

## Submission to the ACCC on the Digital Platform Services Inquiry on updating consumer law for digital platform services – Discussion Paper

13 April 2022

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General Managers  
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Australian Competition and Consumer Commission

**By email:** [digitalmonitoring@accg.gov.au](mailto:digitalmonitoring@accg.gov.au)

Dear Ms Reader and Ms Bond

It's time for a consumer-centred approach to mitigating harms on digital platforms. We need a new approach that will:

- reduce the onus on consumers to identify and report harms by ensuring regulators are adequately resourced to proactively uncover harm that is currently obfuscated
- introduce a more holistic approach to reform that mitigates and reduces the risk of consumer harms from digital platforms
- implement wider whole-of economy reforms to provide adequate baseline safeguards for consumers to complement any regulatory interventions for digital platforms
- put more onus on businesses to treat consumers fairly – this could be done with a new best interests duty.

The Consumer Policy Research Centre (CPRC) welcomes the opportunity to contribute to the ACCC's Digital Platform Services Inquiry on updating consumer law for digital platform services.

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

Our submission aims to respond using insights from our research and will consider the questions and the issues raised in the interim report via the lens of three key principles – fairness, safety and inclusivity for consumers engaging in the digital economy.

We would welcome the opportunity to work with Government and share further insights from our consumer research projects. For further discussion regarding our research and the contents of this submission, please contact [chandni.gupta@cprc.org.au](mailto:chandni.gupta@cprc.org.au).

Yours sincerely



Erin Turner  
Chief Executive Officer  
**Consumer Policy Research Centre**

## Question 1: What competition and consumer harms, as well as key benefits, arise from digital platform services in Australia?

The interim report provides a clear outline of harms present via digital platform services, especially of harms that reduce competition such as self-preferencing, vertical integration and exclusionary measures. Genuine competition can enhance consumer welfare by lowering prices, increasing choice and stimulating innovation. In data driven markets well-functioning competition can also ensure that consumers are able to access products and services with appropriate price, quality, safety and privacy standards.<sup>1</sup>

A lack of efficient and effective competition in digital platform services can lead to harmful outcomes that have a direct impact on consumers. Such outcomes include reduced innovation, poor returns to consumers, lower quality of service or use of data in ways that disadvantages or harms the customer while benefiting the business.<sup>2</sup> While the report covers a variety of harms, it may be useful to characterise these harms as negative externalities, in recognition that often the cost of reduced competition (financial and non-financial) is most felt by consumers, even if they are only passively engaging with digital platform services.

Previous CPRC research<sup>3</sup> has revealed numerous examples of practices from digital platform services<sup>4</sup> that can lead to consumer harm. These practices, summarised below, represent externalities that have a negative effect on consumers. Due to the opacity of digital supply chains, consumers may have little to no direct relations with specific actors within the digital platform services where these risks stem from.

- **Discrimination and exclusion:** information about consumers can be and is used to benefit commercial entities in discriminatory ways at direct odds with the needs and interests of consumers.<sup>5</sup> For example, data can be used to build an “online profile” of a consumer and effectively “score” their value – with a view to identifying and retaining profitable customers through advertisements (and avoiding those who are not profitable).<sup>6</sup> A lack of transparency and accountability within such processes means it is difficult for consumers to see how their profile is produced; understand the impact it will have on them; or influence, appeal or correct assumptions based on wrong information.<sup>7</sup> Profiles can also be used to set prices, leading to some groups of consumers paying more for the same service.<sup>8</sup>
- **Manipulation:** Sophisticated companies can have the power to design online user interfaces in very manipulative ways, for example, via the use of dark patterns.<sup>9</sup> Companies can use the information they hold about customers to shape what products are shown and what information is presented, effectively exacerbating the information asymmetries between companies and consumers. Manipulation can also lead to unfair

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<sup>1</sup> CPRC, “The Digital Checkout”, (December 2021), <https://cprc.org.au/the-digital-checkout/>.

<sup>2</sup> Stigler Centre for the Study of the Economy and the State, “Committee on Digital Platforms Final Report”, (2019), 120, <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>.

<sup>3</sup> See: Brigid Richmond, *A Day in the life of data*, 2019, CPRC, pp. 34-40. CPRC also funded a research project that provided a literature review on data tracking. See: University of Melbourne, *State of the Art in Data Tracking Technology*, 2019

<sup>4</sup> The *Issues Paper* (p. 13) sets out the “data services providers” who design services for analysing and/or have access to information about consumers, including Data Management Platforms, Data Analytics Services and Data Brokers.

<sup>5</sup> University of Melbourne, *State of the Art in Data Tracking Technology*, 2019, p. 14.

<sup>6</sup> Wolfie Christl, “Corporate Surveillance in Everyday Life”, (June 2017), Cracked Labs, p. 13, [https://crackedlabs.org/dl/CrackedLabs\\_Christl\\_CorporateSurveillance.pdf](https://crackedlabs.org/dl/CrackedLabs_Christl_CorporateSurveillance.pdf).

<sup>7</sup> Cathy O’Neil, “Weapons of Math Destruction”, (2016), Crown Books, p. 143.

<sup>8</sup> For an example of personalised pricing, see 2020 investigation by Choice where it found that people over the age of 30 were offered prices more than double the prices of those aged under 30: <https://www.choice.com.au/about-us/media-releases/2020/august/tinders-secret-pricing-practices>.

<sup>9</sup> “Dark Patterns” that make it difficult for users to express their actual preferences or that manipulate users into taking actions that do not comport with their preferences or expectations. For more information see the Stigler Centre’s 2019 [Committee on Digital Platforms – Final Report](#) (p. 12).

outcomes, misuse of data, compromise the dignity of consumers and hinder or distort competition.<sup>10</sup>

- **Lack of control:** CPRC consumer research indicates consumers are uncomfortable with the amount of information collected about them and would prefer to have greater control over that data collection.<sup>11</sup> Control is particularly lacking given that personal data can often be traded between firms deeply embedded in supply chains without a direct link to consumers or even the basic service they'd signed up for. In addition, it can be difficult for consumers to know where and how to remove their associated data from brokers' holdings.<sup>12</sup> This issue is compounded by terms and conditions and privacy policies that are often ineffective at enabling consumers to make informed choices.<sup>13</sup>

## Understanding choice architecture in the digital economy

CPRC recommends the ACCC investigate and consider more deeply the choice architecture behind digital platform services. Digital platform services present, or more so, can misrepresent choice to consumers. They ask people to accept terms and conditions or adjust their privacy settings. In reality, consumers are given little control over what data is collected and how it is used. At the heart of this problem is that notification, consent and disclosure are not appropriate protections against unfair or harmful business practices. Safety and fairness should not be left to consumer choice – these are things which consumers rightly expect the law to ensure regardless of choice.

Qualitative research conducted by CPRC between June and August 2021 found that online life can be a double-edged sword for Australian consumers. While consumers value the convenience and access to more products and services, the online environment can feel overwhelming.<sup>14</sup> The proliferation of choice, while theoretically a positive for consumers, has led to an increase in frustration and confusion. Choice becomes meaningless and even detrimental if it is not structured clearly or easily for consumers to navigate and act in accordance with their preferences.<sup>15</sup>

CPRC recommends the ACCC investigate and consider more deeply the choice architecture behind digital platform services. CPRC welcomes the ACCC's consideration of dark patterns in this inquiry as their prevalence across digital platforms continues to impede consumer control and choice. However, we would recommend broadening the examples of dark patterns from the three examples outlined in the interim report (cancelling paid subscriptions, privacy controls and settings and changing default settings). Research by the UK consumer group Which?<sup>16</sup> and studies by academics from the Center of Information Technology Policy at Princeton University<sup>17</sup> highlight a much broader range of dark patterns in addition to the three mentioned above.

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<sup>10</sup> Kayleen Manwaring, "Will emerging technologies outpace consumer protection law? The case of digital consumer manipulation", (2017), *Competition & Consumer Law Journal*, 26, 149, <https://www.accc.gov.au/system/files/Kayleen%20Manwaring%20%28December%202018%29.PDF>.

<sup>11</sup> CPRC, "CPRC 2020 Data and Technology Consumer Survey", (December 2020), <https://cprc.org.au/cprc-2020-data-and-technology-consumer-survey/>.

<sup>12</sup> Federal Trade Commission, Data Brokers, "A Call for Transparency and Accountability" (2014), <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.

<sup>13</sup> Brigid Richmond, "A day in the life of data", (2019), pp. 25-33, <https://cprc.org.au/research-report-a-day-in-the-life-of-data/>.

<sup>14</sup> CPRC, "Consumer Wellbeing Report", Draft, Unpublished

<sup>15</sup> CPRC, "The Digital Checkout", (December 2021), <https://cprc.org.au/the-digital-checkout/>.

<sup>16</sup> Which?, "Dark Patterns – How consumer choices are manipulated online", (August 2021), <https://consumerinsight.which.co.uk/articles/dark-patterns>.

<sup>17</sup> Arunesh Mathur et.al, "Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites", (2019), *Proc. ACM Hum-Comput. Interact.* 3, CSCW, Vol. November/Article 81, p. 32, <http://dx.doi.org/10.1145/3359183>.

These include but are not limited to:

- **Confirmshaming:** wording on a button or link is presented in such a way that it may guilt the consumer into doing with something they wouldn't have otherwise done.
- **Hidden costs:** pre-selected add-ons embedded close to the final stage of payment that can lead consumers to paying more.
- **Disguised ads:** advertising disguised as prompts that trick consumers into clicking on them.
- **False hierarchy:** one choice option is made to stand out over others through size, placement or colour.
- **Redirection:** consumers are continuously moved away from the task they are wanting to complete (e.g. regular pop-ups inviting to join email subscription service).
- **Price comparison prevention:** difficulty navigating or accessing comparative pricing between two or more items, impeding an informed decision-making process.
- **Scarcity cues:** creating a sense of urgency with notifications indicating that a product, service or offer may soon run out through imposed deadlines, low stock messages or high demand messages.
- **Activity notifications:** momentary but often recurring messages indicating the activity of other users.

While experiences within some of these categories may not be adequately addressed under the current consumer protection framework, the ubiquitous presence of such dark patterns has the potential to erode consumer trust and impede consumer's experience on digital platforms, specifically for people who may be experiencing vulnerability.<sup>18</sup>

**Question 2. Do you consider that the CCA and ACL are sufficient to address competition and consumer harms arising from digital platform services in Australia, or do you consider regulatory reform is required?**

The *Competition and Consumer Act 2010* (CCA) and the Australia Consumer Law (ACL) are insufficient in addressing the consumer harms currently experienced on digital platforms. Consumers need greater protection against unfair practices. Given the depth of harm that can be caused by data, Australia should also consider proactive obligations on businesses to use data in consumer interests. Our laws should require businesses use data to benefit customers, not just have rules against causing specific harm.

### **Measuring and ensuring CCA and ACL are fit-for-purpose**

There is currently lack of clarity on how the ACL applies to digital platforms. As a specific example, the term supply in the CCA is narrowly defined as, "...in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase".<sup>19</sup> As digital platforms often consider themselves as a 'facilitator of the supply' but not the actual supplier, it creates loopholes in accountability which would be difficult to close via traditional compliance and enforcement measures. This is particularly the case where digital platforms operate an online retail marketplace, creating a scenario where consumers are often left with the burden to resolve issues with the third-party seller on their own. This is further exacerbated when the third-party seller is based overseas, so enforcing the ACL is not only

<sup>18</sup> OECD, "Roundtable on Dark Commercial Patterns Online – Summary of discussion", (February 2021), [https://one.oecd.org/document/DSTI/CP/CPS\(2020\)23/FINAL/en/pdf](https://one.oecd.org/document/DSTI/CP/CPS(2020)23/FINAL/en/pdf).

<sup>19</sup> See: *Competition and Consumer Act 2010*, Retrieved from <https://www.legislation.gov.au/Details/C2011C00003>.

difficult, but likely impossible.<sup>20</sup> CPRC recommends that a review of Australia’s current consumer protection frameworks needs to be undertaken without further delay to address these gaps.

### **Regulatory reform that goes beyond the CCA and ACL**

A more holistic approach to mitigating and reducing the risk of consumer harms from digital platforms is needed instead of a piece-meal approach to regulatory interventions. The following quote from CPRC’s 2020 Data and Technology Survey<sup>21</sup> encapsulates the feedback that comes via consumers when it comes to digital policy making:

*“I’d like to think the government (regulates it). Because with private competition, you just have so many different platforms, you can’t just make rules for each platform, it has to be on a broader level.”*

In addition to the ACL and the CCA being measured for fit-for-purpose, wider whole-of-economy reforms are needed to adequately protect consumers, such as:

- introducing an unfair trading prohibition
- strengthening unfair contract terms provisions
- introducing of a general safety provision
- reforming the Privacy Act to give consumers more control and agency over their data
- introducing an obligation for businesses to use data in consumer interests (a data best interests duty, explored below).

### **Question 3. Should law reform be staged to address specific harms sequentially as they are identified and assessed, or should a broader framework be adopted to address multiple potential harms across different digital platform services?**

CPRC supports an adoption of a broader framework to ensure potential harms across digital platforms can be adequately addressed. A staged, harm-by-harm mitigation approach is unlikely to deter poor digital platform practices or provide adequate safeguards for consumers.

A broader framework should require platforms to show evidence of how they mitigate and/or reduce the risk of harms. The approach should place the onus back on digital platforms instead of where it is currently – with consumers via reporting mechanisms and regulators via investigations of identified breaches.

Insights from CPRC’s digital research program highlight what Australian consumers expect the laws governing digital entities to deliver:

- **Fairness** – entities do not collect, share and use data, or engage in business practices in a way that is unfair, exploitative or extractive.
- **Safety and security** – entities are obligated to keep consumers safe.
- **Choice and control** – consumers are provided with genuine, meaningful control and choice over their data and digital experience.
- **Transparency** – entities are required to be transparent about why, what and how data is being collected, shared and used with consumers.

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<sup>20</sup> CPRC, “The Digital Checkout”, (December 2021), <https://cprc.org.au/the-digital-checkout/>.

<sup>21</sup> CPRC, “2020 Data and Technology Consumer Survey”, (December 2020), <https://cprc.org.au/publications/cprc-2020-data-and-technology-consumer-survey/>.

- **Accountability** – entities and individuals are held to account for data misuse, enforcement is effective, and remedies are easily obtained.
- **Inclusion** – consumers are not excluded nor receive detrimental outcomes as a result of data collection, sharing and use by entities.

While many of the principles above apply specifically to data handling practices, these principles could be embedded into the development of a broader framework which actively holds businesses such as digital platforms accountable for their business practices.

### **Incorporating a best interests duty**

A broader framework also brings the opportunity to incorporate elements that may not have yet been considered in competition and consumer protection frameworks for digital settings. Incorporating a fiduciary duty, especially for how consumer data is treated and how choice architecture is presented and implemented on digital platforms, can help add a level of accountability on digital platforms that could significantly reduce the likelihood of consumer harm. It could also lead to pro-business benefits by increasing consumer trust in those platforms that actively build this into their business model.

The idea of a best interests duty for consumer data is relatively new and unexplored in the Australian context. As a next step, CPRC recommends an inquiry to explore how to construct and implement positive obligations on businesses to use data in consumers' interests.

Question 4. What are the benefits, risks, costs and other considerations (such as proportionality, flexibility, adaptability, certainty, procedural fairness, and potential impact on incentives for investment and innovation) relevant to the application of each of the following regulatory tools to competition and consumer harms from digital platform services in Australia:

- a) prohibitions and obligations contained in legislation
- b) the development of code(s) of practice
- c) the conferral of rule-making powers on a regulatory authority
- d) the introduction of pro-competition or pro-consumer measures following a finding of a competitive or consumer harm
- e) the introduction of a third-party access regime, and
- f) any other approaches not mentioned in chapter 7.

Digital platforms and their business models are no longer developing or new. Initiatives such as codes of practice or introducing pro-competition or pro-consumer measures after the fact (once a harm has taken place) are no longer adequate enough in addressing the risks posed to consumers by large and powerful digital platforms.

In our *2020 Data and Technology Consumer Survey*, 9 out of 10 consumers were already raising concerns about online safety in relation to:

- data breaches or hacks
- personal data being used for fraud or scams
- children's data being misused, and
- personal data being sent overseas.

In addition, most Australians believe that government has a high level of responsibility in protecting consumers from online harms:

- 94% of consumers expected government to protect them against the collection and sharing of their personal information (67% high responsibility, 27% moderate responsibility).
- 94% of consumers expected government to protect them from having their information being used in a way that makes them worse off (79% high responsibility, 15% moderate responsibility).

Consumers expect and deserve legislation that holds businesses accountable for their practices. We need to evolve our laws beyond bans on specific unfair practices to broader principles that capture unfair practices and require large businesses like digital platforms to think broadly about how they help rather than hurt consumers.

### **Supporting legislation with effective surveillance and enforcement**

For legislation to be effective, it needs to be supported by regular surveillance and enforcement by the regulator to educate and shift the market towards a more consumer-centric approach to the digital economy.

Australia needs a well-resourced regulator with the capacity and capability to monitor and enforce breaches in the complex digital environment. Traditional compliance and enforcement models often take place post harm. This needs to be reimaged if protection is to be adequately delivered to consumers in the digital economy.

Regulators also need more sophisticated approaches to identify harm. Currently regulators largely rely on reports from consumers, identifying harm after it takes place. The majority of the onus cannot continue to remain on consumers to identify and report breaches. This is not feasible in a digital environment where there is little to no transparency about how consumer data is collected, used and passed on to other businesses. Instead, regulators need to proactively uncover harm that is currently obfuscated. Regulators should be pushing businesses to be radically more transparent about how they use consumer data – this is a first step to then removing unfair practices.

Monitoring and surveillance by regulators in this complex environment needs a diverse workforce that not only understands the implications of the law but also the technical architecture on which these business models are built upon. Experts such as data scientists, artificial intelligence engineers, information security analysts and other technical professionals need to be in the mix to support upstream regulation and mitigate the risk to consumers, potentially before widespread harm has occurred.

### **5. To what extent should a new framework in Australia align with those in overseas jurisdictions to promote regulatory alignment for global digital platforms and their users (both business users and consumers)? What are the key elements that should be aligned?**

Australia is far behind other jurisdictions around the world when it comes to consumer protection within the digital economy.<sup>22</sup> The Australian Government also has an opportunity

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<sup>22</sup> Nitesh Patel, "Government to Enhance Data Privacy and Protection to 'Regulate the Digital Age'", (17 February 2020), <https://www.mondaq.com/australia/data-protection/894470/government-to-enhance-data-privacy-and-protection-to-regulate-the-digital-age>.

to be a role-model on the world stage on what effective consumer protection online can look like.

Alignment could be considered across a variety of reforms, such as introducing a prohibition on unfair practices, similar to the one brought in via the Digital Markets Act in the European Union (EU)<sup>23</sup> and by strengthening Australia's Privacy Act. However, the Australian Government should not shy away from opportunities to enhance what is already in place internationally. As an example, there is value in defining consent in line with GDPR and considering standardised consents to assist with consumer comprehension but simply copying the GDPR consent framework will not address the over-reliance on consent and choice as consumer protections. Australia needs to evolve its approach so that consumer protections proactively stop harm and go beyond disclosure. Safety and fairness should not be left to consumer choice – these are things which consumers expect the law to ensure regardless of choice.<sup>24</sup>

To deliver a holistic consumer protection framework that adequately holds digital platforms accountable across all their business sectors, the following reforms should be prioritised:

- Reform of the Privacy Act to bring Australia's protection framework into the digital age through a coherent, economy-wide consumer protection.
- Introduction of an unfair trading prohibition to protect consumers from data extraction and digital misuse.
- Introduction of a general safety provision to clearly make companies responsible for delivering safe, secure data-driven products and services.
- Establishment of rules or protocols to ensure that deidentified consumer data cannot be re-identified.
- Introduction of technology/data impact assessments for government reforms to data and technology, which include a cost-benefit analysis to truly identify the value of new digital innovations and to whom will it benefit the most – consumers, or entities with a commercial interest.
- Increased enforcement resources for regulators within a complex digital environment and clear pathways for consumers to access support when experiencing digital harms.

[Response to questions 8, 9 and 10 \(Addressing data advantages\) relating to regulatory measures that could increase data access, limit data use and circumstances where increasing data is deemed appropriate.](#)

### **Consumer perception of data handling practices**

Many of the harms experienced by consumers via digital platforms stem from the ubiquitous collection, use and sharing of personal data. Our 2020 Data and Technology Consumer Survey revealed that 94% of Australian consumers do not feel comfortable with how their personal information is collected and shared online:

- Only 12% of consumers feel that they have a clear understanding of how their personal information is collected and shared.

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<sup>23</sup> BEUC, "Digital Markets Act: landmark Big Tech regulation agreed in boost to consumer choice", (25 March 2022), <https://www.beuc.eu/publications/digital-markets-act-landmark-big-tech-regulation-agreed-boost-consumer-choice/html>.

<sup>24</sup> CPRC, "Submission to The Attorney-General's Department – Privacy Act Review – Discussion Paper" (10 January 2022), <https://cprc.org.au/submission-to-the-attorney-generals-department-privacy-act-review-discussion-paper/>.

- Only 6% of consumers are comfortable with how their personal information is collected and shared online.<sup>25</sup>

The majority of Australians consider companies have a “high” level of responsibility in protecting their personal information with 82% of consumers noting that companies should protect against consumers’ information from being used in ways that make them worse off. Most consumers (94%) also expect government to protect them against the collection and sharing of their personal information. The research further reveals consumer discontent with tactics such as ad targeting, personalised price discrimination and exclusion from products and services:

- 92% agree that companies should only collect information they need for providing their product / service
- 60% of Australians consider it very or somewhat unacceptable for their online behaviour to be monitored for targeted ads and offers
- 90% believed it is unacceptable to charge people different prices based on past purchase, online browsing, and payment behaviours.<sup>26</sup>

These findings clearly suggest that market and regulatory failures in relation to companies’ data-handling practices mean that digital platforms are failing to deliver outcomes that are fair and in line with consumer and community expectations. Negative sentiments and consumer concern regarding many of the data handling practices should be cause for concern for policymakers, regulators and industry.<sup>27</sup>

### **Measures where data is handled with a ‘duty of care’**

When considering regulatory measures that increase or limit data access, the concept of a “best interests” duty (as discussed in response to question 2) is just one form of principles-based approach to holding businesses accountable in implementing consumer-centric data handling practices. One way to achieve this is to reconsider how data ownership is defined. Currently, digital platforms would claim that they own the data that is held by them about consumers. However, if data was to be viewed as it is in the Consumer Data Right<sup>28</sup> model, where consumers are data owners and digital platforms are data holders and other intermediaries that may have access to the data are data recipients, it further shifts the focus towards ‘doing right by the consumer’.

### **Importance of strong privacy protections**

Given the increasing role of data collection, use and disclosure across the Australian economy – and the government’s efforts to accelerate this trend – we remain firm that it is essential to strengthen the Privacy Act so it is fit for purpose. Introducing any data handling measures via other reforms is moot if baseline guardrails are not in place to protect consumers against misuse of their personal information. This issue is already being flagged within the CDR consultations where data that moves out of the CDR ecosystem to intermediaries is not subject to the same privacy protections that data holders and accredited data recipients are obligated to uphold.<sup>29</sup> CPRC strongly recommends that the

<sup>25</sup> CPRC, “CPRC 2020 Data and Technology Consumer Survey”, (December 2020), <https://cprc.org.au/cprc-2020-data-and-technology-consumer-survey/>.

<sup>26</sup> *Ibid.*

<sup>27</sup> CPRC, “The Digital Checkout”, (December 2021), <https://cprc.org.au/the-digital-checkout/>.

<sup>28</sup> Consumer Data Right, “What is CDR?” (Accessed 1 April 2022), <https://www.cdr.gov.au/what-is-cdr>.

<sup>29</sup> CPRC, “Submission to The Treasury’s Consumer Data Right amendments (version 3)”, (2 August 2021), <https://cprc.org.au/submission-to-the-treasurys-consumer-data-right-amendments-version-3/>.

Privacy Act is updated and adequately strengthened before any new data accessibility measures are scoped and implemented.

11. What additional measures are necessary or desirable to adequately protect consumers against:

- a) the use of dark patterns online
- b) scams, harmful content, or malicious and exploitative apps?

Our research indicates that while digital platforms provided benefits to consumers and the economy during COVID-19 restrictions, they also exposed consumers to exploitative practices such as scams, false claims, unsafe products and price gouging.<sup>30</sup>

Our Consumers and COVID-19 survey data<sup>31</sup> found that consumers continue to experience problems online. Up to 43% of consumers reported experiencing problems with an online retail marketplace between June and October 2021, noting issues such as:

- a product was unsafe, faulty or poor quality
- a product or service had misleading costs
- incorrect or misleading information provided about a product or service
- unclear or unfair terms and conditions
- difficulty contacting company to change or cancel a service
- not receiving what was originally ordered
- poor customer service
- scams or fraud.

While these results related specifically to online marketplaces, it is an indication of systemic issues that consumers continue to face across the digital platforms. CPRC strongly recommends the introduction of reforms that prohibit unfair trading practices that have the effect of:

- concealing data practices via privacy policies and terms and conditions
- undermining consumer autonomy via opaque targeting practices and interface design strategies
- increasing risks of consumer vulnerabilities being exploited through poor data-handling practices.<sup>32</sup>

Our 'Unfair Trading Practices in Digital Markets' report states that this practice, "...often occurs in the digital environment where third parties can knowingly deal with consumer's personal data without any awareness on the part of the consumer, let alone a contractual relationship with the consumer."<sup>33</sup> These opaque practices further shift the power imbalance creating a market that is far from being safe, fair or inclusive for consumers.

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<sup>30</sup> CPRC, "Unfair Trading Practices in Digital Market: Evidence and Regulatory Gaps", (March 2021), <https://cprc.org.au/unfair-trading-practices-in-digital-market-evidence-and-regulatory-gaps-2/>.

<sup>31</sup> *Ibid.*

<sup>32</sup> CPRC, "The Digital Checkout", (December 2021), <https://cprc.org.au/the-digital-checkout/>.

<sup>33</sup> CPRC, "Unfair Trading Practices in Digital Market: Evidence and Regulatory Gaps", (March 2021), <https://cprc.org.au/unfair-trading-practices-in-digital-market-evidence-and-regulatory-gaps-2/>.

## 12. Which digital platforms should any new consumer protection measures apply to?

Any new consumer protection measures should apply to all digital platforms. Creating a tiered approach or excluding specific types of businesses will continue to create loopholes for poor online practices to thrive. It also places the onus on consumers to navigate a complex market to determine which digital platforms provide specific consumer protections and which ones do not, adding further burden on consumers who already feel overwhelmed when it comes to engaging online.<sup>34</sup>

Insights shared with CPRC by the Commissioner for Residential Tenancies in Victoria, highlight the need for digital reform to be applied economy-wide and not just to specific platforms or digital sectors. Across the rental market, the prevalence of third-party online application programs has led to renters raising the issue of information security provided by such third-party applications. Issues can come from both large businesses and small start-ups.

Renters have raised issues with the Commissioner for Residential Tenancies in Victoria about the security of the information they share when applying for and living in a rented property.

Applying for a rental property typically involves using the application process that the real estate agent or landlord chooses. People who rent, often have no option but to share extremely sensitive and personal information with online rental platforms such as identity documents and employment information. There is little transparency about how this information will be used by third parties.

There is also a lack of transparency of how these applications analyse specific criteria and apply algorithms in grading rental applicants, potentially embedding forms of digital 'redlining'. Such harms, especially when experienced for essential services can significantly impact consumer wellbeing and may even increase the likelihood of consumers experiencing vulnerabilities that they may not have encountered in an analogue process.

Common problems also arise where the landlord is selling the premises with a renter in occupation. Often photographs or videos are taken and put online with very little interaction with the renter. Once online it is very difficult to get the photographs completely removed. The Commissioner has also heard of tenants being asked to take photographs and upload them to an application supplied by the estate agent to meet the agent's obligations to inspect the premises. This practice became more widespread during COVID to avoid face-to-face contact but is likely to become part of ordinary practice to reduce time for the managing agent. There is also some evidence that real estate agents and landlords may be sharing confidential or sensitive information with third parties with the possibility that the information will be further circulated.

## 14. What types of fair-trading obligations might be required for digital platform services in Australia? What are the benefits and risks of such obligations? Which digital platforms should any such fair-trading obligations apply to?

Please see responses to questions 11 and 12.

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<sup>34</sup> CPRC, "The Digital Checkout", (December 2021), <https://cprc.org.au/the-digital-checkout/>.

15. Should specific requirements be imposed on digital platforms (or a subset of digital platforms) to improve aspects of their processes for resolving disputes with business users and/or consumers? What sorts of obligations might be required to improve dispute resolution processes for consumers and business users of digital platform services in Australia?

Insights from our research indicate that convenience alone is not sufficient to deliver good consumer outcomes. Building consumer trust, including a clear pathway to resolving issues and disputes will be critical in ensuring frequent and meaningful engagement by consumers on digital platforms.

When consumers are unable to resolve issues directly with a utility like an energy provider or telecommunications company, they have access to independent support for redress through an ombudsman. However, in the case of redress relating to an online experience, this support is out of reach. Consumers are frequently left to navigate any form of recourse themselves or simply give-up.<sup>35</sup> Several participants in CPRC's qualitative research conducted between June and August 2021, specifically noted not pursuing redress options for products or services purchased online, including via digital platforms, as they felt the likelihood of being compensated was low. In absence of support, consumers are left powerless, with products and services that are either faulty or no longer fit for purpose.

There must be effective dispute resolution pathways to enable consumers to seek redress for when things go wrong in the online space. As consumers increase their engagement online, a Digital Ombudsman needs to be adequately resourced to meet Benchmarks for Industry-based Customer Dispute Resolution to ensure consumers can effectively resolve any disagreements that will arise.

CPRC strongly recommends that Government finalise and release a scoping study as a matter of priority to identify the types of online disputes consumers are raising along with options for establishing more effective external dispute resolution pathways that not only address digital issues today but also complex matters that are likely to arise in the future. As mentioned in previous CPRC submissions, we believe there may be merit in a more holistic approach to dispute resolution, such as via the establishment of a Digital Ombudsman that can provide support on all facets of a digital experience, beyond digital platforms.

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<sup>35</sup> *Ibid.*