



## What We See and What We Don't: Protecting Choice for Online Consumers Policy Report

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# What We See and What We Don't: Protecting Choice for Online Consumers Policy Report 2020

## Executive Summary

### Online Shopping is different from Bricks-and-Mortar Shopping

The experience of consumers who shop online is fundamentally different to 'bricks-and-mortar' shopping. New technologies have enhanced the ability of firms to collect and analyse consumer data, profile consumers so as to engage in targeted online advertising and to control the display of products visible to online consumers. This means that consumer protection laws should be repurposed, and in some cases reformed, to ensure adequate and effective consumer protection for online consumers.

### Data collection

Firms are continually collecting data about consumers: including from online browsing, loyalty cards and social media.<sup>1</sup> Such data can be used to give firms more knowledge about consumers. Firms can combine data from a number of sources to create profiles of consumers. These profiles can be used to develop products that better fit consumers' preferences and also for targeted advertising.

### Targeted advertising

Traditional advertising goes out to all consumers using the medium through which the ad is promoted, such as TV, radio or print. Digital advertising may be targeted at individual consumers or groups of consumers based on profiles created from the data collected about them.<sup>2</sup> Targeted advertising may be useful in some circumstances by ensuring consumers are presented only with potentially relevant advertisements. However, it may be problematic if consumers do not know they are being subject to targeted advertising. Targeted advertising may hide alternative options from the view of consumers. Targeted advertising may also have the effect of exploiting the existing insecurities or vulnerabilities of consumers to produce more sales with little benefit to them.

### Different kinds of displays

In bricks-and-mortar shopping all consumers see the same product displays. When they are online, consumers may see different products and different orderings of products.<sup>3</sup> These kinds of practices make it harder for consumers to make the best choices when shopping online. Consumers will not be aware of what products are available but not prominently displayed. Sometimes products are presented to consumers as 'featured' for reasons that are not at all clear. Consumers may not be able to tell whether these are presented as a 'best fit' for the consumer or paid advertising.

### Out of step with consumer expectations and welfare

These various features of the online shopping experience may be out of step with consumers' expectations.<sup>4</sup> It is possible consumers think displayed products are the one's best suited to their preferences or are the same for all consumers. Moreover, these kinds of practices may cause real consumer harm by narrowing consumer choice, enabling predatory marketing and reducing competition.

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<sup>1</sup> See Dana McKay, *State of the Art in Data Tracking Technology* (Report, November 2019)..

<sup>2</sup> See DQUBE Solutions, Suelette Dreyfus, Shanton Chang, Andrew Clausen, *Drawing Back the Curtain: Consumer Choice Online in a Data Tracking World* (Report, July 2020).

<sup>3</sup> See DQUBE Solutions, Suelette Dreyfus, Shanton Chang, Andrew Clausen, *Drawing Back the Curtain: Consumer Choice Online in a Data Tracking World* (Report, July 2020).

<sup>4</sup> We recommend more research on this issue.

## Regulatory responses to the online shopping experience

### A multi-faceted regulatory approach

Better protecting consumers in their online shopping experience requires a **multi-faceted** approach, utilising privacy law and consumer protection law. Online traders and digital platforms also have a role to play. They have an opportunity to build consumer trust and confidence by giving consumers **more control and clarity** in their shopping experience.

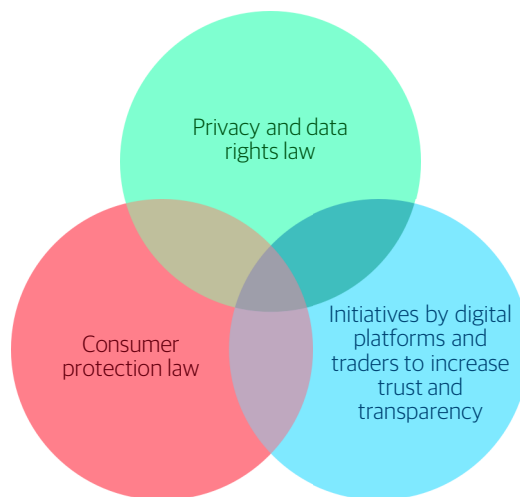


Fig 1: A multi-faceted regulatory approach

### Six Strategic Interventions to Protect Online Consumers

Consumers shopping online need stronger data rights, greater protection against manipulative targeted advertising, more clarity around how products are presented online and more accessible dispute resolution.

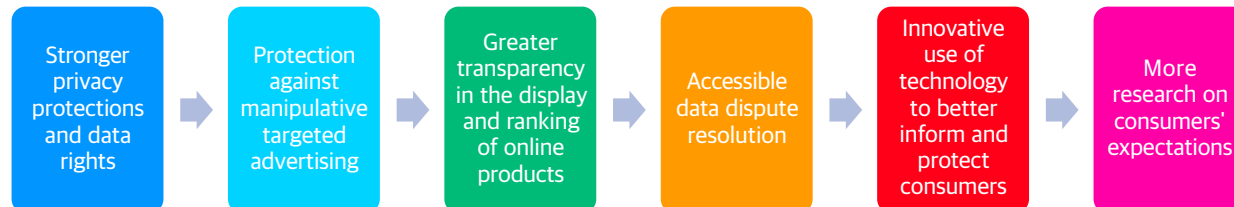


Fig 2: interventions to protect online consumers

#### 1. Stronger privacy protection and data rights

Consumers should be given better protection in online shopping by having greater control over their own data. Greater data protection will reduce the opportunities for manipulative targeted advertising.

- The reforms to introduce stronger consumer privacy protection in the ACCC's *Digital Platforms Inquiry Report* should be adopted.
- Consumer rights over data should be supplemented by substantive fairness protections for consumers, including stronger control over unfair terms.

## 2. Protection against targeted advertising

Consumers need protection against the manipulative tendencies of targeted advertising. Possible strategies include mandating disclosure requirements and introducing prohibitions against unfair trading.

## 3. Greater transparency in the display and ranking of online products

There should be greater transparency demanded from firms in the way in which they present products online, including about whether:

- products at the top of a search list are in that position because of paid advertising, and
- the order in which products are displayed may differ between consumers.

## 4. Accessible data dispute resolution

There should be accessible dispute resolution for consumers concerned about data collection practices and use such as through a data ombudsman.

## 5. Innovative use of technology to better inform and protect consumers

In increasing transparency for consumers in their online shopping experience, the regulator should encourage, and even demand, innovative options that make use of the potential for digital technology to improve the way in which information is provided to consumers and the ways in which they exercise their rights. Consumers do not need more cumbersome terms and conditions.

## 6. More research on consumers' expectations for a fair online shopping experience

Many of these strategies have been raised in the ACCC's 2019 *Digital Platforms Inquiry Report*.

# What We See and What We Don't: Protecting Choice for Online Consumers

## I Introduction

Online shopping — buying goods and services over the internet — brings many advantages to consumers. It gives consumers access to products and stores they could not otherwise reach with the convenience of doing this from home. Online shopping also has the potential to limit the choices available to consumers in ways that are not easily discoverable, and which are very different to the bricks-and-mortar experience. Both bricks-and-mortar stores and online forums collect large amounts of data about consumers. New methods of data analytics enabled by advances in computing and cloud storage allow firms to target online advertising to individual consumers and to vary the order in which products are displayed online as between individual consumers.

The University of Melbourne's *State of the Art*<sup>5</sup> and *Drawing Back the Curtain: Consumer Choice Online in a Data Tracking World*<sup>6</sup> Reports illustrate the scale of data collection practices regularly deployed by firms in interactions with consumers. The *Drawing Back the Curtain Report* further shows the possibility of targeting advertising to consider according to their online profile or demographic. The report also shows the differing presentation of products online. Consumers may not be aware of these practices. They may not meet consumer expectations of a fair and open consumer online market place. Moreover, these kinds of practices have the potential to cause harm to consumers' wellbeing, confidence and engagement in the market. This may occur through reducing privacy, choice and competition, as well as raising the possibility of manipulating consumers into making choices that are not in their best interests.

This report outlines the law reform and policy responses available to address these kinds of potential harms to consumers. It supports the recommendations made in the ACCC's 2019 *Digital Platforms Inquiry Report*<sup>7</sup> for law reform to both the *Privacy Act 1988* (Cth) and the *Australian Consumer Law ('ACL')*<sup>8</sup> to provide consumers with better protection against overreaching data collection practices.<sup>9</sup> This report considers that better consumer data protection should involve both strengthening consumer control over their own data and also substantive protection for consumers against unfair terms in privacy policies and against unfair trading practices in respect to both data collection and digital advertising and sales. These reforms will help to address some of the concerns that have been raised about targeted advertising, particularly to consumers experiencing vulnerability. In addition, this report suggests that online consumers should be better protected in their shopping experience. These protections might usefully include greater transparency in the use of targeted advertising and in trader's display practices, such as in showing different products and different product displays to individual consumers.

## II Consumer experience in shopping online

The digital economy, which relates to the ability of firms to bypass bricks-and-mortar and sell a variety of goods and services to consumers online, has changed the experience of consumer shopping. Regulators and researchers are increasingly investigating the harms that may arise from such practices. Some of the practices in this new data-driven market that have attracted this kind of scrutiny concern data collection practices, the use of targeted advertising and the ways in which products are presented online to consumers.

### Data collection

Consumers' online and digital interactions provide considerable amounts of personal data that may be collected, combined, repurposed and sold to inform the online marketing strategies of firms.

Traders typically now collect large amounts of data about the consumers they deal with. This may be done through innocuous methods, such as loyalty cards or memberships.<sup>10</sup> Large corporate retailers collect information through a variety of methods including via their websites and loyalty programs. Data may also be collected through consumers' online interactions, including browsing, social media and internet transactions.<sup>11</sup> The ACCC *Digital Platforms Inquiry Report* identified a number of tracking practices used by digital platforms including through

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5 Dana McKay et al, *State of the Art in Data Tracking Technology* (Report, November 2019).

6 DQUBE Solutions, Sulette Dreyfus, Shanton Chang, Andrew Clausen, *Drawing Back the Curtain: Consumer Choice Online in a Data Tracking World* (Report, July 2020).

7 See generally Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) ch 7.

8 *Competition and Consumer Act 2010* (Cth) sch 2 ('ACL').

9 While this report focuses on the interactions between consumers, digital platforms and online traders, it is to be noted that the breadth of coverage of digital platforms also raises concerns about the manipulation of citizens in their civic digital interactions, highlighting the need for protections on the democratic process: see Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019); House of Lords Select Committee on Democracy and Digital Technologies, *Digital Technology and the Resurrection of Trust: Report of Session 2019–21* (HL Paper 77, 29 June 2020).

10 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 451.

11 Dana McKay, *State of the Art in Consumer Data Tracking* (Report, November 2019) 5; Brigid Richmond, *A Day in the Life of Data: Removing the Opacity Surrounding the Data Collection, Sharing and Use Environment in Australia* (Report, 29 May 2019).

12 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 387–390.

cookies, web beacons, device or browser fingerprinting, facial recognition, module devices and audio beacons.<sup>12</sup> The data collected from numerous, seemingly discrete, interactions may be recombined through sophisticated data analytics to create a fuller picture of consumers' online behaviour, interests and preferences, a process sometimes referred to as 'consumer profiling'.<sup>13</sup> These profiles are then used for a variety of purposes, including to drive platform and product innovation and for targeted advertising.

A forthcoming technical report by Culane et al. examines the scope and scale of online advertising and tracker activity on the landing pages on five de-identified Australian retailers' sites.<sup>14</sup> It finds multiple advertising networks, trackers and profiling scripts present on all five retailers surveyed. The report observes that in a retail context, in which the consumer is not receiving a product or service for free but is paying for it, such usage needs to be further justified to ensure the market remains fair. The report concludes that the scale and scope of such digital tracking may come as a surprise to consumers, and raises questions about whether the degree and scale of the tracking is fair to consumers. The lack of transparency and the power asymmetry that arises from the information-gathering imbalance are both also noted; at least two of the retailers surveyed prohibited other traders from collecting or utilising the data on *their* websites. The report also finds evidence of browser fingerprinting being used on all five retailer sites. From the consumer perspective, this has privacy implications because it is difficult to change the fingerprint of a browser. By bypassing the protections offered through either clearing cookies, or using incognito/private browsing, there is a lessening of privacy preservation available to consumers.

## Targeted advertising

The combination of 'big data', increasing computing power and developments in predictive analytics provides firms with new opportunities for reaching consumers and for influencing their decision-making about consumer products.<sup>15</sup> One such possibility is targeted advertising. Targeted advertising is digital advertising that is sent to consumers based on their browsing history, online profile and other information collected online about them.<sup>16</sup> For example, online behavioural advertising allows firms to use information gathered about a consumer's browsing habits and to personalise advertisements that may appeal to those displayed preferences.<sup>17</sup> Location tracking allows advertising to be directed to consumers in specific locations.<sup>18</sup> As documented in the ACCC *Digital Platforms Inquiry Report*, Facebook offers firms the ability to advertise directly to customer lists, either held by the firm or provided by a data firm, and to 'look alike audiences'.<sup>19</sup>

The *Drawing Back the Curtain Report* documents an observational experiment conducted by UoM researchers investigating the opportunities for targeted advertising through a social media platform. This was done via shadow observations of the live purchase of online advertising to assess how consumers might be selectively targeted through advertisement buys. The process showed that although a technology-based advertiser may not allow certain searching criteria, for example to do with a particular group, the nature of the technology makes it possible to approximate groups of such consumers by putting together a set of other criteria in targeting of the advertising. The project also showed the potential for indirect or 'sideways' marketing techniques, using proxy descriptors for consumer groupings that the social media platform does not allow firms to advertise to directly.

Targeted advertising may have attractions in ensuring the relevance of advertising presented to consumers. However, it also has the potential for manipulation.<sup>20</sup> The ACCC *Digital Platforms Inquiry Report* notes that technology is being developed that aims to identify the emotional state of the user. This would allow firms to direct advertising that responds to consumers' emotional state in order to leverage further sales.<sup>21</sup>

## Different kinds of displays

In shopping online consumers are heavily reliant on the way in which search results are displayed, namely which products are highlights or promoted and the order they are listed. Yet firms selling online may change the order in which products are displayed even as between individual customers. This may affect the total price of a basket of the top five goods returned on a search by a consumer. Online trackers may follow consumers as they visit shopping sites and gather data about them. Data analysis that reveals profile traits

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13 See recent litigation launched by the ACCC against Google, alleging Google misled Australian consumers to obtain their consent to expand the scope of personal information that Google could collect and combine about consumers' internet activity, for use by Google, including for targeted advertising: Australian Competition and Consumer Commission, 'ACCC Alleges Google Misled Consumers About Expanded Use of Personal Data' (Media Release, 27 July 2020) <<https://www.accc.gov.au/media-release/correction-acc-acc-alleges-google-misled-consumers-about-expanded-use-of-personal-data-0>>.

14 Chris Culane et al, *Tracking on Australian Retail Websites* (Report, forthcoming).

15 Shoshana Zuboff, 'Big Other: Surveillance Capitalism and the Prospects of an Information Civilization' (2015) 30(1) *Journal of Information Technology* 75; Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books, 2019).

16 Alyssa Foote, 'Online Ad Targeting Does Work: As Long as It's Not Creepy', *Wired* (online, 5 November 2018) <<https://www.wired.com/story/online-ad-targeting-does-work-as-long-as-its-not-creepy/>>; Clint Finley, 'Facebook and IBM Team Up to Supercharge Personalized Ads', *Wired* (online, 5 June 2015) <<https://www.wired.com/2015/05/facebook-ibm-team-supercharge-personalized-ads/>>. See also J M Paterson, 'Consumers as Prey' *Competition Lore* (podcast, 2019); 'Algorithmic Advertising' presentation at Lorenz AI Ethics Workshop (in 2019 and forthcoming, 2020).

17 Herbert Smith Freehills, 'Targeted Advertising' (Legal Briefing, 10 January 2018) <<https://www.herbertsmithfreehills.com/latest-thinking/targeted-advertising>>.

18 Herbert Smith Freehills, 'Targeted Advertising' (Legal Briefing, 10 January 2018) <<https://www.herbertsmithfreehills.com/latest-thinking/targeted-advertising>>.

19 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 387.

20 See also Abbey Stemler, Joshua E Perry and Todd Haugh, 'The Code of the Platform' (2020) 54(2) *Georgia Law Review* 605.

21 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 516.

about particular consumers may show them to be more likely to purchase certain kinds of goods or services at particular prices. Different display of products may also arise through A/B testing, whereby firms advertise different combinations of products widely to two similar groupings of consumers to determine which is more amenable to those consumers.

The *Drawing Back the Curtain Report* conducted by UoM researchers documented an observational experiment and a technical experiment to investigate the degree to which the online display of products may differ from a bricks-and-mortar setting and between consumers. The observational analysis compared what a consumer would see when shopping online versus in a bricks-and-mortar store. This observational analysis showed that while an online shop search capability may allow consumers to locate an exact item quickly, for the browsing consumer, it may take some effort in scrolling pages online to see the same number of unique items that a consumer browsing bricks-and-mortar shelves will cover in a single-eye sweep.

The experiments tested online sites to observe what offerings, price variation and product steerage might be visible to consumers browsing the site (but did not investigate the back-end process). The technical experiment investigated what different consumers see in online shopping using created personas segregated by gender, age and online history. This aspect of the research used online personas to visit shopping sites to determine whether different personas were offered products displayed in a different order, or different products at different price points. The experiment found that the order of products can change between individual customers. Therefore, the total price of a bundle of top five goods returned on a search of the site can also change, as a result of re-positioning of products.

The researchers were not able to see the technology behind what was offered. This is part of the transparency problem of complex technology highlighted in this report. Thus, we cannot definitively determine the actual basis on which differences appeared; we can only describe what we saw and present hypotheses about these observations.

Consumers often memorise the layout of their bricks-and-mortar shop, and can therefore find the item they are looking for easily. Online shopping is a different experience for the consumer, and therefore different marketing behaviours, such as A/B testing or digital product shelf placement, may cause unforeseen impacts on the consumer. Whether product steering in an online environment has more ability to coax the customer into less advantageous purchases than steering in a bricks-and-mortar store would prove an avenue for future study.

### III Out of step with consumer expectations and consumer welfare?

Just what consumers think and understand about the online shopping experience is currently unclear. It has been found that 78% of consumers prefer personalised advertising as opposed to non-personalised advertising;<sup>22</sup> however, personalised advertising causes consumer discomfort when there is a low level of transparency as to what data is collected or, despite higher transparency, the collection of data violates data 'flow norms'.<sup>23</sup> Surveys by the Australian Competition and Consumer Commission have found that consumers consider there should be 'transparency and choice in how digital platforms should collect, use and disclose certain types of user data'.<sup>24</sup> The surveys showed that consumers had a range of understandings about the data practices of digital platforms.<sup>25</sup> Other surveys, including by the Consumer Policy Research Centre, similarly show consumers are concerned about privacy and uses of data by digital platforms and online companies.<sup>26</sup>

Further research is needed on how consumers understand the online shopping experience in terms of the kinds of advertising that may be directed to them and the ways in which the display of products may differ from bricks-and-mortar stores. However, the uncertainty shown in surveys around privacy and data practices suggests there may be a gap between consumer expectations and the realities of these process. There is, moreover, real potential for a variety of harms arising from the targeted advertising and fluid display practices, outlined above.<sup>27</sup> The ACCC *Digital Platforms Inquiry Report* identified 'market inefficiencies' resulting in considerable consumer harm, including 'decreasing the likelihood of effective competition on important quality dimensions of digital platforms produces and services',<sup>28</sup> and reduced trust in data driven technologies.<sup>29</sup> The ACCC *Digital Platforms Inquiry Report* also noted the risks to consumers of increased profiling. It noted that detailed online profiles of consumers can be used to influence their behaviour which 'causes consumer harm from risks associated with manipulation and loss of autonomy'.<sup>30</sup>

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22 Adobe, *Adobe Digital Insights Advertising Demand Report 2016: North America* (Research Report, 15 September 2016).

23 Tami Kim, Kate Barasz and Leslie K John, 'Why Am I Seeing This Ad? The Effect of Ad Transparency on Ad Effectiveness' (2019) 45(5) *Journal of Consumer Research* 906, 906, 911.

24 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 382.

25 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 383.

26 Phuong Nguyen and Lauren Solomon, *Consumer Data and the Digital Economy: Emerging Issues in Data Collection, Use and Sharing* (Report, 2018) 34.

27 DQUBE Solutions, Suelette Dreyfus, Shanton Chang, Andrew Clausen *Drawing Back the Curtain: Consumer Choice Online in a Data Tracking World* (Report, July 2020).

28 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 442.

29 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 442.

30 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 442, citing Brigid Richmond, *A Day in the Life of Data: Removing the Opacity Surrounding the Data Collection, Sharing and Use Environment in Australia* (Report, 29 May 2019) 34–6.



All marketing has the aim of, in some way, influencing consumers' purchasing decisions. Bricks-and-mortar stores aim to influence consumer choice through their advertising and by the very way in which they display their products, and the ambience they create inside the store. However, the online environment differs significantly from bricks-and-mortar shopping. The uses of digital technology in marketing to consumers allow firms to go well beyond what has been possible in the past. Firms now have the opportunity to target advertising to narrowly defined consumer profiles with different consumers seeing different material. It is feature that raises significant risk to consumer autonomy, of manipulation and of discrimination.<sup>31</sup>

Targeting, by removing alternative options from consumers' sight, reduces their autonomy. Consumers may be unaware that an advertisement they see online is seen only by them, or people thought to be like them and that other consumers see different options. This means consumers are making decisions from a position of less than full information, in determining the preconditions for the exercise of autonomy.

Targeted advertising may manipulate consumer preferences. It may do this through the way in which the options available to consumers are presented. It may also do this by being designed to trigger pre-existing sensitivities or unconscious biases, identified through data driven profiles, to nudge or even shove consumers towards particular conduct. For example, foods or cosmetics may be advertised at particular times of day when consumers are predicted to be feeling tired or stressed.<sup>32</sup>

Targeted advertising has the potential to entrench existing inequalities by allowing firms to discriminate between different consumer profiles. This creates particular risks for vulnerable and marginalised consumers who may be restricted in their purchasing choices and subject to unfavourable pricing through these methods. For example, a targeted advertising strategy might send advertising for expensive payday loans to consumers on low incomes or Centrelink payments.<sup>33</sup> In addition, targeted advertising also raises the risk of discrimination against certain consumers groups and the potential to exclude them from particular markets.<sup>34</sup>

The form of online shopping displays may not only guide consumers towards specific options designed by the firm but also close off others. Consumers shopping online may have an expectation of a standard display of product and price, which proves not in fact to be the case.<sup>35</sup> As the experiment in the *Drawing Back the Curtain Report* showed, consumers may be steered or channelled towards choices without realising that this is occurring.<sup>36</sup> Different consumers may see different products and not realise others were available, which impacts on choice and on competition.

## IV Regulatory responses to protect consumers shopping online

The ACCC's *Digital Platforms Inquiry Report* recommended reforms to the Australian *Privacy Act 1988* (Cth) and to the *ACL*. The aim of these proposals is to provide Australian consumers with greater rights of control over their data and substantive protections in regard to both data collection and digital advertising practices. We agree with these proposals. They will address the problems raised by the potentially harmful practices documented in the *State of the Art* and *Drawing Back the Curtain* Reports.

### A multi-faceted approach

We consider it is worth emphasising that effective regulatory response to these concerns will require a multi-faceted approach. There is no one easy solution. Effective regulation of online shopping will require a coordinated approach between privacy and consumer protection law. It will also require some buy-in from traders and digital platforms, which might be achieved by incentives to such conduct or through codes of conduct applicable to these entities. Where greater disclosure and transparency is required by the regulatory regime, businesses have an opportunity to build consumer trust and confidence by giving consumers more control and clarity in their online shopping experiences.

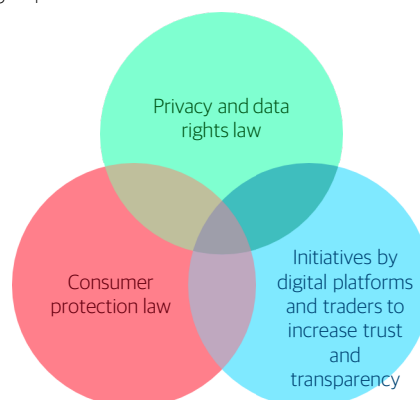


Fig 1: A multi-faceted regulatory approach

31 Eliza Mik, 'The Erosion of Autonomy in Online Consumer Transactions' (2016) 8(1) *Law, Innovation and Technology* 1, 22. See also Gerhard Wagner, 'Down by Algorithms? Siphoning Rents, Exploiting Biases and Shaping Preferences the Dark Side of Personalized Transactions' (2019) 86(2) *University of Chicago Law Review* 581.

32 Rebecca Rosen, 'Is this the grossest advertising strategy of all time?' *The Atlantic* (2013) <https://www.theatlantic.com/technology/archive/2013/10/is-this-the-grossest-advertising-strategy-of-all-time/280242/>.

33 See DQUBE Solutions, Suelette Dreyfus, Shanton Chang, Andrew Clausen, *Drawing Back the Curtain: Consumer Choice Online in a Data Tracking World* (Report, July 2020).

34 See, eg, Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 447, discussing findings by ProPublica in the US showing that rental ads could be purchased to exclude categories of users.

35 'It is the combined, mutually-enforcing effect of multiple technologies that influence consumer decisions at different stages in his path-to-purchase, creating an environment of ambient and pervasive manipulation': Eliza Mik, 'The Erosion of Autonomy in Online Consumer Transactions' (2016) 8(1) *Law, Innovation and Technology* 1, 6.

36 See also Karen Yeung, "'Hypermudge': Big Data as a Mode of Regulation by Design' (2017) 20(1) *Information, Communication and Society* 118, 119.

## Six Strategic Interventions to Better Protect Online Consumers

We recommend 6 interrelated, strategic regulatory interventions to better protect online consumers.

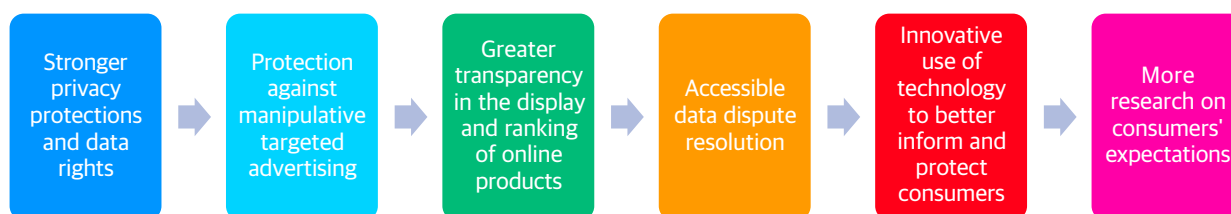


Fig 2: interventions to protect online consumers

These interventions both arise out of and go beyond the recommendations in the ACCC's *Digital Platforms Inquiry Report*.

### 1. Stronger Privacy Protections and Data Rights

First, there should be stronger protections around the collection and use of consumer data. These protections should centre around reforms to the *Privacy Act 1988 (Cth)* to provide consumers with stronger data rights. They should also include substantive consumer protections, such as through the unfair contract terms law and a prohibition on unfair trading.

#### Privacy Act

The capacity of business and government to collect and use data has brought privacy law into the forefront in recent times, and also placed new demands on existing laws that in many cases were not designed to deal with the varied uses of consumer data. The *Privacy Act 1988 (Cth)* provides consumers with some form of data protection. However, these protections are not as extensive as in other jurisdictions, in particular under the European Union's *General Data Privacy Regulation ('GDPR')*.<sup>37</sup>

The cornerstone of the *Privacy Act* protective framework is the *Australian Privacy Principles ('APP')*. The *APP* are principles-based law. They were designed to be 'technology neutral', which allows them to adapt to changing technologies. Nonetheless, they have been criticised in their application to data on the grounds that they provide minimal real options for consumers to control their data.<sup>38</sup> It is indeed often suggested that privacy policies are designed to nudge (or shove) consumers towards not exercising privacy enhancing rights.<sup>39</sup>

Moreover, under Australian law:

- many data collection practices do not need the consent of consumers;<sup>40</sup>
- privacy notices outlining uses of collected data are often difficult to access and understand, and often the default setting is not privacy enhancing;<sup>41</sup> and
- where consumer consent is required for data collection, it is often bundled and the defaults are not privacy protecting.<sup>42</sup>

This state of affairs may be contrasted with the European Union's *GDPR*, which provides consumers with more comprehensive rights specifically in relation to data.<sup>43</sup> Other jurisdictions are also increasingly developing data protections regimes, such as seen in the *California Consumer Privacy Act of 2018 ('CCPA')*.<sup>44</sup> See further Appendix 1 for a comparison of consumer data rights between these jurisdictions.

The ACCC's *Digital Platforms Inquiry Report* made recommendations for the reform of the *Privacy Act 1988 (Cth)* to provide for better mechanisms for ensuring consumer consent to data collection practices.<sup>45</sup> These suggested

37 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1, 1–88 ('GDPR').

38 See Katherine Kemp and Rob Nicholls, Submission to the Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (1 March 2019) <<https://www.accc.gov.au/system/files/Katharine%20Kemp%20%26%20Rob%20Nicholls%20%28March%202019%29.pdf>>.

39 See further ForbrukerRaadet, *Deceived by Design: How Tech Companies Use Dark Patterns to Discourage Us From Exercising Our Rights to Privacy* (Report, 27 June 2018).

40 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) [7.8.3]

41 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) [7.5]. Also on consumer tracking [7.6.2].

42 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) [7.4].

43 Moira Paterson and Maeve McDonagh, 'Data Protection in an Era of Big Data: The Challenges Posed by Big Personal Data', (2018) 44 *Monash University Law Review* 1 (2018)

44 *Civil Code* (California) §§ 1798.100–1798.199 (2018). See further the guide to other states: Mitchell Noordyke, 'US State Comprehensive Privacy Law Comparison', *Resource Centre* (Web Page) <<https://iapp.org/resources/article/state-comparison-table/>>. See also in India, adopting a unique data fiduciary model: Committee of Experts under the Chairmanship of Justice B N Srikrishna, *A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians; Personal Data Protection Bill 2019* (India) Bill No. 373 of 2019. In Singapore see <https://www.pdpc.gov.sg/>. In Canada see [https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/02\\_05\\_d\\_15/](https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/02_05_d_15/).

45 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 34–5.

reforms would bring Australian privacy laws closer to the regime for data protection in the *GDPR*. As recognised by the ACCC, and discussed below, an important part of the regulatory design process will be ensuring these reforms are actually accessible to consumers and able to be exercised effectively.

### Substantive fairness protection

As advocated in the ACCC's *Digital Platforms Inquiry Report*, we consider that reform to privacy protection should also be supplemented by consumer protection law initiatives directed at consumers' online experiences.<sup>46</sup> Although beneficial, greater privacy protections are unlikely to be sufficient to ensure genuine protection of consumers in collection of consumer data and in the uses that may be made of their data.<sup>47</sup> This is because privacy protection is largely premised on consumers taking control over their own data, particularly through requiring a robust standard of consent from consumers before data about them can be collected. This is a useful reform that gives consumers greater control and autonomy. However, it is not sufficient to ensure consumer welfare is promoted and not undermined in this new age of extensive capacity for data collection and capacities for predicative analytics.<sup>48</sup>

There are well recognised limitations in the effectiveness of relying on consent to protect consumer welfare.<sup>49</sup> To begin with, consumers may feel that they have little real option but to accept a firm's presented privacy policy.<sup>50</sup> In particular, this sense of a lack of other real options may arise because contracts for services and products are commonly presented as 'clickwrap agreements', which are online agreements using digital prompts that request users to provide their consent to online terms and policies without requiring them to read or understand those terms. Moreover, the terms are commonly presented on a 'take it or leave it' basis, which means consumers have little choice but to accept them if they want to receive the service in question.<sup>51</sup> (Note here the importance of the right not to be discriminated against for opting out of data collection policies in the *CCPA*).<sup>52</sup>

Moreover, in making decisions about privacy and data protection, behavioural biases may work against consumers making active choices about data protection, including:

- information overload;
- default options being privacy;
- framing;
- hyperbolic discounting; and
- overconfidence.<sup>53</sup>

The ACCC *Digital Platforms Inquiry Report* suggested that firms may use behavioural bias to induce consumers to agree to privacy limiting policies that work in the interests of firms by allowing them to collect and use consumer data collected through online interactions.<sup>54</sup>

Accordingly, we consider that reforms to the *Privacy Act* to provide data rights to consumers should be supplemented by law reform designed to promote fairness in consumer transactions. The *ACL* already includes provisions that aim to preserve the integrity of the bargaining process — such as prohibitions on misrepresentation or unconscionable conduct.<sup>55</sup> In particular, a degree of privacy protection for consumers will be brought about through robust enforcement of the prohibitions in the *ACL* on misleading conduct. Firms that mislead consumers about the scope and operation of their own privacy policies will contravene this prohibition and be liable for significant pecuniary penalties as a result.<sup>56</sup> The ACCC has recently taken action against Google

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46 Stephen Corones and Juliet Davis, 'Protecting Consumer Privacy and Data Security: Regulatory Challenges and Potential Future Directions' (2017) 45(1) *Federal Law Review* 65. See also Damian Clifford and Jeannie Paterson, 'Consumer Privacy and Consent: Reform in the Light of Contract and Consumer Protection Law' (forthcoming) *Australian Law Journal*.

47 Karen Yeung, "'Hypermudge': Big Data as a Mode of Regulation by Design' (2017) 20(1) *Information, Communication and Society* 118, 118–36; Martin Engel and Johanna Stark, 'Buttons, Boxes, Ticks, and Trust' in Klaus Mathis (ed), *European Perspectives on Behavioural Law and Economics* (Springer, 2015) 107; Damian Clifford et al, 'Pre-Formulated Declarations of Data Subject Consent: Citizen-consumer Empowerment and the Alignment of Data, Consumer and Competition Law Protections' (2019) 20(5) *German Law Journal* 679.

48 See in particular Dennis D Hirsch, 'From Individual Control to Social Protection: New Paradigms for Privacy Law in the Age of Predictive Analytics' (2020) 79(2) *Maryland Law Review* 439.

49 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report (Report, June 2019)* 23; Damian Clifford and Jeannie Paterson, 'Consumer Privacy and Consent: Reform in the Light of Contract and Consumer Protection Law' (forthcoming) *Australian Law Journal*.

50 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report (Report, June 2019)* 25.

51 Moira Paterson and Meave McDonagh, 'Data Protection in an Era of Big Data: The Challenges Posed by Big Personal Data' (2018) 44(1) *Monash University Law Review* 1, 30.

52 See Civil Code (California) § 1798.125: *right of non-discrimination*.

53 See Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report (Report, June 2019)* 428–33; Yoan Hermstrüwer, 'Contracting Around Privacy: The (Behavioural) Law and Economics of Consent and Big Data' (2017) 8(1) *Journal of International Property, Information Technology and E-Commerce Law* 9.

54 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report (Report, June 2019)* 396. See also Yoan Hermstrüwer, 'Contracting Around Privacy: The (Behavioural) Law and Economics of Consent and Big Data' (2017) 8(1) *Journal of International Property, Information Technology and E-Commerce Law* 9, discussing the possibility of regulators using nudging to promote more privacy enhancing choices.

55 *ACL* ss 18, 21.

56 See *ACL* s 224.

for misleading conduct over privacy protections in location tracking<sup>57</sup> and combining data from searches on non-Google websites.<sup>58</sup> Notably, however, in many cases of digital marketing the concern is unlikely to amount to misleading or unconscionable conduct, which impose relatively high standards of wrongdoing.<sup>59</sup> More work may be done by substantive protections, such as unfair contract terms review<sup>60</sup> and a possible prohibition on unfair trading.<sup>61</sup>

### Unfair contract terms

The ACCC has recommended amending the unfair contract terms regime to prohibit the use of such terms. This measure will allow the award of civil penalties for breach.<sup>62</sup> The regime in Pt 2-3 of the *ACL* that renders void unfair contract terms is an important protection for consumers against one-sided or overreaching data collection and privacy policies. For example, unfettered rights to unilaterally vary agreed terms in consumer contracts, found by the ACCC to be prevalent in online privacy policies, are typically void under unfair terms regimes.<sup>63</sup> The ACCC recommended that protection should be strengthened by prohibiting such terms and accompanying civil pecuniary penalties for contravention.<sup>64</sup>

We note, significantly, that the unfair terms regime in the *ACL* only extends to contracts, not notices. Some privacy policies are not clearly contracts. Therefore, we recommend reform to extend the regime of unfair terms scrutiny to notices may be warranted as has occurred in the UK.<sup>65</sup>

### A prohibition on unfair trading

The ACCC's *Digital Platforms Inquiry Report* also recommended introducing a general 'safety net' prohibition on unfair trading practices.<sup>66</sup> The rationale for this proposed reform is to allow a more nuanced response to subtle forms of manipulation of consumers around privacy policies than allowed through the existing prohibitions on misleading and unconscionable conduct.<sup>67</sup> The models raised by the ACCC's *Digital Platforms Inquiry Report*<sup>68</sup> for a prohibition on unfair trading were the general prohibition in the European Union's *Directive on Unfair Commercial Practices*<sup>69</sup> or the United States' *Federal Trade Commission Act*.<sup>70</sup> The ACCC sees potential in these kinds of prohibitions to address conduct by firms that induces consent to privacy policies by using long and complex contracts and dissuades consumers from exercising their legal rights.<sup>71</sup> The ACCC has drawn attention to the use of unfair trading prohibitions to address such conduct in the EU and the US.<sup>72</sup> In addition, the ACCC suggested a prohibition on unfair trading may provide protection against more potentially exploitative uses of targeted advertising to manipulate existing consumer vulnerabilities.<sup>73</sup> Paterson and Bant observe that these general prohibitions have not been extensively used to address this kind of concern in their home jurisdictions.<sup>74</sup> This means that there is more work to be done in understanding the scope of the provisions and their application in this context. However, they agree with Brody and Temple that it is certainly possible that a general prohibition on unfair conduct may 'bring in consideration of consumers' behavioural biases that might be exploited by traders'.<sup>75</sup>

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57 See Australian Competition and Consumer Commission, 'ACCC Alleges Google Misled Consumers About Expanded Use of Personal Data' (Media Release, 27 July 2020) <<https://www.accc.gov.au/media-release/correction-accc-alleges-google-misled-consumers-about-expanded-use-of-personal-data-0>>.

58 Australian Competition and Consumer Commission, 'ACCC Alleges Google Misled Consumers About Expanded Use of Personal Data' (Media Release, 27 July 2020) <<https://www.accc.gov.au/media-release/correction-accc-alleges-google-misled-consumers-about-expanded-use-of-personal-data-0>>.

59 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.

60 *ACL* pt 2-3.

61 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 37.

62 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 497-8 [Recommendation 20].

63 Jeannie Marie Paterson and Rhonda Smith, 'Why Unilateral Variation Clauses are Unfair' (2016) 23 *Competition and Consumer Law Journal* 201.

64 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 498-501 [Recommendation 20].

65 *Consumer Rights Act 2015* (c15) (UK) s 61(4).

66 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 498-501 [Recommendation 21].

67 Jeannie Marie Paterson and Elise Bant, 'Should Australia adopt a prohibition on unfair trading?' 2020 *Journal of Consumer Policy*, available at <https://link.springer.com/article/10.1007/s10603-020-09467-9>; Jeannie Marie Paterson and Gerard Brody, '"Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models' (2015) 38(3) *Journal of Consumer Policy* 331.

68 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 26.

69 *Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market* [2005] OJ L 149/23.

70 *Federal Trade Commission Act* 15 USC section 45(a)(1).

71 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 498.

72 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 439-440.

73 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) recommendation 21.

74 Moreover, in the EU article 22 of the *GDPR* provides some protection against targeted advertising through its statement that individuals have a right not to be subject to a decision based solely on automated processing. See further Margot E Kaminski, 'The Right to Explanation, Explained' (2018) 34(1) *Berkeley Technology Law Journal* 189.

75 Gerard Brody and Katherine Temple, 'Unfair but not Illegal: Are Australia's Consumer Protection Laws Allowing Predatory Businesses to Flourish?' (2016) 41(3) *Alternative Law Journal* 164.

## 2. Protection against targeted advertising

Secondly, there needs to be better protection for consumers against online targeted advertising. This should include greater transparency in the ways in which advertisements may be targeted. It should also include effective prohibitions on unfair trading to protect consumers who are especially vulnerable to manipulative or predatory online advertising.

### Data rights and targeted advertising

Stronger rights for consumers to control and limit the collection of their own data will assist in this regard. Targeted advertising is 'fuelled' by data. If consumers have the right to refuse consent for these uses of their data, targeted advertising will become necessarily more limited. However, for the reasons discussed above data rights are not the sole solution. Even with law reform to restrict the use of consumer data for targeted advertising, some consumers will consent to data collection because they are overloaded with requests for consent, do not understand the reasons why consent is being requested or are not concerned about the risks of targeted advertising.<sup>76</sup>

### Transparency and targeted advertising

One further strategy is to require consumers to be informed when they are subject to narrowly targeted advertising. Thus, for example, disclosure might be required where an advertisement is not generally promoted to consumers, but has been targeted to particular consumers on the basis of the consumers' individual characteristics or membership of a specific demographical class. This will give consumers the opportunity to understand what they are being shown is not what is generally available, but something specifically sent to them. Such a measure would assist in giving consumers a context for understanding more about the uses of data. But disclosure is generally not a complete strategy for consumer protection; for various reasons disclosure may have least impact on consumers most in need of protection.<sup>77</sup>

## 3. Greater transparency in online shopping

Thirdly, there should be greater transparency in the manner in which online products are presented and displayed online. It seems quite possible that consumers expect the results of an online search, whether through a search engine or at an online store, to be neutral, although further research on this point would be useful. As noted above, it appears that online traders vary the display of products from search results between consumers in a number of ways.<sup>78</sup> Consumers are unlikely to understand why this occurs, particularly as it is difficult to determine the basis for such practices. In particular, we note that A/B testing may appear an innocuous practice, but it is not one consumers will be aware occurs.

We suggest that there should be greater transparency demanded from firms including where:

- products at the top of a search list are in that position because of paid advertising, and
- the order in which products are displayed may differ between consumers.

Greater transparency might also usefully be applied to online marketing to inform consumers where display options and pricing may be different, and advertising may be targeted to particular demographic groupings. This level of disclosure may allow consumers to understand the personalised nature of some online offerings, and through this, prompt some useful scepticism about the value of the offering or, at least, disrupt the perhaps implicit belief that consumers are being offered the best possible price and product through an online offering.<sup>79</sup>

## 4. Accessible Dispute Resolution

Fourthly, consumers need effective and accessible dispute resolution where their rights over their data are not respected. The ACCC's *Digital Platforms Inquiry Report* recommended establishing an ombudsman scheme for consumers and business users of digital platforms.<sup>80</sup> The ACCC suggested that the ombudsman would be responsible for complaints and disputes that had not been resolved through the platforms' internal procedures. This report suggests such systems are essential and should be given a broad scope to respond to consumer concerns about data collection practices and use by digital platforms and other online advertising providers.<sup>81</sup> The scope of the ombudsman's powers should be to investigate complaints and disputes from consumers about digital platforms, including in relation to scams, that were not resolved by reference to internal dispute resolution

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<sup>76</sup> See also D Clifford and JM Paterson 'Consumer privacy and consent: Reform in the light of contract and consumer protection law' 2020 *Australian Law Journal*.

<sup>77</sup> See generally Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) *Journal of Law and Society* 349.

<sup>78</sup> See DQUBE Solutions, Suelette Dreyfus, Shanton Chang, Andrew Clausen, Drawing Back the Curtain: Consumer Choice Online in a Data Tracking World (Report, July 2020).

<sup>79</sup> Tami Kim, Kate Barasz and Leslie K John, 'Why Am I Seeing This Ad? The Effect of Ad Transparency on Ad Effectiveness' (2019) 45(5) *Journal of Consumer Research* 906, 906, 911.

<sup>80</sup> Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 27, 37–8.

<sup>81</sup> Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 509–10 [Recommendations 22, 23].

procedures.<sup>82</sup> The Ombudsman should have the power to 'make decisions that are binding on digital platforms, compel information, order compensation in appropriate cases and compel digital platforms to take down scam content'.<sup>83</sup>

We support this suggestion. Ombudsman services have the attraction of an informal and proactive method of dispute resolution. The powers of an Ombudsman are typically premised on providing a result that is 'fair in all the circumstances'.<sup>84</sup> This provides an accessible and non-legalistic dispute resolution forum recourse for consumers who typically do not have recourses or expertise to enforce their rights through litigation. It would accordingly go some way to redressing the inevitable inequality of bargaining power between consumers and digital platforms. We suggest that such an Ombudsman should have power to investigate scams and also instances of targeted advertising that have the potential to exploit consumers' vulnerabilities.

## 5. Innovative use of use of technology to better inform and protect consumers

Fifthly, thought should be given to the ways in which information is presented to consumers online. Consumers are constantly being asked to read, understand and assess material relating to their consumption choices and legal rights. As already discussed, consumers do not have time, or necessarily the skills, to make use of all of the material presented to them. It is possible technology may be utilised to assist in this task. The ACCC, in discussing consent to data collection, suggested:

To provide consumers with a readily understood and meaningful overview of an APP entity's data practices and as a means of reducing their information burden, it may also be appropriate for these requirements to be implemented along with measures such as the use of multi-layered notifications or the use of standardised icons or phrases.<sup>85</sup>

We suggest that there is potential to utilise knowledge about behavioural biases and the innovative opportunities for presenting information to make privacy and other crucial topics more salient from consumers' perspectives.<sup>86</sup> Technology might also be utilised to allow consumers to exercise their rights under law more easily. For example, rights to opt out, or of erasure, might be made more accessible through creative digital strategies, such as the use of buttons and links. While it is possible that business might themselves take such steps; in our opinion a legislative framework would be desirable to ensure a uniform approach and strategies that genuinely enhance consumer welfare. In this light it is notable that the *California Consumer Privacy Act* requires businesses to incorporate a 'Do Not Sell My Personal Information' link on their website homepage,<sup>87</sup> which takes consumers to a designated webpage which enables them to 'opt-out'.<sup>88</sup> The use of a 'do not track' button to allow consumers to block online trackers<sup>89</sup> while still accessing websites would also be useful.

## 6. Research on consumers' experiences and expectations in online shopping

Sixthly, we note that ongoing empirical and technical research on consumers' online shopping experiences and expectations is vital. It is this combination of methods that will ensure the continued currency and efficacy of safeguards against the misuse of new technologies to manipulate consumers' choice and, indeed, agency. We suggest that further research is needed to know more about:

- how much consumers understand about targeted advertising;
- whether consumers think targeted advertising is of benefit to them and/or others in the community, and what they think is lost in this environment;
- the degree to which product display in an online environment influences consumers' purchasing decisions;
- how much consumers understand about the factors that determine the order in which products are displayed following an online search;
- the degree to which consumers expect searches on store websites to be neutral as between products; and
- the extent to which consumers trust the algorithms that determine what products and services are offered to them, and how important this trust is to the economy.

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82 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 27.

83 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 27.

84 See eg the Australian Financial Services Complaints Authority at <<https://www.afca.org.au/about-afca/fairness/fairness-project>>.

85 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019).

86 See, eg, Uri Benoliel and Shmuel I Becher, 'The Duty to Read the Unreadable' (2019) 60(8) *Boston College Law Review* 2255.

87 *Civil Code (California)* §§ 1798.135.

88 See Gilbert and Tobin, 'Why Australian Businesses Should Care about the California Consumer Privacy Act' (Web Page, 25 March 2020) <<https://www.gtlaw.com.au/insights/why-australian-businesses-should-care-about-california-consumer-privacy-act>>.

89 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 439-440.

## V Conclusion

Better controls over privacy and data rights will restrict the flow of data to digital platforms and digital marketing firms, thereby restricting the opportunity for targeted advertising, and differential marketing to consumers. However, on their own, these reforms are unlikely to be sufficiently adequate to protect consumer online shopping experiences. This is because asking consumers to consent to data practices every time they shop is likely simply to result in fatigue and confusion. They should be supported by other policy tools, including substantive consumer protections, and greater transparency about data collection and digital marketing practices. The key here is for a coordinated approach by policy makers, regulators and consumer advocates to continue to scrutinise the applications of new technologies in consumer markets.

### **Addendum: Consumer protection in a time of pandemic**

Even more vigilance for consumer protection is required in a time of pandemic. Consumers already vulnerable through being confined and worried about their health are subject to a host of misleading and fraudulent practices that reduce their capacity to respond to the pressures upon them. Hoax calls and the promotion of ineffective products are practices that should not be tolerated for the well-being of the whole community.<sup>90</sup>

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<sup>90</sup> ACCC, "Warnings on COVID-19 Scams, <https://www.accc.gov.au/media-release/warning-on-covid-19-scams>

## Appendix: Table of comparative data protection

	Privacy Act <sup>91</sup>	GDPR <sup>92</sup>	CCPA <sup>93</sup>
<b>Rights to information about data collection</b>	Yes <sup>94</sup>	Yes <sup>95</sup>	Yes <sup>96</sup>
<b>Consent required for data collection</b>	In some contexts <sup>97</sup>	One of the bases for data collection <sup>98</sup>	No
<b>Robust standard of consent required (not bundled in a tick a box format)</b>	No <sup>99</sup>	Yes <sup>100</sup>	No
<b>Consumer rights to object/opt-out</b>	To opt-out of direct marketing <sup>101</sup>	To object to data processing <sup>102</sup>	To opt-out of the sale of data <sup>103</sup>
<b>Consumer rights to correct personal data</b>	Yes <sup>104</sup>	Yes <sup>105</sup>	No
<b>Consumer rights to require erasure/deletion of personal data</b>	No	Yes <sup>106</sup>	Yes <sup>107</sup>
<b>Individual rights of action in response to data breaches</b>	No	Yes <sup>108</sup>	Yes <sup>109</sup>

The ACCC's *Digital Platforms Inquiry Report* made recommendations for the reform of the *Privacy Act 1988* (Cth) to provide for better mechanisms for ensuring consumer consent to data collection practices.<sup>110</sup> These recommendations would bring Australian privacy protection closer to that provided under the GDPR. The suggested reforms include:

- Updating the 'personal information' definition;
- Strengthening notification requirements;
- Strengthening consent requirements and pro-consumer defaults;
- Enabling the erasure of personal information;
- Introducing direct rights of action for individuals; and
- Increasing the civil penalties that may be awarded for breaches of the Privacy Act.<sup>111</sup>

91 See Australian Government, Office of the Australian Information Commissioner, *Australian Privacy Principles Guidelines* <<https://www.oaic.gov.au/privacy/australian-privacy-principles-guidelines/>>.

92 See United Kingdom Government, *Guide to the General Data Protection Regulation* (Web Page, 25 May 2018) <<https://www.gov.uk/government/publications/guide-to-the-general-data-protection-regulation>>.

93 Office of the Attorney General (California), *California Consumer Privacy Act (CCPA)* (Web Page) <<https://oag.ca.gov/privacy/ccpa>>.

94 *Australian Privacy Principles* 1 and 5.

95 *GDPR* arts 12–14.

96 *Civil Code (California)* §§ 1798.100, 130.

97 An APP entity must only collect personal information which is 'reasonably necessary' for one or more of the entity's functions or activities: *Australian Privacy Principle* 3.

98 *GDPR* art 6.

99 Consent 'means express consent or implied consent': *Privacy Act 1988* (Cth) s 6.

100 *GDPR* art 4(11) defines consent: 'Consent of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her'. See also art 7.

101 *Australian Privacy Principle* 7.

102 *GDPR*, art 21: right to object.

103 *Civil Code (California)* § 1798.120 and also 135. See also *Civil Code (California)* § 1798.125: right of non-discrimination.

104 *Australian Privacy Principle* 13.

105 *GDPR* art 16.

106 *GDPR* art 17.

107 *Civil Code (California)* § 1798.105.

108 *GDPR* art 79(82).

109 *Civil Code (California)* § 1798.150.

110 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 34–5.

111 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019) 456–8 [Recommendation 16].