especially so when Australian consumers have never really had a choice about what kinds of data they supply, who it is shared with and what it is used for to date. The absence of reform to provide consumers this right imposes unacceptable costs on consumers and acts as a barrier to competition.

Lastly, CPRC would strongly encourage the narrow interpretation of the exemption of a right to delete for the purpose of exercising a contract. Many new business models which are exploitative are established on the back of monetising personal information and data. It would be a failure of the purpose of the introduction of such a right, if businesses were able to take a broad interpretation of 'for the purpose of exercising a contract'. The inclusion of contract provisions that require the collection and processing of personal data – for example, for behavioural advertising or analytics purposes – should not be included.

²⁹ CPRC, 2018, *Consumer Data & the Digital Economy Report*, p38

CPRC strongly supports Recommendation 16(d) - Enable the erasure of personal information, with caution of a narrow interpretation of the exemption 'for the purpose of exercising a contract'.

Accountability & explainability

Consumer profiling & scoring – multiple scoring systems

Data is increasingly being collected, shared and combined to develop detailed profiles of consumers, often without their knowledge or consent. These practices have been extensively explored in CPRC research *A Day in the Life of Data*³⁰.

Data brokers play a key role in the exchange of consumer data, with a large volume of companies, through the ongoing opacity of privacy policies, simply stating that they share data about consumers with 'third-parties', 'strategic and joint marketing partners' and 'public databases'³¹.

Common information now collected by companies such as device ID, location, usage behavior, search history, messaging and communications content, relationships and contacts, biometrics, transactions and purchase interests can all be combined to develop very detailed inferred information and profiles. This includes information such as socioeconomic status, sexual orientation, political views, mood, stress levels, health status, personal interests, customer worth or relationship status.³²

These profiles operate in a similar way to credit scores, scoring, sorting and targeting people based on defined criteria. These profiles come with a variety of terminology such as 'E-scores', 'Customer Lifetime Value' or '360 view of a customer'.

For example, in the Nine Entertainment Co partnership with Microsoft, their website details "Data and Targeting", explaining how their relationship allowed them to build a '360 view of a consumer, modelling end user behavior and cross-device consumer behavior....' enabling them to 'see beyond buckets of intention behavior to more complex path to purchase behavior for specific brands'. Furthermore 'matching or synching against the largest scale of registered users in Australia allows advertisers to find their offline email databases or DMP segments across the entire breadth of our digital assets, starting intelligent dialogue, rewarding customers for their loyalty, designing upsell and cross-sell strategies and finding new "lookalike" customers'.³³

Unlike the credit reporting system which has legislation and rules in place to govern how and when this credit information can be used, these profiling and scoring systems fall outside these protections and regulations.

Yet here we have an arguably more detailed, more valuable dataset being used by companies to score and make decisions about consumers, with consumers having little to no ability to access this information. It is not transparent to consumers what information is being used to target or offer them certain products, whether this information is correct and accurate, or how to correct the record if it's wrong.

³⁰ Ibid, CPRC, 2019

³¹ Ibid CPRC, 2019 p29.

³² Ibid CPRC, p15

³³ Ibid, CPRC, p31

Companies claim that this information is ‘transformed’ and is part of their IP, and therefore are unwilling to share this with consumers, creating significant information asymmetries between buyers and sellers when bargaining.

CPRC strongly supports *recommendation 16 (a) - Update ‘personal information’ definition* in the Privacy Act to clarify that it includes technical data such as IP addresses, device identifiers, location data and any other data that may be used to identify an individual.

CPRC also strongly encourages policymakers to review shadow scoring and profiling systems running in parallel to the National Consumer Credit Protection Act 2009, including whether additional policy and regulation needs to be developed where firms are clearly using data over and above credit scoring information to make decisions about consumers.

We also strongly encourage policymakers to enable access by consumers to transformed data, scoring or profile data that has been developed using personal information about an individual. At present, consumers have little capacity to access, amend or challenge decisions made about them by firms. When these decisions may influence significant or essential products and services, policymakers will need to pay close attention to the growing scope for increasing price discrimination due to micro-targeting. Whether this is addressed directly through the market or other social policy adjustment, the fact remains that growing hyper-personalisation will likely lead to an increase in spread of offers and inequality as firms more strongly compete for ‘high value’ or ‘high customer worth’ customers.

Automated decision-making and profiling

As highlighted above, new technologies provide companies with increasing power and capacity to develop detailed profiles about consumers and for decisions to be made by automated means; for example, whether a loan is awarded, or an offer for a certain product is made.

Consumers in the EU, through the General Data Protection Regulation (GDPR), have special rights in this regard. Specifically, Article 22 of the GDPR provides consumers with the right not to be subject to a decision based solely on automated processing (including profiling) which produces legal effects concerning him or her. This right also provides for consumers to obtain human intervention in contesting the decision.

The ACCC has not explored the protections necessary to limit the harm of automated decision-making and profiling across the broader economy. With significant technological transformation underway, CPRC research has highlighted the potential exclusionary and discriminatory harms that can come from the deployment of profiling practices.³⁴ This policy area needs much greater consideration and investigation, particularly with regards to the impact on consumers of the supply of essential services and housing. Consumer profiling and algorithmic decision-making needs to be far more transparent, consumers need an ability to correct the record if the judgements and predictions being made about them are wrong, and consumers also need an ability to challenge decisions in a fair and efficient manner.

³⁴ Ibid, 9 (p37)

Protection against exploitation and manipulation

Unfair commercial practices and contract terms

The growing scope for consumer manipulation and exploitation as a result of the growing information asymmetry between consumers and firms is significant. Our research *A Day in the Life of Data*³⁵ outlined the use of mood, health, psychological and behavioural information by firms to target and manipulate consumers.

With the explosion of sensors and data collected about consumers as we move about our homes and lives, this provides firms with a growing amount of information about who we are and when we might be most vulnerable to targeting by particular messages or products. For example, a recent investigation by the ABC found that National Australia Bank supplies de-identified customer transaction data to data analytics firm Quantum, enabling marketing and targeting of NAB customers by firms like Sportsbet³⁶.

Internationally, regulators have flagged that hyper-targeting and manipulation of consumers based on the data collected about them in online markets represents a ‘threat to society’. It is crucial in the fast-moving digital economy with technologies changing each week that regulators are able to identify and address practices which are deeply unfair by imposing a clear, ongoing principle that practices should not be unfair.

Case law has demonstrated significant challenges with reliance on unconscionable conduct, as evidenced by the recent High Court of Australia decision in *ASIC v Kobelt*. That decision is seen as adopting a narrow interpretation of the doctrine of unconscionable conduct, and may constrain consumer protection in the collection, sharing and use of data. A significant part of the *Kobelt* decision concerned whether the ‘book-up’ transactions used by Mr Kobelt’s Aboriginal customers were entered into voluntarily. The majority of the Court seems to have adopted a narrow view of what constitutes voluntariness in consumer transactions. The decision has been critiqued for not enquiring into how informed the customers’ decisions were, and the availability and knowledge of alternative options.³⁷ If the decision does in fact set a low bar for voluntariness in consumer transactions, this has important ramifications for the regulation of consumer data practices. A consumer might be regarded as voluntarily entering into an unfair data transaction, despite being poorly equipped to make an informed choice. All consumers currently suffer from a severe lack of information about new technologies and the collection, sharing and use of the data they exchange, underscoring the need for stronger protections to protect consumers from manipulative, exploitative and unfair conduct.

CPRC strongly supports reform of the Competition and Consumer Act 2010 to include a prohibition on certain unfair trading practices (recommendation 21) and a prohibition against unfair contract terms (recommendation 20).

Minimum safety standards for new technologies

CPRC also support further work being undertaken with respect to the introduction of a general safety provision into consumer law. Safety aspects of new data-driven technologies must be considered for

³⁵ Ibid 9, (p34-35)

³⁶ <https://www.abc.net.au/news/2019-03-05/sportsbet-documents-reveal-millions-spent-on-marketing/10833196>

³⁷ Jeannie Marie Paterson, Elise Bant and Matthew Clare, ‘Doctrine, policy, culture and choice in assessing unconscionable conduct under statute: *ASIC v Kobelt*’ (2019) 13 *Journal of Equity* 81.

Australian consumers to build trust and sustainable take up of these new technologies. We strongly support the work of CHOICE in regard to the introduction a general safety provision and encourage consideration of data, IoT devices and AI as part of the establishment of any safety standard.

The rise of intermediaries and addressing gaps in policy & regulation

CPRC highlights the rapid growth of intermediary businesses and their impact on advice and recommendations provided to consumers, the matching of consumers and suppliers and the process of conducting transactions.

As more providers come in between consumers and suppliers, more data is collected along the supply chain. This can be used in socially beneficial ways, such as greater transparency as to ethical supply chains, and better assisting consumers to identify products that suit their preferences more efficiently. However, this also increases the data collected by middle parties and their ability to influence purchase decisions.

Comparator websites, personal porters, matching sites, some new mobile payment technologies, and online booking systems will all have the potential to influence purchase decisions, consumer behavior and the data collected about consumers. This is a structural change in markets which CPRC strongly encourages policymakers and regulators to carefully consider, especially in terms of monitoring and enforcement. Most comparator websites do not, for example, have a Code of Conduct or industry specific regulations stipulating their required transparency when it comes to sponsorship deals, presentation of offers or the collection of data. Industry-specific regulations pertaining, for example, to the display of pricing information often only apply to licensed retailers within those markets, leaving a gap in regulation for the way pricing information might be presented or compared by other parties.

Online markets and marketplaces have enormous potential to improve consumer choice and outcomes – through reduced search costs, significantly expanded choices to meet all kinds of consumer preferences, and through increased competition to reduce the cost of products and services. But as noted by the ACCC, consumers attempting to navigate online markets and marketplaces can find themselves overwhelmed by the sheer volume of information, with suboptimal consequences.

Digital platforms and comparison services play a central role in the consumer journey for consumers engaging in search or shopping online. As noted by the ACCC, Google’s search engine is effectively the current default on over 95 percent of mobile device in Australia.³⁸ Moreover, the European Commission noted that “on Android devices (with Google Search and Chrome pre-installed) more than 95 per cent of all search queries were made via Google Search”.³⁹

Taking the travel sector as an example, a number of Google’s competitors have raised concerns about Google’s Travel businesses (Google Flights, Google Hotels and Google Trips) which are integrated in its general search results – and will be further integrated with Google Search and Google Maps.⁴⁰ Though Google claims that it “competes directly with specialised search services for many categories of queries, including shopping, local, travel and more”, the first result that appears for a “general search” conducted

³⁸ ACCC, DPI, pg 70

³⁹ European Commission, [Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google’s search engine](#), 18 July 2018, accessed 23 November 2018. – ACCC, DPI, pg71

⁴⁰ Why Google will own travel, AFR

through google about a general aspect of a holiday (e.g. a flight between destinations or accommodation) is a vertical search within one of Google’s own Travel businesses.⁴¹ Moreover, changes in Google’s general search algorithm may directly affect Google’s competitors – some of whom have reported a sudden reduction in traffic to their own sites.⁴² As noted by the ACCC, this insulation from market dynamics at the starting point – where consumers engage in a “general search” enables Google to exert market power.

Moreover, existing consumer research suggests that a significant portion of Australians do not understand how sponsored search results work – which may have implications for how they understand the vertical search results (via one of Google’s affiliated businesses) that stem from a general search. Other Australian consumer research sought to challenge the underlying assumptions about expectations of a reasonable consumer’s understanding of internet search results sponsored search results. Daley and Scardamaglia found that 38 percent of all of respondents were unable to distinguish between a paid-for ad (marked by an “Ad” notification in orange) and an organic search result conducted through Google’s search engine.⁴³ Younger respondents (18-24 year old) were more successful in identifying the sponsored advertisement (74 percent), compared with respondents in the 65+ bracket (56 percent).⁴⁴ Notably, only 55 percent of the 35-44 age bracket were able to successfully identify the advertisement.⁴⁵ The study found that those with graduate or post-graduate qualifications (71 percent) were better able to identify sponsored content compared with those without a tertiary education (51 percent), yet this suggests sizeable portion of tertiary educated Australians still have difficulty identifying organic results.⁴⁶ Moreover, the study also found that 70 percent of participants were unaware that Google Shopping results were a Google affiliated service, which now operates on a purely paid model rather than displaying organic results.⁴⁷

CPRC encourages policymakers to further explore and investigate the growing role of intermediaries, given the expansion of their role in providing advice to consumers about offers, matching demand and supply and in some cases, acting on behalf of consumers.

Scams and availability of personal information

The broad and deep availability of personal information about consumers through the trade of personal information now increases the exposure of consumers to other harms such as data breaches and scams.

Scams are becoming increasingly sophisticated and targeted and are much easier to perpetrate when other information about individuals is easier to obtain through direct collection or purchase. In May this year, AI firm Dessa produced the first synthetic voice, built from the voice data of podcaster Joe Rogan. The synthetic voice responds and sounds just as if you were talking to the real Joe. Dessa were open about this development, highlighting that this synthetic voice could be created of anyone, with enough voice data⁴⁸. They note this raises considerable risks of human-like speech synthesis, which they believe will soon be a reality everywhere including:

⁴¹ Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 33. See also ACCC DPI report p 64.

⁴² Why Google will own travel, AFR

⁴³ A. Daley and A. Scardamaglia, ‘Profiling the Australian Google Consumer: Implications of Search Engine Practices for Consumer Law and Policy’, *Journal of Consumer Policy*, 10 May 2017, 15.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid., 17.

⁴⁸ <https://medium.com/dessa-news/real-talk-speech-synthesis-5dd0897eef7f>

- Spam callers impersonating family members to obtain personal information
- Impersonation for bullying and harassment
- Gaining entrance to high security areas by impersonating a government official
- Audio deepfakes of politicians to manipulate election outcomes

Voice data is now rapidly being collected by a multitude of companies to develop a range of AI technologies. Consumers engaging with products and services collecting voice data may well not be aware of the risks of accumulating large storages of their voice data, or any other types of personal information.

The risks of scams can be lessened by reducing the ‘attack surface’ of personal information. We strongly recommend that enforcement agencies charged with responsibility for addressing scams and frauds consider the impact of consumers not having a right to delete their personal information in this regard. *This further supports recommendation 16(d) that consumers need to be provided a right to erasure of their personal information.*

A nimble, focused and well-resourced regulator

CPRC strongly supports recommendation 4: proactive investigation, monitoring and enforcement of issues in markets in which digital platforms operate. Technology is moving much faster than policymakers and regulators are able to keep pace. During this period of rapid transformation, the scope for significant and swift consumer harm is escalated. It is appropriate and prudent for the Australian Government to increase investment to regulatory bodies tasked with:

- Ongoing monitoring of the operation of digital markets and emerging technologies
- Enforcement of new laws and regulations, given the significant under-resourcing of the OAIC in previous years

CPRC strongly recommends investment in ongoing market research by regulators, policymakers and civil society to identify and understand new technologies, their data collecting capabilities, along with machine-learning and AI applications. Significant workforce and skills development are required, with Australia lacking the depth of the technical skills and knowledge in these fields relative to other jurisdictions.

Broader Privacy Act reform

Acknowledging the growing intersection of consumer protection, competition and privacy regulation, CPRC supports a broader review of the Privacy Act and strengthening existing provisions. These reforms must work in parallel to others outlined above in order to deliver the balance of consumer autonomy and minimum protections required. As highlighted by Daniel Solove, privacy self-management alone does not provide people with meaningful control over their data.⁴⁹ We therefore support broader Privacy Act review and reforms (Recommendation 17) and the adoption of privacy-by-design approaches to regulation and intervention.

⁴⁹ Solove, 2013, *Introduction: Privacy self-management and the consent dilemma*

We also support other Privacy Act reform initiatives such as:

- Updating the definition of personal information to include technical data such as: IP addresses, device identifiers, location data, and any other identifiers that may be used by the individual (Recommendation 16(a))
- Introducing direct rights of action for individuals (Recommendation 16(e))
- Higher penalties for breach of the Privacy Act (Recommendation 16(f))
- Introducing a statutory tort for serious invasions of the Privacy Act (Recommendation 19)

3. Trends that need further consideration

The increasing combination of private sector and public sector data

Data and personal information collected about consumers can clearly be valuable to both the corporate sector and the public sector. Good data use by governments can improve wellbeing, health outcomes, infrastructure investments when data is explicitly used for those purposes, with appropriate protections in place.

We are now seeing growing interest in the sharing of consumer data across the corporate and government sectors. With location data being sought for public transport infrastructure investments⁵⁰ and the potential sharing of public sector data with commercial entities⁵¹. In this environment, it is critical that policymakers carefully consider the role of consumer consent and the stated use cases as part of this process, as well as the differences in consumer expectations of their data use across the corporate and government sectors.

Adequate support for good data and innovation initiatives to improve consumer and community welfare

Diversity of thought and experience working on data policy and program initiatives will be central to driving sustainable change, literacy and technology uptake across the community. Consumer advocates have raised significant concern with the digital divide disproportionately negatively impacting people with a disability, older consumers, indigenous communities, and those on lower incomes.

As technology advances, the impact of this digital divide will be amplified without intervention. More advantaged consumers will have more access to digital tools, platforms, comparisons, information to assist them navigate markets. This risk of growing inequality is significant. These structural shifts must be taken into account by all sectors, not only with reforms outlined above, but also with positive investment and fostering of inclusive technology initiatives.

Socially beneficial innovation that improves welfare across the community needs to be actively supported and fostered by governments. Inclusive initiatives where technology, data collection, sharing and use can be undertaken with and for groups of consumers can contribute to building greater trust and confidence in data-driven initiatives.

⁵⁰<https://www.abc.net.au/news/2019-07-02/victoria-to-collect-mobile-phone-data-for-transport-planning/11270958>

⁵¹<https://www.datacommissioner.gov.au/data-sharing/discussion-paper-PIA>

Ultimately, consumers and communities need to be placed at the centre of digital transformation and reforms. We look forward to continuing discussions with the Australian Government over the coming months as we face one of the most significant opportunities to lay the important and essential groundwork to prepare Australian's markets for the Fourth Industrial Revolution.

For further discussions regarding our research our this submission, please contact lauren.solomon@cprc.org.au or (03) 9639 7600.

Yours sincerely,



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