

UNFAIR TRADING PRACTICES IN DIGITAL MARKETS – EVIDENCE AND REGULATORY GAPS



Research and policy briefing

December 2020

Background to this briefing

The Consumer Policy Research Centre (CPRC) is a strong supporter of an unfair trading practices prohibition being introduced in Australia. This reform would address a gap in the Australian Consumer Law (ACL) and we are pleased to contribute to the ongoing consideration of this matter by Ministers responsible for consumer affairs across Australia and New Zealand.¹

CPRC aims to create fairer, safer and inclusive markets by undertaking research and working with leading regulators, policymakers, businesses, academics and community advocates. Data and technology issues are a research focus for CPRC, including emerging risks and harms and opportunities to better use data to improve consumer wellbeing and welfare. CPRC therefore has a keen interest in how the national consumer policy framework can best fulfil its overarching objectives² regarding effective competition, consumer confidence and fairness in the context of consumer experiences in digital markets.

In preparing this research and policy briefing CPRC has been assisted by Dr Katharine Kemp, Senior Lecturer, University of New South Wales (UNSW) Law (with research assistance from Ms Roseanna Bricknell) in **Section 4 - “Gaps in the Australian law”** and **“Annex 2 - Relevant laws in other jurisdictions”**.

The briefing also draws on consumer survey research recently published by CPRC. This research explored Australians’ knowledge, behaviours, and attitudes regarding data collection, sharing and use. The survey results are attached (see **Attachment 1**).

Australian consumers are left to rely on analogue protections in a digital age

This briefing outlines evidence that supports an unfair trading practices prohibition being added to the ACL. The potential for an unfair trading practices prohibition was flagged during the [ACL Review](#) finalised in 2017. More recently the Australian Competition and Consumer Commission (ACCC) has – as part of its 2019 [Digital Platforms Inquiry Final Report](#) – recommended a prohibition on certain unfair practices be introduced. Our briefing builds on the findings of these previous policy processes – and CPRC’s own research on online consumer experiences³ – by outlining evidence in the following areas:

- 1. Consumer participation online – the seismic shift caused by COVID-19**
- 2. Consumer expectations in digital markets**
- 3. Evidence of unfair trading practices**
- 4. Gaps in the Australian law**

Governments have agreed that policies which “accelerate” the digitisation and resilience of businesses are key to Australia’s response to COVID-19 and will contribute to making Australia a world-leading digital economy by 2030.⁴ In this broad context, Consumers International note that it is essential that consumer protections keep pace with the fast rate of change in electronic commerce.⁵ It is therefore critical that governments also “accelerate” reform to consumer protections that were implemented in more analogue times. While Australia does have some powerful consumer protection laws, there is a compelling case for them to be strengthened in some areas, particularly in relation to digital markets. This will result in firms facing appropriate incentives to compete and innovate on the basis of treating consumers fairly, while also ensuring Australians are able to trust and have confidence in digital products and services, and the markets they’re traded in.

1. Consumer participation online - the seismic shift caused by COVID-19

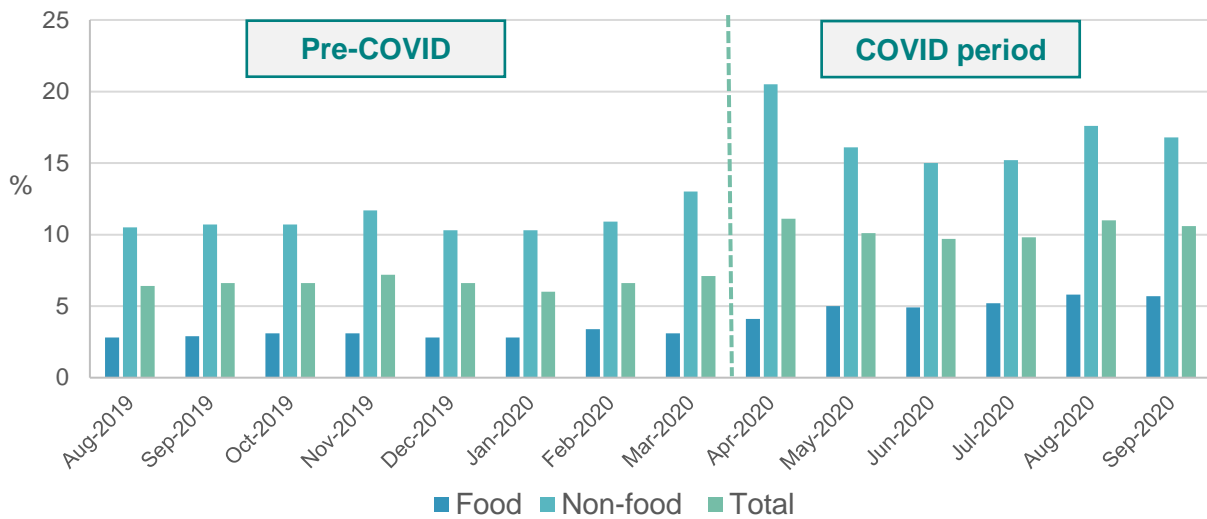
The ACCC's Digital Platforms Inquiry found that information asymmetries, bargaining power imbalances and exploitation of behavioural biases characterise the data practices of many firms in the economy, beyond digital platforms.⁶ It concluded that practices which seek to take advantage of these characteristics contribute to many forms of consumer detriment, and can pose particular risks to vulnerable consumers.⁷ Since the ACCC announced these findings, the COVID-19 pandemic and subsequent public health restrictions have resulted in huge changes to the consumer policy landscape. Digitisation of business practices has accelerated dramatically due to COVID-19, and there is clear evidence that consumers are relying on digital markets at much higher levels than they were before the pandemic.

- CPRC's Consumers and COVID-19 consumer survey reveals many Australians are:
 - Now spending more online for groceries and personal items, compared to a typical month before COVID-19 – for example, in September 18% of consumers reported spending more online for groceries and 28% were spending more shopping online for discretionary personal items.
 - Expecting to continue spending more online in 3 months' time – for example, in October 12% of consumers reported they were likely to spend more online for groceries in 3 months' time, while 18% considered they were likely to spend more shopping online for discretionary personal items in 3 months' time.
 - Experiencing problems when shopping online – for example, in October, of consumers who reported a problem with a retailer over the past two months, 36% reported it occurring in an online marketplace (e.g. Amazon, eBay), 22% with an online classifieds/exchange platform (e.g. Gumtree, Facebook, Craigslist), 30% with an Australian company retail website, and 21% with an international company retail website.

(see **Annex 1** for CPRC's Consumers and COVID-19 survey results data).

- **Australian Bureau of Statistics (ABS)** data shows that the proportion of industry turnover via online sales, for both food and non-food products, has increased significantly since COVID-19 restrictions were put in place in March 2020 (see **Figure 1**). Total online sales remain elevated at 10.6% of total sales in September 2020, which is only a slight fall from the peak of 11.1% in April 2020. Both food and non-food industry turnover online are elevated compared to pre-COVID levels.

Figure 1 – proportion of industry group turnover online⁸



Source: Australian Bureau of Statistics

- **eSafety Commissioner** research reveals a significant increase in online activity, driven by consumers using the internet “a lot more” for staying up to date with news (30%), work (27%), watching videos (27%), and social media (25%). Also, 10% of consumers reported shopping online “a lot more”.⁹
- **Office of the Australian Information Commissioner (OAIC)** research shows that at least 53% of Australians had at least one person in their household having to work or study from home as a result of the pandemic, while 47% of Australians have downloaded an app or signed up to a new digital service due to COVID-19.¹⁰
- **Australian Communications and Media Authority (ACMA)** survey data found that more Australians had participated in a wide range of online activities in the previous 6 months to June 2020, compared to 2019, with the biggest jumps seen in watching videos (83% 2019, 89% 2020) and shopping (78% 2019 to 83% 2020) online.¹¹

The United Nations Conference on Trade and Development (UNCTAD) notes that changes in behaviour resulting from the COVID-19 crisis are likely to have lasting effects when economies start to pick up.¹² The view that these changes are permanent has also been echoed in Australia.¹³ With greater consumer reliance on digital technologies, products and services likely to be one of the lasting effects of COVID-19, it follows that consumers’ exposure to the risks and detriments identified by the ACCC Digital Platforms Inquiry will increase. Furthermore, CPRC’s [Consumer and COVID-19 research report](#) outlines how the prevailing economic conditions caused by COVID-19 will mean more consumers will find themselves in vulnerable situations in the coming months and years.¹⁴ Heightened financial concerns and hardships will amplify existing – and create new – vulnerable situations.

We are concerned that the increased exposure to risks online, combined with increased levels of vulnerability, will translate into higher levels of detriment to consumers in digital markets. This increases the urgency for ACL reforms. We strongly agree with ACCC Chair Rod Sims’ remarks that “there is no place for unfairness that sees significant detriment from highly questionable business practices”.¹⁵ Australian consumers expect and deserve a protections framework that deters unfair practice across the economy, including in digital markets.

2. Consumer expectations in digital markets

In 2018, CPRC commissioned a survey asking Australians for their views about common data collection, sharing and use practices. In March and April 2020, these 2018 survey questions were refreshed – with the survey scope also expanded to explore (amongst other topics) consumers’ attitudes about the fairness of certain data practices. Highlights from the survey are set out below, with complete results attached to this briefing (**Attachment 1**).

2.1 Consumers expectations regarding data practices – changes from 2018 to 2020

The 2020 survey results show that there continue to be strong preferences about how firms go about collecting data from consumers. For instance, over 9 out of 10 Australians continue to agree or strongly agree firms should:

- Give options to opt out of certain types of information they can collect, use and share (95% in 2018 and 2020)
- Be open about how personal data is used to assess eligibility or exclude them from products/services (93% in 2018, 94% in 2020)
- Only collect information needed for providing their products or services (91% in 2018, 92% in 2020)

Sentiment about data practices considered to be “somewhat” or “very” unacceptable was also consistent between 2018 and 2020, with practices considered unacceptable including:

- Charging consumers different prices based on past purchasing, online browsing history, or payment behaviour (88% in 2018, 90% in 2020)
- Collecting consumer data without their knowledge to assess their eligibility or exclude them from a loan or insurance (87% in 2018, 90% in 2020)
- Collecting data about consumer payment behaviour to assess their eligibility or exclude them from essential products and services (82% in 2018, 83% in 2020)

2.2 Consumer views on the fairness of particular data practices

The 2020 survey also revealed that there is strong sentiment amongst Australians regarding what they consider to be unfair (“very unfair” or “unfair”), including:

- Hard-to-find Terms and Conditions (T&Cs) regarding the collecting and sharing of their personal information (88%)
- Companies requiring more personal information than is necessary to deliver products or services (88%)
- Companies collecting personal information about them from other companies (83%)
- Companies sharing personal information that consumers have provided with other companies (85%)
- Companies selling personal information that consumers have provided with other companies (90%)
- When default settings are set to ‘on’ for all data collection and sharing (82%)
- Personal information impacting what products they are eligible for (80%)
- Companies using their personal information to make predictions about them (76%)

2.3 Consumer policy implications of survey results

CPRC's 2020 survey results confirm there is very strong consumer sentiment regarding which data handling practices are unfair, unacceptable or disagreeable. Consumers clearly expect firms to provide them with choices (e.g. choice to opt out of certain practices) and to not collect data not needed for what they are signing up for. There is also, understandably, strong consumer opposition to the prospect of their personal data being used in ways that could leave them worse off (e.g. excluding them or charging potentially higher prices). There needs to be better alignment between consumer expectations of firms, and how consumer protections incentivise firms to act. Without alignment, consumers risk being and/or feeling mistreated by firms handling their data and consumer confidence and trust in data-driven products, services and innovations will be at risk.¹⁶ There is already evidence of this happening – with the OAIC noting evidence of public distrust in information handling practices, and growing uncertainty from individuals about how their information is used.¹⁷

3. Evidence of unfair trading practices

Since the ACCC released its Digital Platforms Inquiry findings in June 2019 further evidence has emerged on harms and risks to consumers from unfair practices. Below we outline evidence regarding three categories of unfair practices which we consider Australia's existing consumer protections do not adequately address (see **Section 4**), particularly having regard to protections available in other jurisdictions (see **Annex 2**). For each category of unfair practice, the harms and risks posed to consumers are heightened due to the longer-term structural shift to online activities due to COVID-19 – while also being clearly at odds with CPRC's consumer survey evidence regarding how consumers expect to be treated (see **Attachment 1**). We therefore consider these practices warrant urgent and robust exploration through the recently announced regulation impact assessment process.¹⁸

3.1 Concealed data practices

“Notice and choice” is a prevailing model of information privacy regulation that requires firms to provide notice of data practices via Privacy Policy and T&Cs, with consumers then choosing whether to accept those terms and thereby permit certain data collection, use and sharing of their personal information.¹⁹ An unfair practice seen within this regulation model is where firms are:²⁰

Unfair trading practice #1:

Inducing consumer consent or agreement to data collection through concealed data practices

Results from CPRC's 2020 Data and Technology Consumer Survey²¹ indicate that effective consumer engagement with the information in Privacy Policies and T&Cs documents has not increased since 2018. Many firms continue to design these “notices” with the intent of inducing consumer agreement or consent, rather than supporting consumers to make an informed and meaningful choice. Key findings from the survey include:

- Across both years of the survey, 33% of consumers never read these Privacy Policies and T&Cs, and 35% only read them for a few products they signed up for

- Consumer discomfort with accepting privacy policies and T&Cs has grown, with 69% of consumers who had read such a document in the past year accepting them for at least a few products or services despite feeling uncomfortable doing so – up from 67% in 2018
- Only 33% of consumers agreed that it is enough to be notified about data collection through privacy policies and T&Cs (down from 37% in 2018)
- As noted in **Section 2**, 88% of consumers think it is unfair when T&Cs are hard to find.

These survey results show the increasingly negative sentiment amongst consumers regarding how firms use Privacy Policies and T&Cs to “inform” them about data practices. This is not surprising, given these documents can seem deliberately designed to conceal important information about how a consumer’s data will be handled.²² This tactic is similar to the broader practice identified in financial product markets whereby firms make the content and delivery of information disclosure “strategically complex”, for example, by making information hard to find or disclosing it at a point when it is unlikely to be able to be factored in to a consumer’s decision.²³

Kemp (2020) has defined, and provided evidence of, “concealed data practices”, which “occur when suppliers’ terms provide weak privacy protections for consumers while the extent of those terms, the resultant data practices and the consequences of these data practices are concealed from consumers”.²⁴ Concealment can occur by hiding important information at the end of long documents, diminishing the importance of certain information, and using vague, confusing language.^{25, 26} Other practices, highlighted through the ACCC Digital Platforms Inquiry, that leverage information asymmetries, bargaining power imbalances and behavioral biases to conceal important information from consumers include the use of “click wrap agreements” and “take it or leave it terms” that purport to obtain “bundled consents” from users.²⁷

Furthermore – we note that the multiple advertising networks, trackers and profiling scripts that can be present on retailer websites to gather information are often unknown to a consumer, with this lack of transparency also exacerbating the power asymmetry between a consumer and a firm.²⁸ These information gathering techniques have privacy implications because they bypass protections offered by clearing cookies, or using incognito browsing – as more difficult changes to the “fingerprint” of a browser are required.²⁹ Extensive tracking practices from online private messaging, social media and search services are also outlined in the ACCC’s Digital Platform Services Inquiry September 2020 interim report. Analysis from the ACCC and AppCensus found that Google and Facebook receive vast amounts of information on consumers’ activity on websites and apps not connected to their platforms, while many communication apps requested access to sensitive information from users and some were observed transmitting this information to third parties.³⁰

We consider that the most significant detriments from concealed data practices relate to reduced consumer choice – and subsequent impacts on consumer welfare and competition. Specifically, these practices lead to significant detriment by:

- Reducing consumers’ ability to make informed choices on how to protect themselves from privacy breaches and violations that could harm them in the future
- Making it difficult for consumers to prevent their personal information being used by firms to build “consumer profiles” which can then be used to discriminate against, exclude and target them in ways they are not comfortable with

- Disincentivising firms from competing to provide products and services that best meet consumers data and privacy preferences.³¹

The use of choice architecture that seeks to conceal (and thereby effectively withhold) information from consumers is an example of an unfair practice that should be prohibited as part of a broader prohibition on unfair trading practices. A lack of candour and transparency on the part of firms means consumers have little hope of understanding the content and future consequences of the decisions sought in Privacy Policies and T&Cs – even if they are diligent and concerned.³² This blatant absence of consumer centricity – often by firms that pride themselves on offering a positive online user experience to their consumers – indicates these are strategic practices. Many such practices would not be captured by the existing prohibition on misleading or deceptive conduct (see **Section 4**). Prohibiting such unfair practices will also place an appropriate restraint on firms gaining access to valuable consumer data and the subsequent market power this can provide.³³

3.2 Undermining consumer autonomy

Research carried out by CPRC, in partnership with *Greater than X*, in 2019 describes how the detailed consumer data and insights firms’ hold can be used to influence consumer behaviour with far greater precision – and at a far greater volume and velocity – than has ever been possible before.³⁴ This capability – combined with market and regulatory failures that allow firms to take advantage of information asymmetries, bargaining power imbalances and consumer behavioural biases³⁵ – creates an environment where firms are able to:

Unfair trading practice #2:
Use opaque data-driven targeting and interface design strategies to undermine consumer autonomy

3.2.1 Opaque data-driven targeting practices

Recent research by the University of Melbourne (UoM) provides a detailed overview of the data tracking technologies firms are able to utilise, which may then be deployed to influence consumer decisions in potentially highly-targeted and effective ways.³⁶ UoM’s research also involved experiments³⁷ (and an accompanying policy report³⁸) that explored how the opaque marketing techniques that data tracking technology enables can impact Australian consumers when they are shopping online. One of the experiments UoM conducted sought to determine whether different “online personas”³⁹ were offered products displayed in a different order, or different products at different price points. This experiment – which controlled for other factors external to the online personas – found that the order of products shown changed between online personas. This occurred as a result of the re-positioning and reordering of, and potential steerage toward, certain products. As a result, the total price of a bundle of top five goods returned on a search of a shopping website could be different for different online personas.⁴⁰

This experiment illustrated the extent to which the display and ordering of products online is both far more personal and far less apparent than consumers are accustomed to in “bricks and mortar” retail stores. Importantly, UoM researchers were not able to see the technology behind the online shopping websites, and therefore could not determine the basis on which

differences appeared. However, given that differences in the way products were curated online were identified – it is appropriate to conclude that consumers could be steered toward choices when shopping online without realising it is occurring.

Firms employing practices to influence or steer consumers' purchasing choices will not be unfair in all circumstances. Rather, it is the opacity and subtlety of practices fuelled by a consumer's personal, potentially sensitive, data that test the limits of fairness. We agree with Paterson and Bant (2020) that there is cause for concern that manipulative techniques can steer consumers towards certain purchasing choices, while closing off others, based on firms knowing about the proclivities and characteristics of a consumer.⁴¹ It is in this context that the UoM research concluded that targeted marketing that is enabled by data-driven technologies poses the following risks of consumer detriment:

- Targeting products to consumers, by removing alternatives from sight, can **reduce consumer autonomy**, as they are making decisions with less than full information because they only see certain products without realising others are available.
- Targeted marketing can **manipulate consumers** through the way available options are presented, or by targeting consumers in a way that is designed to trigger pre-existing sensitivities or unconscious biases identified by data-driven consumer profiles.
- Targeted marketing can **entrench existing inequalities** by allowing firms to discriminate between different consumer profiles, creating particular risks for vulnerable consumers who could be restricted in their purchasing choices and subject to unfavourable pricing.⁴²

The UoM researchers note that targeting and steerage practices may be out of step with consumer expectations, and moreover may cause significant consumer detriment by enabling predatory marketing, and by narrowing consumer choice and reducing competition⁴³ (in **Section 3.3** we discuss how targeting practices can lead to the exploitation of consumer vulnerabilities). The researchers also stressed that further research that goes beyond experiments and seeks to understand how firms' backend systems may execute product targeting and steerage, and explores consumer attitudes towards such practices, would be valuable for better understanding the tangible impacts these practices have on Australian consumers. CPRC agrees with this and considers that any practices found to materially undermine consumer autonomy – either by impacting or restricting consumer' freedom of choice without good reason⁴⁴ – should be prohibited.

The potential impacts of practices that undermine consumer autonomy in digital markets are especially concerning. In a bricks and mortar shopping environment efforts to influence and manipulate consumer decisions are both more transparent and less precise. This differs significantly to a more digital environment, where interfaces can be individually customised and consumers may not be able to detect opaque data-driven manipulation or influence techniques and “walk away” if they dislike it. Ultimately, competition does not place an effective restraint on unfair practices that undermine consumer autonomy in digital markets, as consumers can't avoid what they can't see.

3.2.2 Interface design strategies

The ability for firms to undermine consumer autonomy when they are online goes beyond opaque exclusion or targeting of certain products to consumers. Firms are also able to adopt “dark pattern” strategies that are informed by data and insights regarding how consumers interact with digital interfaces. These dark pattern strategies are defined by Gray et al (2018) as “instances where designers use their knowledge of human behaviour (e.g. psychology) and the desires of end users to implement deceptive functionality that is not in the user’s best interests.”⁴⁵ Gray goes on to break down dark patterns into five methods of influencing decisions:

- **nagging** – repeated intrusions or interruptions unrelated to the task the consumer wants to complete (e.g. continued “pop-up” notifications with no easy way to discontinue)
- **obstruction** – making a process more difficult than it needs to be, with intent of dissuading certain actions (e.g. “roach motel” practices whereby signing up for a service is easy, but closing/ cancelling is far more difficult)
- **sneaking** – attempting to hide, disguise or delay information that is relevant to the user (e.g. hidden costs, or “forced continuity” techniques that charge consumers without warning or notice, after they’ve signed up for a service)
- **interface interference** – manipulation of user interfaces that privileges certain actions over others (e.g. option preselection, hidden information and trick questions)
- **forced action** – requiring the user to perform a certain action to access, or continue to access, certain functionality (e.g. “Privacy Zuckering” whereby consumers are tricked into sharing more information about themselves than they intend to or would agree to).⁴⁶

Many of the above dark pattern strategies may not fit neatly within existing protection frameworks⁴⁷ (see **section 4** on Gaps in Australian Law for further analysis). For this reason, it is important to understand the experiences consumers have when interacting with dark patterns⁴⁸ and whether this aligns with their expectations or should be regarded as unfair or contrary to good faith.⁴⁹ Furthermore, evidence has emerged since the ACCC Digital Platforms Inquiry final report was published in 2019 that highlights the prevalence of subtle nudge and dark-pattern practices on globally popular online shopping websites;⁵⁰ and their higher levels of effectiveness at undermining the decisions of consumers from less educated backgrounds – thereby raising distributive issues.^{51, 52} CPRC’s 2020 *[Towards markets that work for people](#)* research report also highlights evidence of how consumers who encounter vulnerabilities often face greater challenges making decisions in markets.⁵³ We note that regulation designed to protect consumers from detriment in specific circumstances where they may be especially vulnerable to detriment – such as in distant-selling situations or when seeking small-amount loans – are already a feature of the ACL.

Seeking to influence or nudge consumer decisions through subtle design techniques is not an unfair trading practice in all the circumstances. For example, such techniques can be reasonable forms of influence and even used to nudge consumers toward advantageous decisions.⁵⁴ However, nudge and dark pattern techniques that subtly manipulate consumers’ decisions in ways that leave, or are likely to leave, them materially worse off are unfair⁵⁵ and (to the extent they are not captured by existing Australian laws) should be prohibited. Examples of ways consumers are made materially worse off include when a design practice negatively affects a large number of users, systematically undermines the intent of laws in areas like data protection or the protection of children, or exploits the vulnerability of an

individual or group of consumers. Prohibiting such practices would have some key benefits. Firstly, it would provide a strong disincentive to firms that currently consider subtle design practices that undermine consumer autonomy to be in their commercial interest – while rewarding firms who do not seek to gain commercial advantage in this way. Secondly, it would help to address bargaining power imbalances that all consumers – but particularly consumers in vulnerable situations – face when they are participating in digital markets, given consumers have limited opportunities to protect themselves from practices often because they are not recognised or doing so would require disproportionate effort. And, thirdly, it would provide firms with greater incentives to embed the consumer interest and fairness into the design of online processes and business models⁵⁶ that are becoming increasingly common post COVID-19.

3.3. Exploiting consumer vulnerabilities

The ACCC Digital Platforms Inquiry found that data collection and handling practices can lead to particularly significant detriment for vulnerable consumers, for example, by placing vulnerable consumers at risk of being targeted with inappropriate products or scams, being discriminated against or excluded from markets.⁵⁷ An unfair trading practices prohibition would help to ensure all consumers can participate in digital markets with confidence that their vulnerabilities will not be exploited.⁵⁸ For this to happen, consumer protections need to provide an unambiguous signal to firms that it is not acceptable to:

Unfair trading practice #3:

Adopt data practices that, by design or indifference, lead to or increase risks of consumer vulnerabilities being exploited

3.3.1 Predatory business practices

There are businesses operating in the Australian economy that target vulnerable consumers – such as credit repair and for profit debt negotiators⁵⁹ and payday loan providers.⁶⁰ Evidence of the value of consumer data to similar firms in the United States is provided by the Federal Trade Commission’s (FTC) study of the United States data broker sector which found that lenders and financial services firms utilised data brokers for a range of purposes including direct marketing, online marketing and marketing analytics.⁶¹ Research from Chen (2020) in relation to Australian online payday lenders also reveals how developments in digital technology allow advertising to be more closely targeted to individual consumers.⁶² The World Privacy Forum has set out how data held about consumers facilitates predatory offers to those experiencing vulnerability – including consumers with poor credit histories, those in financial trouble and even seniors suffering dementia.⁶³ More recently in the United Kingdom, the CMA’s 2020 Online Platforms and Digital Advertising Market Study found evidence that suggests pre-installed apps can be a relevant source of data for brokers who have links with credit risk and banking companies.⁶⁴

CPRC’s core concern is that it has never been easier for firms with predatory business models to access and use consumer data to systematically target consumers and prey on their vulnerabilities. CPRC’s 2019 [*Day in the Life of Data*](#) research report outlined how this power can be used with a view to manipulating consumers based on their sensitive circumstances (e.g. their mood, personality, stress levels, mental health or emotional state).⁶⁵ Broad groups of vulnerable consumers can also be targeted, for example,

consumers who may lack choice or experience in a given market.⁶⁶ UoM's recent research involved an observational experiment designed to understand how advertising to Australian consumers via Facebook could be used to reach different groups of potentially vulnerable consumers.⁶⁷ UoM observed that, although Facebook does not allow searching criteria that could identify certain potentially vulnerable groups (e.g. a cultural minority) the nature of the technology makes it possible for firms to approximate groups of consumers by putting together a set of other criteria to target them (such as data held about a consumer's location, income and interests). Utilising these indirect "sideways" marketing techniques⁶⁸ allows firms to target groups of vulnerable consumers that the social media platform does not permit firms to target directly.

An unfair trading practices prohibition should seek to stamp out deliberate predatory practices aimed at targeting consumers with sales approaches when they are vulnerable.⁶⁹ As Paterson and Bant (2020) note, the growth in digital technologies means that such a reform needs to be effective at protecting consumers from predatory business systems in the online environment.⁷⁰ This is especially important given evidence that data-driven targeting techniques mean there is greater ability for firms to efficiently and effectively reach consumers who are in a vulnerable situation.⁷¹ If Australians are to be able to trust digital products, services and markets it is imperative they can have confidence that they will not have their vulnerabilities exploited or be at risk of significant detriment.

3.3.2 Scams and fraud

Another example of a data practice that can lead to consumers being exploited relates to the leakage of personal data which results in consumers being targeted with scams or fraud. CPRC's 2020 Data and Technology Consumer Survey (**Attachment 1**, p. 27) revealed 93% of Australian consumers are concerned about their personal data being used to commit scams or fraud. Furthermore, CPRC's [*COVID-19 and Consumers: from crisis to recovery*](#) research report highlights how modern computing and technology can fuel scams and fraud at a scale, efficiency and accuracy that is unequalled in history.⁷² Consumers' increased use of technology during COVID-19 – and the amplified mental, physical and financial stresses triggered by the pandemic – has driven a sharp increase in scammers seeking personal information.⁷³ The ACCC's Digital Platform Services Inquiry September 2020 interim report has also found that data that infers consumers' vulnerabilities places them at particular risk of being targeted by scammers.⁷⁴

CPRC's survey of consumers during COVID-19 has been capturing data on consumers reporting being a victim of scams or fraud – and in what sort of environment this has occurred (see Table 4 in **Annex 1**). The survey results show how scams and fraud have been reported at higher levels in digital settings (such as online marketplaces like Amazon and eBay; online classifieds/exchange platforms like Gumtree, Facebook and Craigslist; and Australian and international company websites) compared to more traditional settings, like bricks and mortar retail stores or over-the-phone sales. For example, in October 5% of consumers reported they were the victim of a scam or fraud over the past two months. Of these consumers:

- 27% said this occurred on an online classifieds/exchange platform (e.g. Gumtree, Facebook, Craigslist etc)
- 25% said this occurred in an online marketplace (e.g. eBay, Amazon etc)
- 18% said this occurred on an Australian retail website

- 15% said this occurred on an international retail website.

Higher levels of consumers reporting losses from being scammed and defrauded in digital markets is likely continue into the future as more Australians shift their consumer activities online (although we note that this will considerably understate the scale of the detriment due to underreporting⁷⁵). We therefore strongly agree with the ACCC's view that any firms' failure to comply with reasonable data security standards, including failing to put in place appropriate measures to protect consumer data, is significantly detrimental to consumers.⁷⁶ We also support more stringent requirements on digital platforms to remove known scams.⁷⁷

An unfair trading practices prohibition should fundamentally boost incentives for firms to have in place reasonable data security and safety standards that protect consumer data and avoid putting them in harm's way. Failing to take such care is a manifestly unfair practice that is recognised by the OECD in their Good Practice Guide on Consumer Data.⁷⁸ Given the substantial detriment that can arise from consumers' being exposed to scams and fraud, it is proportionate to ban practices that put consumers at risk of this harm. This is an appropriate step that, in combination with other reforms⁷⁹, will bolster consumer protections and promote trust and confidence in digital markets.

4. Gaps in the Australian law

We have set out evidence regarding unfair practices in digital markets that we consider fall well short of the treatment consumers expect and deserve. The three categories of unfair trading practices outlined were:

1. Firms inducing consumer consent or agreement to data collection through **concealed data practices**
2. Firms using opaque data-driven targeting and interface design strategies to **undermine consumer autonomy**
3. Firms having data practices that, by design or indifference, lead to or increase risks of **consumer vulnerabilities being exploited**

In Australia, there is a range of laws that are potentially relevant to these unfair trading practices, most relevantly:

- Misleading or deceptive conduct (MDC): Australian Consumer Law (ACL), s 18;
- Unconscionable conduct: ACL, s 21;
- The equitable doctrine of unconscionable dealing;
- Unfair contract terms: ACL, s 23;
- Misuse of market power: *Competition and Consumer Act 2020* (Cth), s 46; and
- Interference with the privacy of an individual: *Privacy Act 1988* (Cth), ss 13, 13G.

It is our view that these laws fail to address these unfair practices in significant respects, as outlined in turn below.

The prohibition against **MDC** will not capture conduct where the firm does not mislead consumers about their practices, but coerces consumers or exploits their lack of bargaining power. Further, the prohibition would very rarely impose a positive duty on the firm to disclose information about its practices, even where the firm's practices have significant and negative consequences for the consumer. Nor does the prohibition require the firm to act

fairly, having regard to the parties' respective interests, beyond the issue of whether the firm's conduct is likely to mislead or deceive. For example, the imposition of exploitative data terms or unreasonably difficult opt-out or cancellation procedures that work to undermine consumer autonomy would not, of itself, amount to MDC.

The **prohibition of unconscionable conduct** under section 21 of the ACL was intended to capture a broader category of conduct than the equitable doctrine of unconscionable dealing, but the Australian courts have interpreted the prohibition to require conduct to meet a very high threshold of unconscionability that goes well beyond accepted notions of unfairness. In the High Court case of *ASIC v Kobelt*,⁸⁰ members of the majority emphasised the heavy burden of establishing statutory unconscionability, with Gageler J explaining that it required:⁸¹

conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to the conscience.

Keane J stated that:⁸²

The terms imports the 'high level of moral obloquy' associated with the victimisation of the vulnerable.

The continuing restrictive approach to unconscionable conduct adopted by the Australian courts has been criticised, particularly in light of the fact that, in the words of Edelman J:⁸³

over the last two decades Parliament has repeatedly amended the statutory proscription against unconscionable conduct in continued efforts to require the courts to take a less restrictive approach ...

It seems highly unlikely that this trend in the interpretation of unconscionable conduct under section 21 will be reversed in the foreseeable future.

The equitable doctrine of **unconscionable dealing** provides a ground for rescission of a contract, but is limited to situations where the plaintiff can demonstrate a 'special disadvantage'.⁸⁴ The concept of a special disadvantage is narrowly interpreted to encompass situations where the plaintiff's ability to understand the terms of the contract was severely impaired, for example, where the plaintiff lacked English literacy; was intoxicated; or suffering from a mental or physical disability which "seriously affects the ability of the innocent party to make a judgment as to [their] own best interests". This doctrine does not aid the "average" consumer who is capable of understanding contractual terms even if they have no practical choice in them. Nor does it assist where there is no contractual relationship between the parties. Even where a special disadvantage exists, and rescission is available, this remedy is incapable of requiring the firm not to engage in similar conduct again, restoring a consumer's data privacy, or adequately compensating the plaintiff for the harm suffered. In combination, these remedial shortcomings may create a commercial incentive for firms to engage in exploitative conduct, while disadvantaging firms who do seek to treat consumers fairly.

The **unfair contract terms law** makes unfair contract terms void. However, it will not assist consumers if unfair contract terms are void if, for example, their personal data has already been disclosed to numerous other firms or used for purposes well beyond the original purpose. Further, the unfair contract terms law does not capture practices where there is no

contract between the parties, which will often be the case where third parties knowingly deal with a consumer's personal data without any awareness on the part of the consumer, let alone a contractual relationship with the consumer. This may occur, for example, where data brokers or "trusted partners" deal with a consumer's personal data in unfair ways even though they have no direct contractual relationship with the consumer in question. Nor will this law assist where the objectionable practices are predatory business systems, as opposed to terms in a contract with the consumer: for example, a marketing strategy which targets inexperienced or vulnerable consumers with costly or unsuitable products.⁸⁵

The **prohibition against misuse of market power** is limited in that it only applies to firms who are proved to possess substantial market power, whereas many firms without substantial market power are capable of engaging in unfair practices, especially in the context of digital services and data practices where the relevant conduct is largely concealed from consumers. Further, in contrast to some jurisdictions, the Australian law against unilateral anticompetitive conduct focuses on exclusionary conduct, in the sense of conduct that is likely to hinder rivals' ability to compete with the dominant firm, and is unlikely to capture exploitative conduct, which causes direct consumer harm without necessarily excluding rivals (such as predatory business models that seek to exploit consumer vulnerabilities).⁸⁶ The assumption is that, in the absence of exclusionary conduct, the market will self-correct to provide consumers with competitive offers. However, it is clear that this is not always the case. For example, the dearth of privacy-enhancing alternatives in response to consumers' declared preference for greater data privacy in the online environment, indicates a market failure, which is likely created by substantial imbalances in bargaining power, gross information asymmetries and firms' overwhelming incentives (and increasing capacity) to collect data about a consumer's behaviours without their knowledge or consent.

The **Privacy Act** imposes obligations on certain firms to comply with the Australian Privacy Principles (APPs) in respect of their dealings with personal information, including, in broad terms, taking reasonable steps to secure the information; providing individuals with notice about their data practices; and, in more limited circumstances, obtaining individuals' consent before those firms can engage in certain data practices. The Act also includes a scheme for notification of eligible data breaches. A contravention of the APPs constitutes an interference with the privacy of an individual.⁸⁷ Firms may be liable for civil penalties for serious or repeated interferences with the privacy of an individual.⁸⁸ To our knowledge, the Office of the Australian Information Commissioner (OAIC) has only once sought a civil penalty order under the *Privacy Act*.

Numerous weaknesses have been identified in the standards set by the *Privacy Act*. These include that the Act sets low standards for notice and consent, expressly providing that consent includes 'implied consent',⁸⁹ which would be found to exist, for example, when a consumer accesses a website which provides a link to a privacy policy, without alerting consumers to any unusual or potentially detrimental data practices. The Act also provides no direct right for individuals to bring proceedings for contraventions of the Act, permitting only complaints to the OAIC. Individuals can only bring proceedings to enforce a determination of the OAIC. The OAIC may also commence such proceedings, which are rare in practice.

The current laws leave significant "gaps" in addressing unfair practices, given that there is:

- **No positive duty to provide consumers with meaningful choices about or adequately disclose practices**, even where those practices seriously and directly impact the consumer.
- No prohibition of conduct which is substantially contrary to concepts of fairness, and consumers' reasonable expectations, but which fall short of the **very high threshold for unconscionable conduct** established by the Australian case law.
- No prohibition of practices where practices seriously and directly impact the consumer in the **absence of a contract**, unless the firm engages in MDC or meets the unconscionable conduct (UC) threshold.
- No prohibition of **exploitative practices**, in the absence of exclusionary conduct, where the firm possesses substantial market power (unless the UC threshold is met).
- **Inadequate recourse and remedies** for harm occasioned by firms that repeatedly engage in unfair conduct which does not amount to MDC or UC, or widely disclose consumer data against the interests of consumers and/or expose data to unacceptable risks.

In **Annex 2** we outline some “unfair practices” prohibitions in other jurisdictions. Our description of these prohibitions – and some examples of how they have been applied – demonstrate the much greater extent to which concealed data practices, and practices that seek to undermine consumer autonomy and exploit consumer vulnerabilities, are addressed and sanctioned in other jurisdictions, relative to the Australian law.

CPRC Conclusions

Urgent action is needed to modernise Australian consumer protections

A modern consumer protections framework must be able to deter trading practices that entrench and exploit information asymmetries, bargaining power imbalances and consumer behavioural biases in digital markets. Current market and regulatory failures (as identified by the ACCC's Digital Platforms Inquiry⁹⁰) lead to risks and detriment to consumers, with our evidence showing how firms can treat consumers unfairly by:

1. **Using concealed data practices**
2. **Undermining consumer autonomy**
3. **Exploiting consumer vulnerabilities**

An ACL protections framework that may have been appropriate in more analogue times needs to be updated so it is effective at addressing the aforementioned categories of unfair practice in digital markets. Research and analysis from Dr Katharine Kemp from UNSW (see **Section 4**) explains why existing protections – including existing prohibitions for unconscionable conduct and misleading and deceptive conduct within the ACL – fall short in addressing and deterring these unfair practices. Additionally, the analysis in **Annex 2** shows how consumers in other jurisdictions receive higher levels of protection from many of these types of practices.

Reforms to modernise consumer protections must be a fundamental component of the Australian Government's goal for Australia to be a leading digital economy and society by 2030.⁹¹ Just as the Government's Cyber Security Strategy⁹² sets out a vision, plan and actions for ensuring “Australians will have greater confidence that essential systems are protected” – a clear vision, plan and – most importantly – actions that strengthen consumer

protections will ensure consumers can have greater confidence in digital markets. A robust standard of protection will not only benefit consumers, but will also reward firms that do the right thing and innovate in ways that treat consumers fairly. These firms deserve a commercial advantage over firms that rely on slippery, sharp practices to compete. To deliver these outcomes for Australian consumers and businesses – policymakers, regulators, consumer advocates and firms themselves must work together to urgently develop and introduce an unfair trading practices prohibition into the ACL. The end goal should be to establish digital markets that – instead of being characterised by firms exploiting information asymmetries, bargaining power imbalances and consumer behavioural biases – is characterised by firms:

- **Pursuing their business interests in a fair way (i.e. act fairly⁹³)**
- **Possessing a mature and consumer-centric data-handling culture**
- **Promoting trust and confidence in digital markets.**

Regulatory design considerations

A single general unfair practices prohibition is unlikely, by itself, to address all of the concerning risks and detriments we have identified and achieve the aforementioned end goal. As Paterson and Bant recognise, what is needed is a layered regulatory regime in which bright-line rules are supplemented by more general standards-based safety net protections.⁹⁴ CPRC agrees with this view and considers that an unfair trading practices prohibition should form a fundamental part of a layered consumer protection regime. While we do not currently have a firm view on precise regulatory design of an unfair trading practices prohibition, we consider there are merits for exploring both specific and general safety-net regulations. We also agree with the ACCC's position that it will be important for boundaries to a prohibition to be codified in law to ensure proportionality.⁹⁵ Such boundaries should be based on the risks of consumer detriment, including detriment that arises from firms facing paltry commercial disincentives for using highly opaque and subtle unfair practices – to the disadvantage of other firms that do treat consumers fairly.

We note that the generality or specificity with which a potential unfair practices prohibition is ultimately framed will have implications for other consumer protection reforms under consideration, such as a general safety provision^{96, 97} and unfair contract terms prohibition⁹⁸ being added to the ACL, potential Privacy Act reforms⁹⁹, and the ongoing development of rules relating to the Consumer Data Right.¹⁰⁰ Given that the scope, enforcement practices and underlying policy rationales for these different laws and rules are sufficiently different to an unfair trading practices prohibition, we consider that a multifaceted approach for protecting consumers in digital markets is warranted. Robust protections in all of these areas are necessary to effectively protect Australian consumers across digital markets.

Implications beyond digital markets

While the focus of our evidence has been on digital markets, CPRC also notes that an unfair trading practices prohibition would have application beyond digital markets. We consider that protections that clearly prohibit firms from inducing consumer consent or agreement through concealment; undermining consumer autonomy or exploiting vulnerabilities in more “analogue” markets will be a positive outcome for consumers. Having such protections in both digital and “bricks and mortar” markets will also ensure a level playing field between firms who may be competing to sell the same products or services to consumers while

preferring to use different channels (e.g. ensure a level regulatory playing field between a small independent clothes store at a local shopping centre versus an online marketplace like Amazon or eBay).

We note that achieving a “level playing field” between online and smaller businesses was a key objective of 2019 European Union (EU) consumer protection reforms regarding consumer remedies for faulty products¹⁰¹ and is an underpinning principle of the EU Digital Services Act currently under development.¹⁰² Banning unfair trading practices can also place an appropriate restraint on the substantial market power of firms that already have a strong position in terms of data access and use – in comparison to smaller businesses.

Further engagement

CPRC will be producing further research focused on a fair, safe and inclusive digital recovery in 2021. For more information please contact office@cprc.org.au

**ANNEX 1 -
CPRC CONSUMERS AND COVID-19 SURVEY DATA TABLES**

Table 1 – Australian consumers’ spending vs typical month before COVID-19 lockdown (Online vs In store shopping comparison)

<u>Online</u> grocery shopping	May	Jul	Sep	<u>In store</u> grocery shopping	May	Jul	Sep
Spending more now	16%	17%	18%	Spending more now	32%	26%	25%
About the same	30%	31%	28%	About the same	46%	51%	54%
Spending less now	7%	9%	10%	Spending less now	20%	21%	18%
NA / Can't say	46%	43%	44%	NA / Can't say	2%	2%	3%
Net spending more (less)	9%	8%	8%	Net spending more (less)	12%	5%	6%
<u>Online</u> shopping for personal items	May	Jul	Sep	<u>In store</u> shopping for personal items	May	Jul	Sep
Spending more now	26%	22%	28%	Spending more now	6%	8%	7%
About the same	35%	36%	33%	About the same	28%	37%	35%
Spending less now	22%	24%	22%	Spending less now	59%	50%	53%
NA / Can't say	17%	18%	16%	NA / Can't say	7%	6%	5%
Net spending more (less)	4%	(-2%)	6%	Net spending more (less)	(-52%)	(-42%)	(-46%)

Question: Thinking of a typical month before the COVID19 lockdown, which began in late March, are you now spending more, about the same, or less on the following essential/discretionary items?

Sample sizes: May N = 1,114; July N = 1,463; September N = 1,106

Table 2 – Australian consumers’ expected spending changes in the next 3 months

<u>Online grocery shopping</u>	Jun	Aug	Oct		<u>In store grocery shopping</u>	Jun	Aug	Oct
Likely to spend more	11%	16%	12%		Likely to spend more	17%	19%	16%
Likely to spend the same	34%	35%	36%		Likely to spend the same	62%	58%	61%
Likely to spend less	13%	13%	15%		Likely to spend less	19%	22%	21%
NA / Can't say	42%	37%	37%		NA / Can't say	2%	2%	2%
Net spending more (less)	(-2%)	3%	(-4%)		Net spending more (less)	(-2%)	(-3%)	(-4%)
<u>Online shopping for personal items</u>	Jun	Aug	Oct		<u>In store shopping for personal items</u>	Jun	Aug	Oct
Likely to spend more	13%	21%	18%		Likely to spend more	13%	11%	13%
Likely to spend the same	43%	38%	37%		Likely to spend the same	45%	42%	44%
Likely to spend less	29%	29%	30%		Likely to spend less	38%	43%	39%
NA / Can't say	15%	12%	15%		NA / Can't say	4%	4%	4%
Net spending more (less)	(-15%)	(-9%)	(-12%)		Net spending more (less)	(-26%)	(-32%)	(-26%)

Question: Compared to today, how is your spending on the following essential/discretionary expenses likely to change 3 months from now?

Sample sizes: June N = 1,430; August N = 2,154; October N = 2,274

Table 3 – Australian consumers reporting problems with different types of retailers

	Jun	Aug	Oct
% consumers reporting a problem with any retailer	20%	26%	28%
% consumer reporting problems - retailer breakdown*			
Traditional retail store	24%	23%	26%
Business selling products / services over the phone	6%	16%	15%
Online marketplace (e.g. Amazon, eBay)	28%	43%	36%
Online classifieds/exchange platform (e.g. Gumtree, Facebook)	7%	18%	22%
Online Australian company retail website	29%	31%	30%
Online international company retail website	23%	16%	21%
Other	15%	15%	13%

***Note** %'s do not add to 100%. Respondents could report multiple problems with different types of retailers

Question: Over the past two months, have you experienced any of the following problems when purchasing discretionary products or services from a retailer? (Product was unsafe, faulty or poor quality; Product / service had misleading costs; Incorrect or misleading information provided about product / service; Unclear or unfair terms and conditions; Difficulty contacting company to change / cancel service; Not what I had originally ordered; Poor customer service; Was a victim of a scam or fraud) With what type of business / provider did this problem occur?

Sample sizes: June total N = 1,430 / with problems N = 290 ; August total N = 2,154 / with problems N = 551, October total N = 2,274 / with problems N = 642

Table 4 – Australian consumers reporting being a victim of a scams or fraud

	Jun	Aug	Oct
% consumers reporting scam or fraud	2%	3%	5%
% consumers reporting scam or fraud – retailer breakdown*			
Traditional retail store	4%	13%	9%
Business selling products / services over the phone	6%	15%	17%
Online marketplace (e.g. Amazon, eBay)	25%	29%	25%
Online classifieds/exchange platform (e.g. Gumtree, Facebook)	14%	34%	27%
Online Australian company retail website	8%	11%	18%
Online international company retail website	23%	14%	15%
Other	37%	36%	18%

***Note** – %'s do not add to 100%. Respondents could report multiple problems with different types of retailers

Question: Over the past two months, have you experienced any of the following problems when purchasing discretionary products or services from a retailer? (Was a victim of scam or fraud) With what type of business / provider did this problem occur?

Sample sizes: June total N = 1,430 / victim of scam or fraud N = 32 ; August total N = 2,154 / victim of scam or fraud N = 72, October total N = 2,274 / victim of scam or fraud N = 93.

ANNEX 2 – RELEVANT LAWS IN OTHER JURISDICTIONS

The following note on prohibitions which target unfair practices in other jurisdictions has been prepared by Dr Katharine Kemp and Ms Roseanna Bricknell from the University of New South Wales.

The note demonstrates at the outset the much greater extent to which unfair trading practices are addressed and sanctioned in other jurisdictions, relative to the Australian law. In particular, the note focuses on practices that are particularly relevant to digital markets. A more in-depth comparison is currently being undertaken, and we will publish the results of this in the new year.

European Union

In the European Union, unfair commercial practices are governed by *Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market* (UCPD). The UCPD was deliberately drafted in broad terms, taking a principles-based approach, to permit it to capture unfair practices in the context of fast evolving products and services.¹⁰³ The general provisions of the UCPD (Arts 5 to 9) cover unfair, misleading and aggressive commercial practices which are capable of distorting consumers' economic behaviour.

While the prohibitions against misleading or deceptive conduct and omissions (Arts 6 and 7) are similar to the MDC prohibition in Australia, they are in some respects broader, including, for example, the prohibition of provision of certain information in an unclear manner. Other prohibitions extend beyond misleading conduct matters, including the prohibition of a commercial practice that is contrary to the requirements of professional diligence and "materially distorts or is likely to materially distort" the economic behaviour of the average consumer. Professional diligence means "the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity".¹⁰⁴

The prohibition of "aggressive commercial practices" (including sharp practices arising from the failure to disclose information) (Art 8) is also broader than MDC or UC. In determining whether aggressive commercial practices have occurred, relevant factors include: exploitation by the trader of specific misfortune of the consumer of which the trader is aware; and any onerous or disproportionate non-contractual barriers imposed by the trader where the consumer wishes to exercise rights under the contract.¹⁰⁵

The UCPD, as amended by the more recent 'Omnibus Directive',¹⁰⁶ also imposes a positive duty to provide information in certain situations, including:

- Clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within search results, when providing search results in response to a consumer's online search query; and
- Informing consumers each time the price presented to them online is based on an algorithm taking into account personal consumer behaviour, so they are aware of the risk that the asking price was increased.

The case law under UCPD has resulted in findings of contravention in cases that are unlikely to contravene any Australian law, including:

- **Samsung Italy** – required consumers, after purchasing products pursuant to a promotional offer, to register on the Samsung People online platform and provide their personal data. The data was used by Samsung for marketing purposes not linked with the promotional offer of the product they had purchased. This was an aggressive practice infringing arts 8 and 9. Samsung was fined €975,000.¹⁰⁷
- **Facebook** – The Italian Competition Authority found that Facebook “exerts undue influence on registered consumers, who suffer, without express and prior consent and therefore unconsciously and automatically, the transmission of their data from Facebook to third-party websites/apps for commercial purposes, and vice versa. The undue influence is caused by the pre-selection by Facebook of the broadest consent to data sharing. When users decide to limit their consent, they are faced with significant restrictions on the use of the social network and third-party websites / apps, which induce users to maintain the pre-selected choice”. This was an aggressive practice infringing arts 8 and 9. Facebook was fined €10 million.¹⁰⁸
- **Sixthcontinent Europe S.r.l.** – is active in online advertising and e-commerce and, in particular, in offering and selling shopping cards. Among other conduct, it blocked the accounts of many customers in an unjustified manner; hindered the issue of shopping cards by various merchants and delayed their activation several times; considerably reduced the number and importance of shopping cards that could be purchased with credits on the platform; and considerably reduced other payment services that could previously be used with the customer’s balance and accumulated credits. These, and other misleading and aggressive practices by the firm, resulted in a €4 million fine.¹⁰⁹

United Kingdom

In the UK, the *Consumer Protection from Unfair Trading Regulations 2008* (UK) operate to implement the EU UCPD in the UK. The *Consumer Rights Act 2015* (UK), which provides more specific protections for unfair contracts terms / notices also applies, as do consumer provisions in Part 8 of the *Enterprise Act 2002* (UK).

The UK case law has resulted in recent enforcement actions and investigation in cases involving some conduct that would be unlikely to contravene any Australian law, including:

- **Hotel booking sites** – The CMA identified concerns including lack of transparency in ranking of search results, in addition to various misleading practices.¹¹⁰ It secured undertakings from Agoda, Booking.com, Expedia, ebookers, Hotels.com and trivago.¹¹¹ The action resulted in sector-wide principles, adoption of which would make it less likely that businesses would breach the Consumer Protection from Unfair Trading Regulations.¹¹² These principles included a requirement for businesses to disclose the effect of payments made to the website had on the ranking of search results. The CMA stated that the effect of these underlying commercial relationships on the ranking of results should be disclosed clearly in prominent, static text on the search screen or results screen. Disclosure via a hyperlink or separate page would be insufficient.

- **Secondary ticketing websites** – The CMA investigated a number of secondary ticketing websites in respect of potentially unfair practices, in addition to various misleading practices. It obtained a court order against viagogo, including requirements that viagogo should make it easier for consumers to get their money back under viagogo’s guarantee when things go wrong, rather than baselessly refusing claims; inform consumers of which seat they would get in a venue; and inform consumers when ticket sellers are businesses, including professional resellers.¹¹³
- **Apple Inc** – The CMA took enforcement action against Apple Inc in relation to inadequate information provided to consumers who might have attempted to repair or replace their phones when they were not aware of the effects of a software upgrade on the performance of their phone. This CMA action resulted in undertakings from Apple that it would “always to notify people when issuing a planned software update if it is expected to materially change the impact of performance management on their phones” and “provide easily accessible information about battery health and unexpected shutdowns, along with guidance on how iPhone users can maximise the health of their phone’s battery”.¹¹⁴

United States

In the United States, section 5 of the Federal Trade Commission Act (FTC Act) prohibits “unfair or deceptive acts or practices”, capturing both misleading conduct and “unfair” conduct. An act or practice may be unfair if it causes “substantial consumer injury that the consumers themselves could not reasonably have avoided and that is not outweighed by countervailing benefits to consumers or competition”. The FTC “has long maintained that Congress intended for the word ‘unfair’ to be interpreted broadly and flexibly to allow the agency to protect consumers as technology changes”.¹¹⁵ Section 5 can apply to a firm’s practices even where it has no contract with, and has made no representation to, the relevant consumer(s).

The case law under section 5 of the FTC Act has resulted in findings of contravention in cases involving some conduct that would be unlikely to contravene any Australian law, including:

- **ABCmouse** – Children’s online education provider ABCmouse agreed to orders requiring payment of \$10 million and changes to its practices to settle FTC charges. In addition to misleading conduct, the FTC objected to the company’s cancellation procedures which required customers to “negotiate a lengthy and confusing process that often prevented many consumers from being able to complete their cancellations”.¹¹⁶
- **Dating services** - The FTC alleged that dating service Match.com, which also owns Tinder, OKCupid, PlentyOfFish, engaged in unfair practices in addition to various misleading representations. These included unfairly exposing consumers to the risk of fraud through communications from other accounts (when the company had internally flagged these accounts as likely to be fraudulent); banning consumers from services they had paid for when they unsuccessfully disputed charges; and making it difficult for users to cancel their subscriptions.¹¹⁷ A similar action was taken against JDI Dating in 2014.¹¹⁸

- **Retina-X** – The FTC secured a settlement following allegations that Retina-X developed apps that allowed purchasers to monitor the mobile devices (including physical location and online activities) on which they were installed, without the knowledge or permission of the device’s user. To install the apps, the purchasers were required to bypass mobile device manufacturer restrictions, which the FTC alleged exposed the devices to security vulnerabilities and likely invalidated manufacturer warranties. Each of the apps provided purchasers with instructions on how to remove the app’s icon from the mobile device’s screen so that the device’s user would not know the app was installed on the device. The FTC also alleges that Retina-X failed to adequately secure the information collected from the mobile devices.
- **Dating apps** – Three dating apps operated by Ukraine-based Wildec LLC (Meet24, FastMeet and Meet4U) were removed from the Apple Store and the Google Play Store after the FTC warned they allowed children who indicated they were as young as 12 to access them and allowed adult users to communicate with the children, which was likely to cause substantial consumer injury. According to the FTC, this conduct appeared to contravene the unfair practices prohibition under the FTC Act, as well as the Children’s Online Privacy Protection Act.¹¹⁹

ANNEX 3 – REFERENCES

- ¹ We note that at the 6 November 2020 Meeting of Ministers for Consumer Affairs it was agreed that unfair trading practices issues and options warrant further exploration through a regulation impact assessment process, including seeking further evidence on the nature of the problem and the extent of consumer harm arising from potential gaps in the current law. See: Legislative and Governance Forum on Consumer Affairs, “Joint Communique – Meeting of Ministers For Consumer Affairs”, (November 2020), 3, <https://consumerlaw.gov.au/sites/consumer/files/inline-files/CAFCommunique-20201106.pdf>
- ² The overarching objective that underpins the national consumer policy framework is “to improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.” See: Consumer Affairs Australia and New Zealand, “Australian Consumer Law Review – Final Report” (March 2017), 8, https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf
- ³ See: Brigid Richmond, “A Day in the Life of Data”, (May 2019), 6-12, https://cprc.org.au/app/uploads/2019/05/CPRC-Research-Report_A-Day-in-the-Life-of-Data_final-full-report.pdf ; Phuong Nguyen & Lauren Solomon, “Consumer Data and the Digital Economy”, (July 2018), 6-9, https://cprc.org.au/app/uploads/2018/07/Full_Data_Report_A4_FIN.pdf
- ⁴ Australian Government, “National Meeting of Digital Economy and Technology Ministers: Communique May 2020”, (May 2020), <https://www.industry.gov.au/news-media/national-meeting-of-digital-economy-and-technology-ministers-communique-may-2020>
- ⁵ Consumers International, “Consumer Protection: Why it matters to you – A Practical Guide to the United Nations Guidelines for Consumer Protection”, (2016), 17, <https://www.consumersinternational.org/media/2049/un-consumer-protection-guidelines-english.pdf>
- ⁶ ACCC, “Digital Platforms Inquiry – Final Report”, (June 2019), 449, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>
- ⁷ For the list of consumer harms identified by the ACCC, and explanation of how they can pose particular risks to vulnerable consumers – such as children, consumers from a low socio-economic background and consumers with low digital literacy, see: Ibid 442-448
- ⁸ Australian Bureau of Statistics, “Retail Trade, Australia, September 2020”, (accessed November 2020), <https://www.abs.gov.au/statistics/industry/retail-and-wholesale-trade/retail-trade-australia/latest-release#supplementary-covid-19-analysis-online-sales>
- ⁹ eSafety Commissioner, “Covid-19 impact on Australian adults’ online activities and attitudes”, (June 2020), 6, <https://www.esafety.gov.au/sites/default/files/2020-06/Covid-19-impact-on-Australian-adults-online-report.pdf>
- ¹⁰ OAIC, “Australian Community Attitudes to Privacy Survey 2020”, (September 2020), 107 & 116, <https://www.oaic.gov.au/assets/engage-with-us/research/acaps-2020/Australian-Community-Attitudes-to-Privacy-Survey-2020.pdf>
- ¹¹ ACMA, “Trends in online behaviour and technology usage: ACMA consumer survey 2020” (September 2020), 6, <https://www.acma.gov.au/sites/default/files/2020-09/Trends-in-online-behaviour0-and-technology-usage-ACMA-consumer-survey-2020.pdf>
- ¹² United Nations Conference on Trade and Development, “The COVID-19 Crisis: Accentuating the need to Bridge Digital Divides”, (April 2020), 6, https://unctad.org/system/files/official-document/dtlinf2020d1_en.pdf
- ¹³ Rod Sims, “Tackling market power in the COVID-19 era”, (October 2020), <https://www.accc.gov.au/speech/tackling-market-power-in-the-covid-19-era>
- ¹⁴ CPRC, “Consumers and COVID-19: from crisis to recovery”, (June 2020), 35-44, 54, https://cprc.org.au/wp-content/uploads/Consumers-and-COVID-19_full-report_25June2020_compressed.pdf
- ¹⁵ Rod Sims, “Tackling market power in the COVID-19 era”, (October 2020)
- ¹⁶ The United Kingdom’s Centre for Data Ethics and Innovation has considered issues of consumer trust and innovation, and note that “in the absence of trust, consumers are unlikely to use new technologies or share the data needed to build them, while industry will be unwilling to engage in new innovation programmes for fear of meeting opposition”. See: UK Centre for Data Ethics, “An overview of the CDEI’s AI Barometer” (June 2020), <https://cdei.blog.gov.uk/2020/06/18/overview-cdei-ai-barometer/>
- ¹⁷ OAIC, “OAIC international strategy 2020-2021”, (March 2020), <https://www.oaic.gov.au/about-us/our-corporate-information/oaic-international-strategy-2020-2021/#ftnref3> .
- ¹⁸ Legislative and Governance Forum on Consumer Affairs, “Joint Communique – Meeting of Ministers For Consumer Affairs”, (November 2020), 3, <https://consumerlaw.gov.au/sites/consumer/files/inline-files/CAFCommunique-20201106.pdf>
- ¹⁹ Katharine Kemp, “Concealed data practices and competition law: Why privacy matters”, (2020), *European Competition Journal*, 634-637, <https://doi.org/10.1080/17441056.2020.1839228>
- ²⁰ Trading practices that work to conceal data practices from consumers, were identified by the Digital Platforms Inquiry as being significantly detrimental to consumers but not expressly prohibited by the ACL. See: ACCC, “Digital Platforms Inquiry – Final Report”, (June 2019), 498.

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- ²¹ See Attachment 1, Part 2. Full standalone report available at: CPRC, “2020 Data and Technology Consumer Survey”, (December 2020), <https://cprc.org.au/app/uploads/2020/11/CPRC-2020-Data-and-Technology-Consumer-Survey.pdf>
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⁶⁶ Consumer Affairs Australia and New Zealand has previously noted evidence of persistent unfair trading practices, with stakeholders providing examples of common features of unfair practices in business models that:

- take advantage of consumers being unable or failing to appreciate the unexpected consequences of a contract
- exploit vulnerable consumers by charging fees or costs that far exceed the cost of providing the service
- take advantage of vulnerable consumers who cannot access alternative products or are unaware of alternatives available to them.

See: Consumer Affairs Australia and New Zealand, “Australian Consumer Law Review – Final Report” (March 2017), 50-51.

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- ⁶⁸ “Sideways marketing” is where an advertiser cannot target an exact desired audience due to restriction or other constraint, so it finds proxy descriptors for the audience and use those, in order to reach the target audience. See *Ibid*, 46
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- ⁸³ Justice Chris Maxwell, ‘Equity and Good Conscience: The Judge as Moral Arbiter and the Regulation of Modern Commerce’ (Victorian Law Foundation Oration, 14 August 2019).
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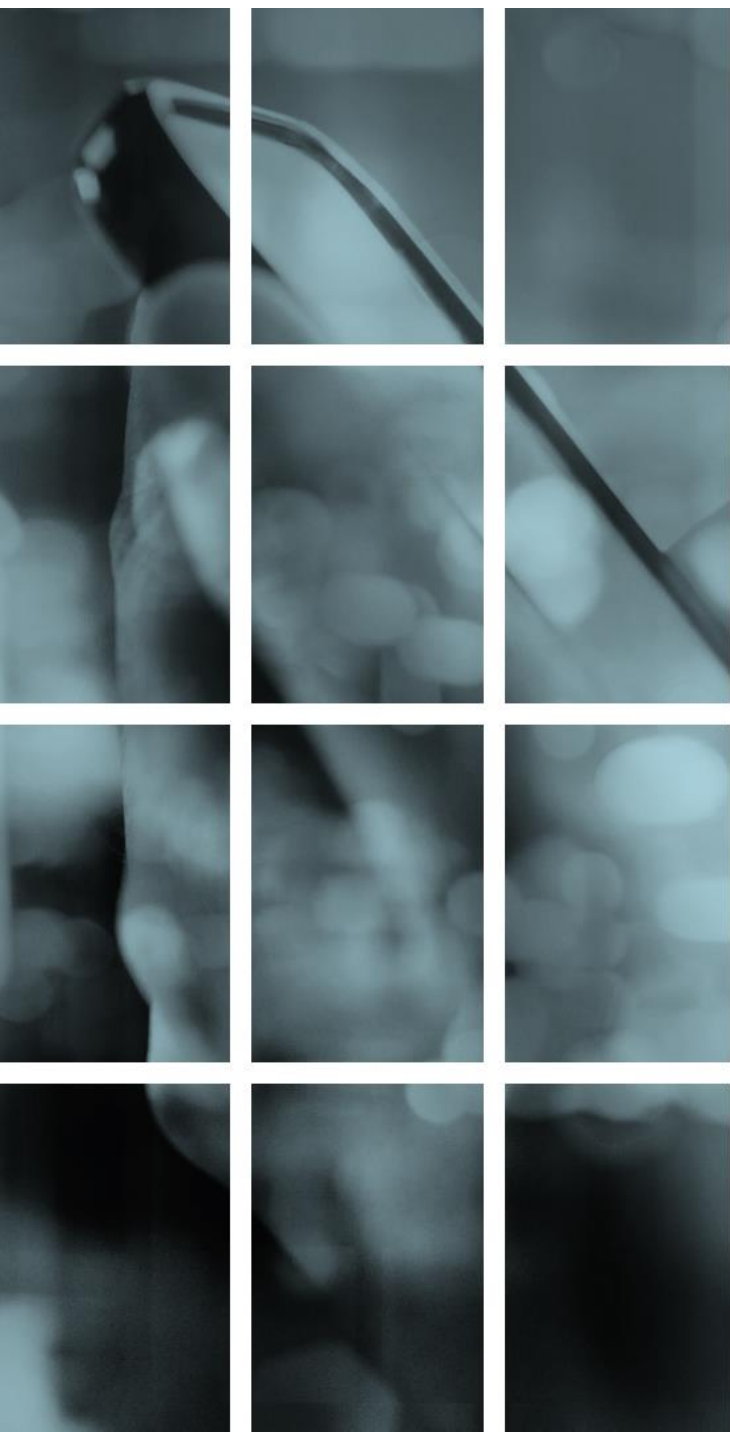
CPRC 2020 Data and Technology Consumer Survey

*Consumer research conducted in partnership with
Roy Morgan Research over March and April 2020*

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Executive Summary

Overview of our consumer research findings

CPRC's 2020 Data and Technology Consumer Survey reveals the increasing reliance consumers have on digital technologies, products and services.

- 70% of Australians use Google products or services daily, while 58% use Facebook daily.
- 28% of 2020 survey respondents visited online shopping websites at least once a week, up from 21% in 2018.
- Location apps and GPS devices were by far the most commonly used internet-connected devices (69% of consumers) – while smart assistants (32%) and exercise health trackers (24%) were also commonly used.

Privacy Policies offer no protection when the majority of consumers don't read them. Australians also view the sharing and selling of personal information by companies as an unfair practice.

- Privacy Policies and Terms and Conditions (T&Cs) continue to be ineffective at informing consumers of company data-handling practices – 94% of Australians are not reading this information all the time.
- Of consumers who had read a Privacy Policy or T&Cs in the past 12 months, 69% admitted to having agreed to them for at least a few products/services despite feeling uncomfortable doing so.
- 85% of consumers consider it is unfair for companies to share personal information they've provided with other companies – while 90% think it is unfair for this information to be sold to other companies. A large majority of consumers also find it unfair when companies collect more information than is necessary to deliver the product or service they are receiving (88%).
- Consumers have high concerns about online safety issues, with concern highest regarding data breaches or hacks (94%), personal data being used for fraud or scams (93%) and children's data being misused (92%).

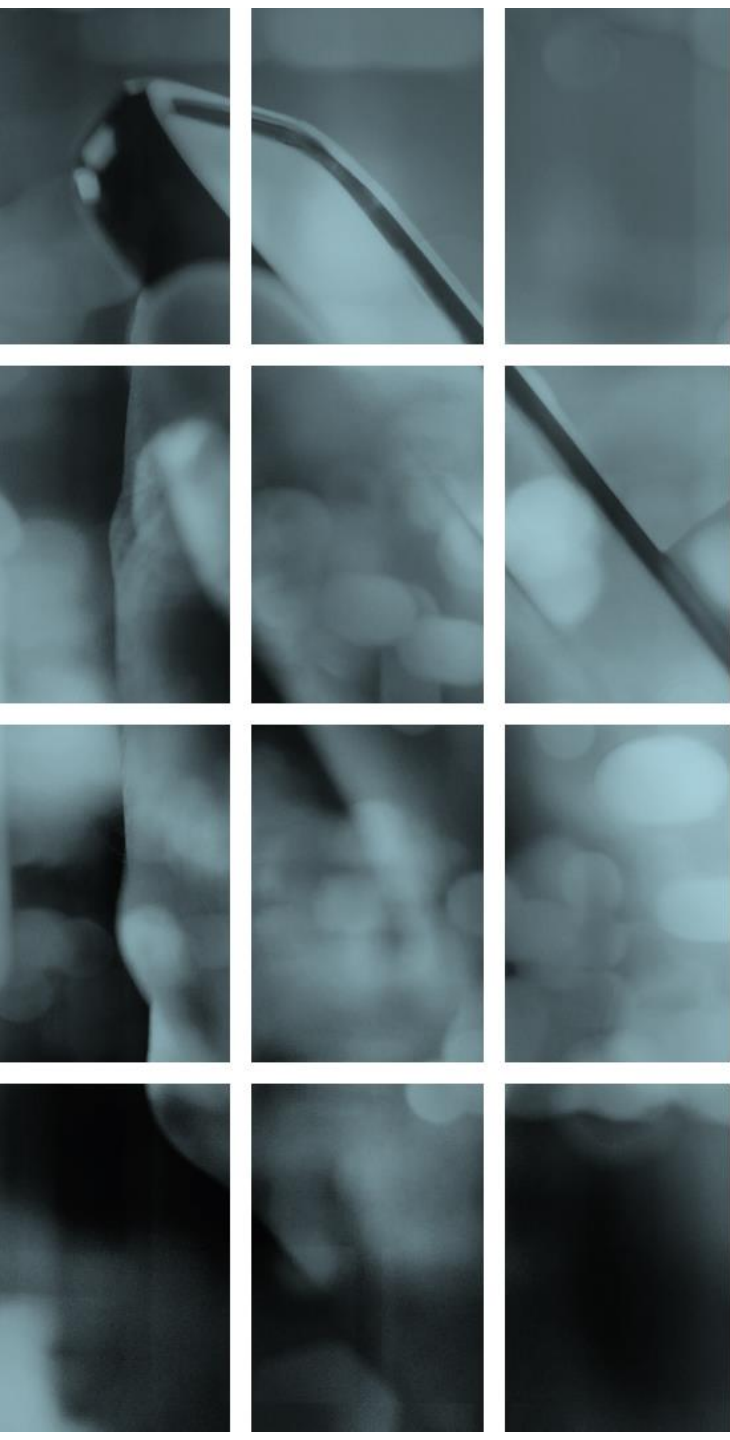
Overview of our consumer policy insights

Consumers consider that both companies and government have high levels of responsibility for making sure consumers are protected from unfair and harmful data practices.

- A majority of Australians consider companies have a “high” level of responsibility in protecting their personal information, for example:
 - protecting against consumers’ information from being used in ways that make them worse off (82%)
 - protecting consumers against collection and sharing of their personal information (75%).
- Government is also seen to have high responsibilities in these areas (79% and 67% respectively) – while 80% of consumers consider government has a “high” level of responsibility for developing protections to ensure no one is excluded from essential products or services based on their data.

Market and regulatory failures in relation to companies’ data-handling practices mean that digital marketplaces are failing to deliver fair outcomes to consumers.

- At a time when COVID-19 has increased consumer reliance on digital technologies and marketplaces, Australians are left to rely on analogue laws and regulations to protect them in an increasingly digital world.
- Australia’s consumer protections need to be modernised so that consumers are protected against practices that unfairly exploit information asymmetries, bargaining power imbalances and behavioural biases in digital marketplaces.
- Reform processes already announced – such as an unfair trading practice prohibition and general safety provision being added to Australian Consumer Law, and a comprehensive review of the Privacy Act – need to deliver stronger protections without delay. This will ensure Australian consumers are properly protected, and help to drive greater trust and confidence in digital marketplaces, as the economy recovers from COVID-19.



Introduction to our research

Background

The Consumer Policy Research Centre (CPRC) is an independent, not-for-profit organisation that undertakes interdisciplinary and cross-sectoral consumer research. We want markets to deliver a fairer, safer and more inclusive future for consumers.

Data and technology issues are a research focus for CPRC, including emerging consumer risks and harms and the opportunities to better use data to improve consumer wellbeing and welfare.

In 2018, CPRC engaged Roy Morgan Research (Roy Morgan) to conduct a survey regarding Australians' knowledge, behaviours and attitudes regarding data collection, sharing and use. In 2020 Roy Morgan were engaged to refresh the survey findings from 2018 – and also expand the research scope to cover recent developments in data technology, collection, sharing and use.

This report presents the findings of the 2020 survey – drawing out some key consumer policy insights from the results. The research builds off extensive research from CPRC relating to data, digital marketplaces and the outcomes consumer both experience and expect. This past research includes:

- [*Data and the Digital Economy*](#) report in 2018
- [*The Day in the Life of Data*](#) report in 2019
- [*Consumers and COVID-19: from crisis to recovery*](#) report in 2020.

Research objectives and methodology

The objectives of our consumer research was to build on our understanding of Australians' behaviours and attitudes towards digital marketplaces, in terms of:

- interactions with different data-driven products and services
- knowledge and acceptance of data collection, use and sharing
- attitudes towards the use of data for marketing and personalised pricing
- concerns towards personal data breaches and misuse
- responsibilities of consumers, government and companies with regard to protection.

To fulfil these objectives, a nationally representative online survey of 1000 consumers aged 18 or over was undertaken between 19 March and 1 April 2020, in partnership with Roy Morgan. The survey results have been weighted so they are representative of the Australian population.

The online survey was supplemented by in-depth 30 minute telephone interviews of 10 online survey respondents carried out between 6-8 April 2020. A selection of quotes from these interviews are included throughout the report.

How to read this report

This report is divided into four parts - reflecting the focus of our consumer research.

Part one is about the reliance Australian consumers have on data-driven technologies and “**digital marketplaces**”^{*} – and explores how this reliance has evolved since 2018. It looks at what technologies, products and services Australians are using and what this means for their daily lives.

Note: *our consumer survey took place mostly in March 2020 – before COVID-19 restrictions fully set in. On p. 15 we highlight other research that shows how consumer behaviours have changed dramatically due to COVID-19 restrictions.*

Part two is about current consumer attitudes toward data practices and privacy – and how these compare to our 2018 survey results.

Part three explores consumer attitudes toward fairness, safety and responsibility for protections in digital marketplaces. All of these questions were asked for the first time in our 2020 survey.

Part four sets out the key consumer policy implications our research results pose – and what can be done by market stewards to ensure consumers interests are promoted in digital marketplaces.

CPRC uses the term “digital marketplaces**” to mean a broad range of online locations – for example, apps, websites or digital platforms – where consumers can engage in activities such as accessing and receiving information, comparing propositions and finalising transactions (be they monetary or data-based).*

Part One

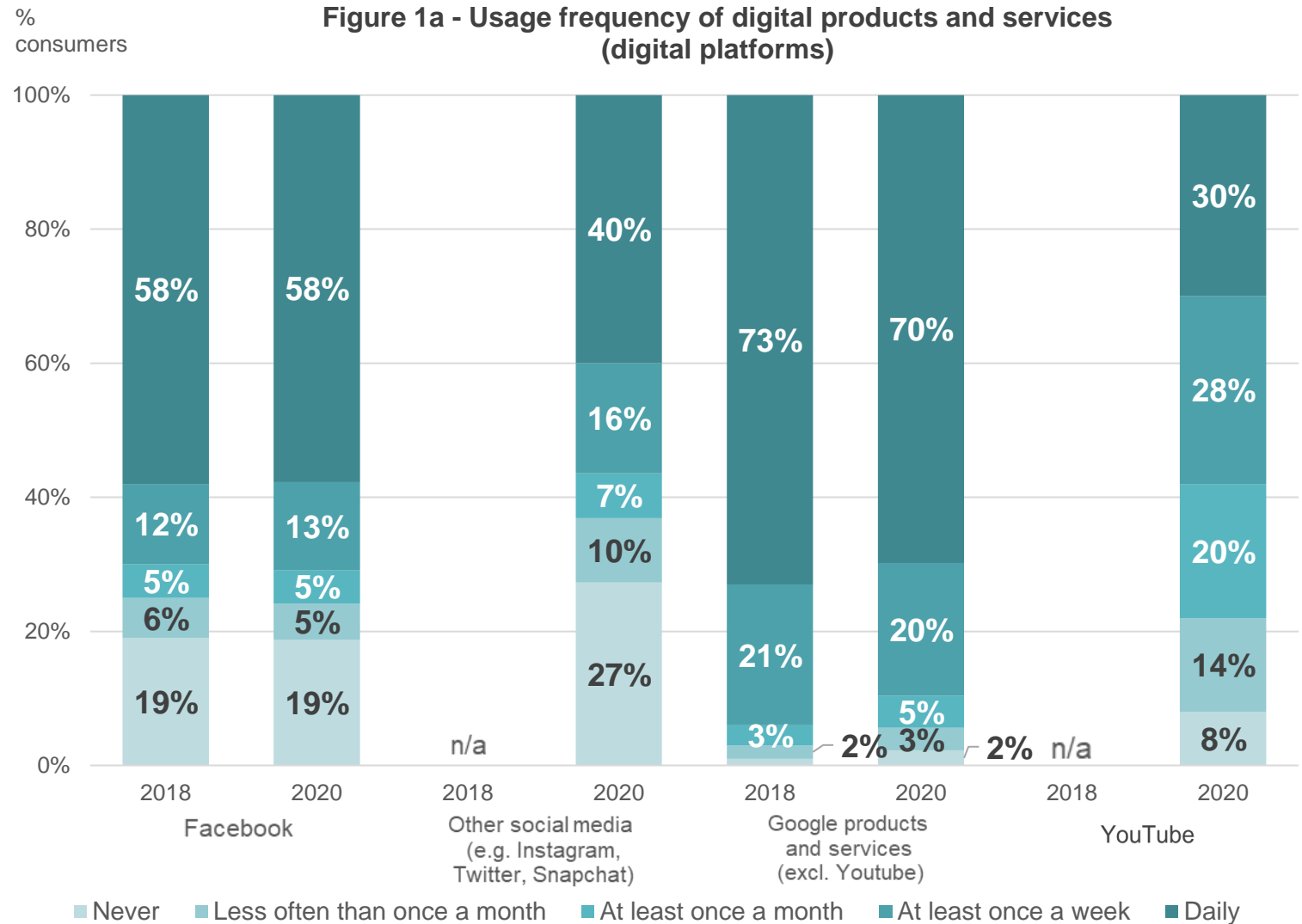


**Consumer
usage and
reliance on
data-driven
products
and
services**

Consumers continue to use digital platforms at a high frequency – with over half of consumers using Google and Facebook products daily

Use of Google products and services remained stable between 2018 and 2020, with 70% of consumers continuing to use these daily. 58% of Australians also used YouTube at least once a week.

Social media was commonly used, with 58% and 40% of Australians being daily users of Facebook and “Other social media” respectively.



Q: In the past 12 months how often did you use:

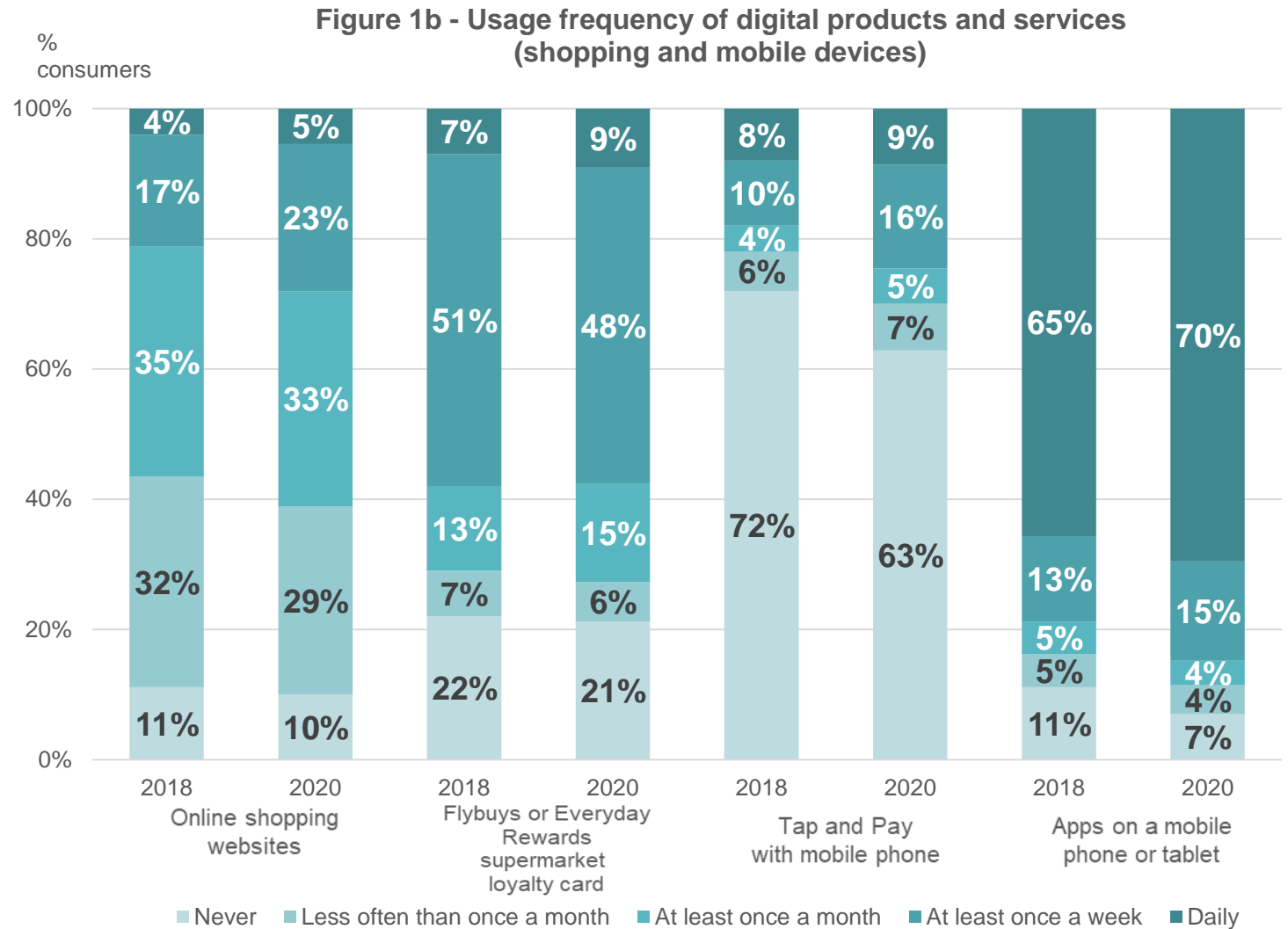
Note – data labels ≤ 1% are not shown

There were significant increases regarding usage of apps and online shopping between 2018 and 2020

28% of 2020 respondents visited online shopping websites at least once a week, well up from 21% in 2018.

There were also significantly more daily users of apps on mobile phones or tablets in 2020 (70%) compared to 2018 (65%).

Tap and Pay use also increased - with 25% of consumers using this technology at least once a week (18% in 2018).



Q: In the past 12 months how often did you use:

Our survey indicates that 81% Australians are currently using internet connected devices

Locations apps and GPS devices were the most commonly used internet-connected device (69%), followed by smart assistants (32%) and exercise health trackers (24%).

The survey also revealed that less than 8% of Australians currently use the following internet connected devices:

- Smart household appliances (7%)
- Smart home security system (6%)
- Smart thermostat (2%)
- Smart baby monitor (2%).

19% of consumers indicated that they did not use any of the internet connected devices we asked about.

Figure 2 - Internet connected devices consumers are using



69%

Use locations apps / GPS devices



32%

Use smart assistants
(Siri, Alexa, Google Assistant etc.)



24%

Use exercise / health trackers



13%

Use smart watches



8%

Use smart cars

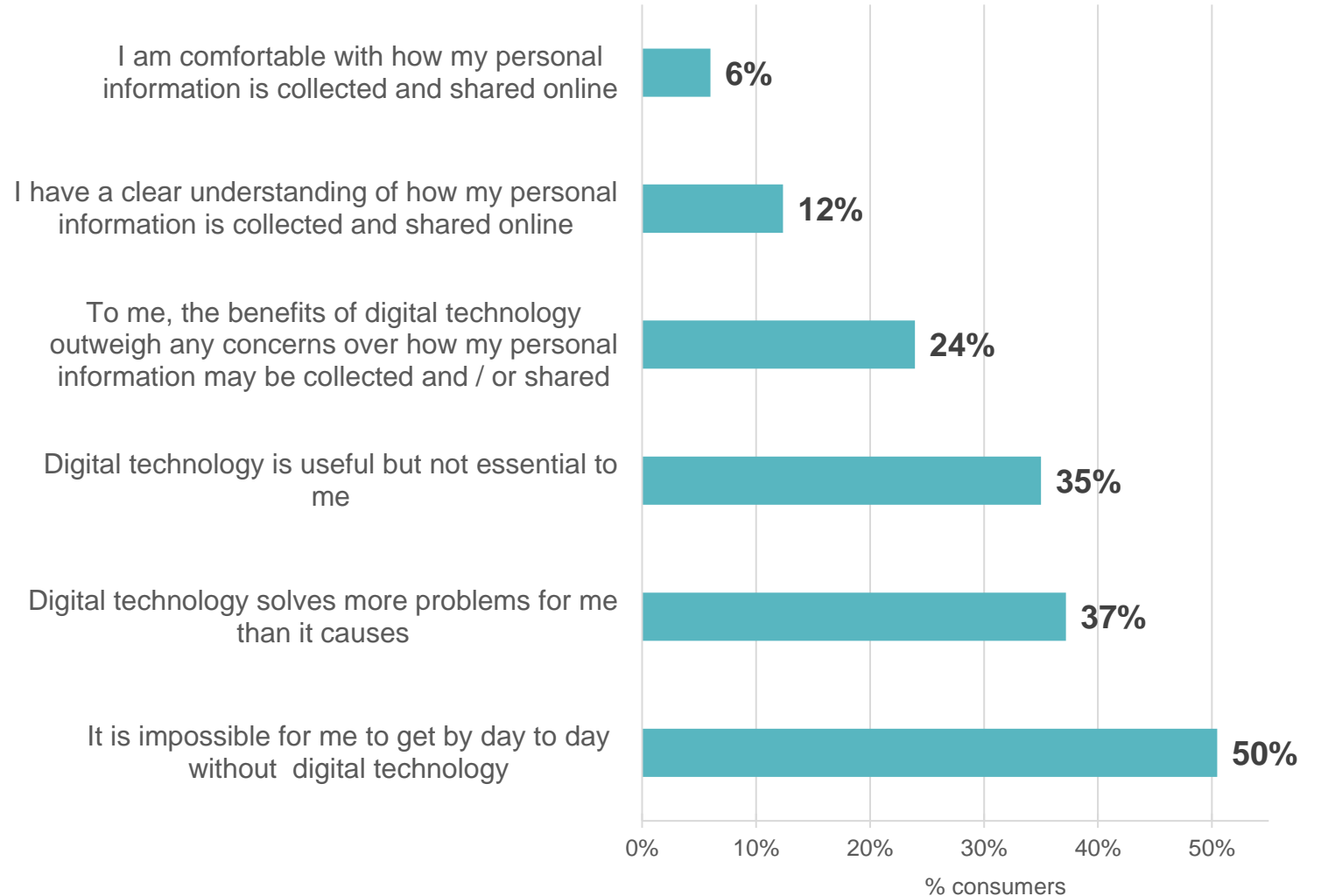
Q: Which of the following internet connected devices do you currently use:

While there is a heavy reliance on digital technology among many Australians, most do not feel comfortable or properly informed with how their personal information is handled online

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

Only 6% of consumers are comfortable with how their personal information is collected and shared online.

Figure 3 - Consumer attitudes towards digital technology



Q: Which of the following statements do you agree with:

Due to COVID-19, consumption of digital products and services has exploded in recent months

Consumer research from other organisations – conducted after CPRC’s survey – shows how consumer behaviours have changed dramatically due to COVID-19.

- [eSafety Commissioner](#) research shows how people have been using the internet “a lot more” for staying up to date with news (30%), work (27%), watching videos (27%), and social media (25%). 10% of respondents reported shopping online “a lot more.”
- [Office of the Australian Information Commissioner](#) research shows that 47% of Australians have downloaded an app or signed up to a new digital service due to COVID-19.
- [Australian Communications and Media Authority](#) research found that in the first six months of 2020 more Australians had participated in a range of online activities compared to 2019, with the biggest jumps seen relating to watching videos (83% 2019, 89% 2020) and shopping (78% 2019 to 83% 2020) online.

Figure 4 – Respondent quotes about the impact of COVID-19 restrictions on how often they are online



“My classes are now online, so I spend even more time on the internet.”



“Now that I’m working from home; I seem to spend every moment online.”



“I already spent most of my time online.”

Q: (As of early April 2020) do you find that in the last few weeks (with everything that’s going on), you have been using the internet more than usual, about the same amount or actually less than before?

Part Two



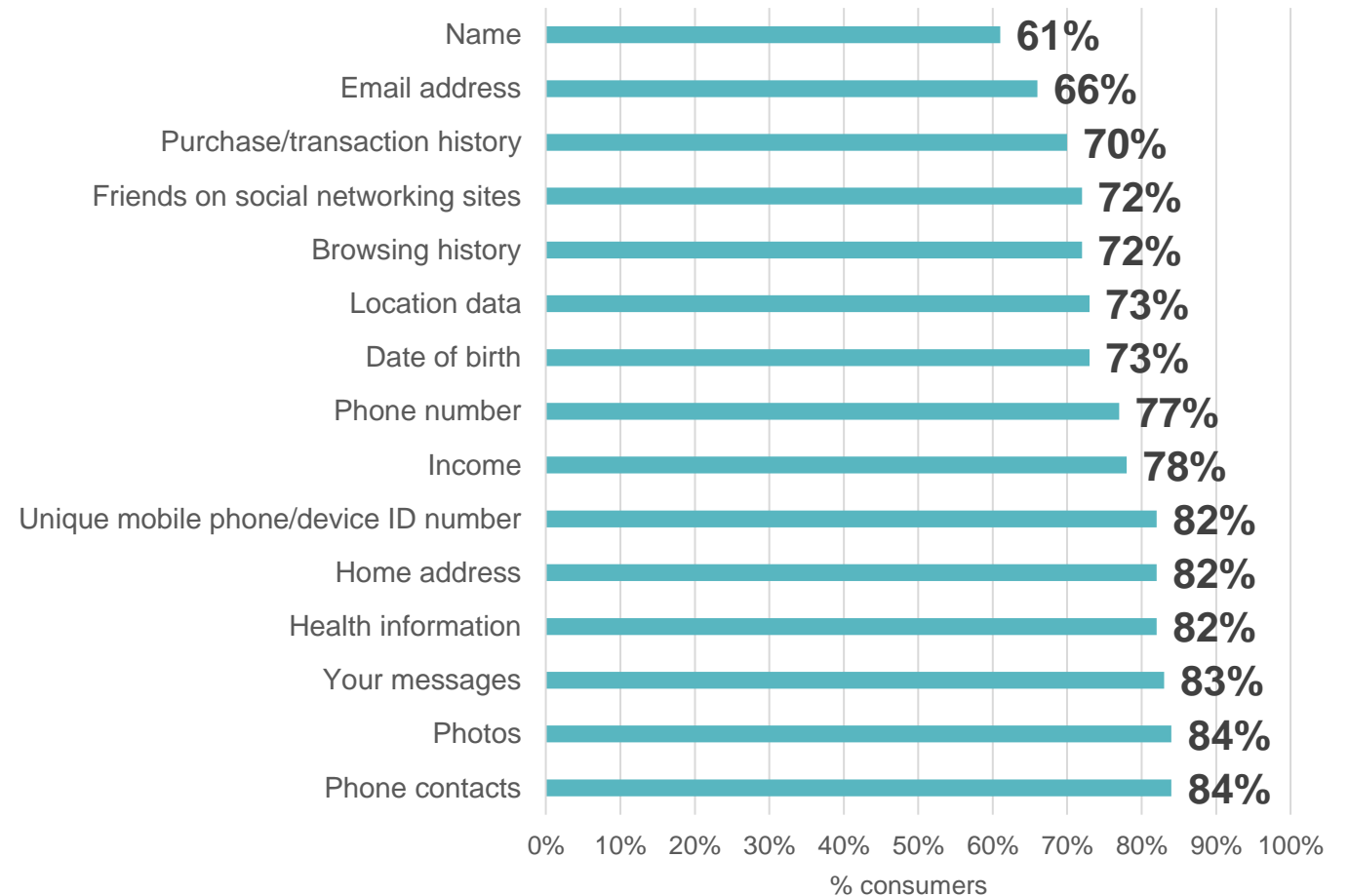
Consumer attitudes toward data handling and privacy practices

More than 60% of Australians were uncomfortable with companies sharing their personal information with third parties for purposes other than delivering products and services they'd signed up for

Over 8 out of 10 consumers are uncomfortable with the unnecessary sharing of information regarding their:

- phone contacts (84% 2020, 87% 2018),
- photos (84% 2020, n/a 2018)
- messages (83% 2020, 86% 2018)
- unique ID numbers for mobile phone/devices (82% 2020, 84% 2018).
- Health information (82% 2020, n/a 2018)
- Home address (82% 2020, n/a 2018).

Figure 5 - Information consumers are uncomfortable with companies sharing with third parties for purposes other than delivering a product or service



Q: What data/information would you be uncomfortable with companies sharing with third parties for purposes other than delivering the product or service?

Privacy Policies and T&Cs continue to be ineffective at engaging Australians – 94% of consumers are not reading this information all the time

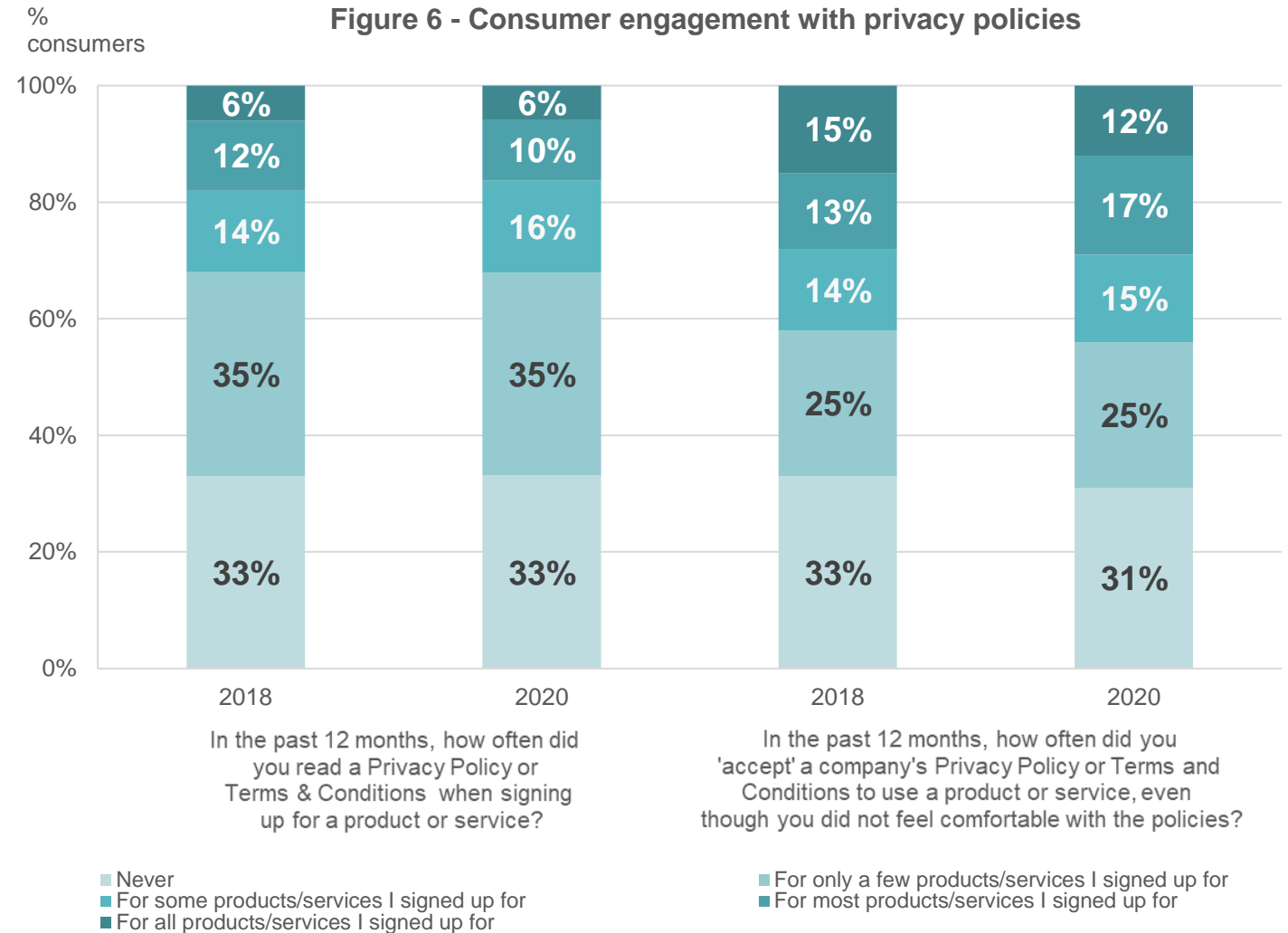
Reading of Privacy Policies and T&Cs did not change between 2018 and 2020. 33% of consumers never read these documents, and 35% read them only for a few products/services.

“Hardly anyone reads the Terms and Conditions and it’s so long and detailed, you can’t really get the critical data from it.”

“It’s really quite hard to find the Terms and Conditions, then they are generally not written to provide information easily.”

Of the 67% of 2020 survey respondents who said they had read Privacy Policies or T&Cs in the past 12 months - 69% reported accepting terms even though they were not comfortable with them.

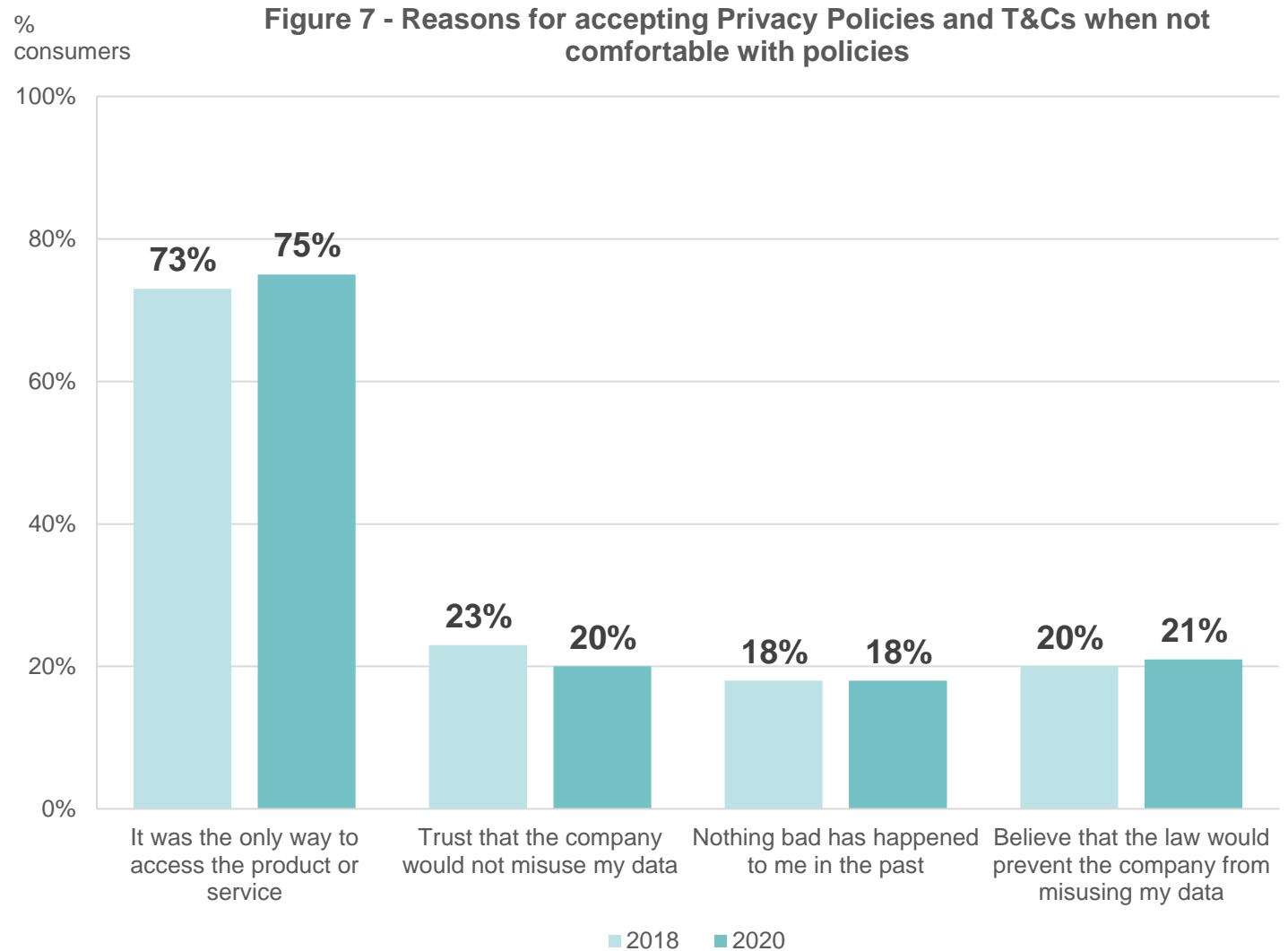
Figure 6 - Consumer engagement with privacy policies



Of the Australians who had felt uncomfortable accepting Privacy Policies and T&Cs in the past 12 months, 75% did this because “it was the only way to access the product or service”

20% of consumers accepted Privacy Policies and T&Cs because they trusted the company would not misuse their data.

21% of consumers accepted - believing that the law would prevent the company from misusing their data.

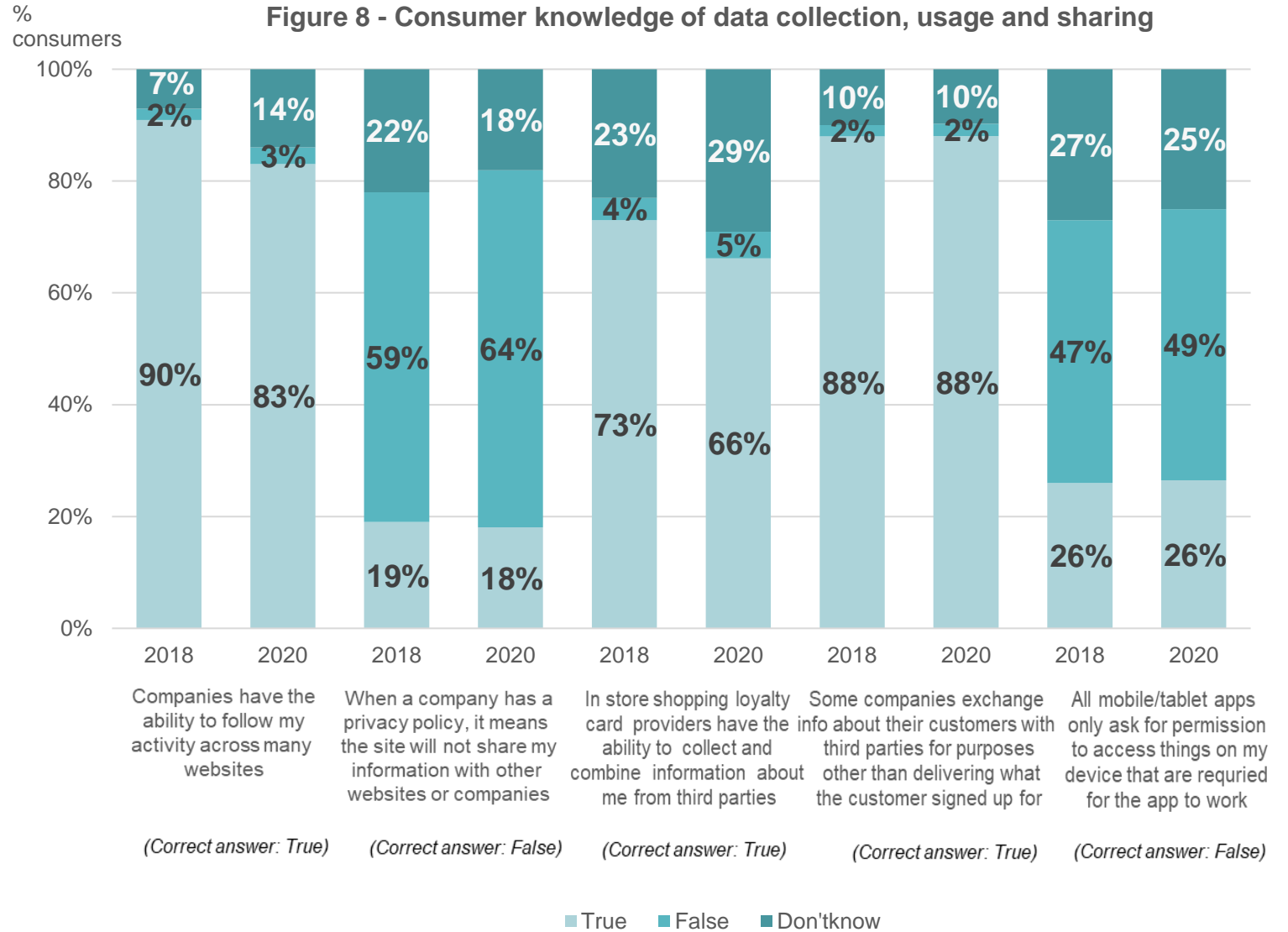


Q: Why did you 'accept' the Privacy Policy or Terms and Conditions even though you did not feel comfortable with the policies?

Since 2018 we have seen some drops in consumer knowledge concerning the data practices of companies they engage with

Less Australians are certain that companies today have the ability to follow their activities across many websites – with those knowing this to be true falling from 90% in 2018 to 83% in 2020.

The only significant increase in knowledge seen since 2018 was regarding a company having a Privacy Policy not meaning they won't share consumers' information with other websites or companies (59% knew this to be false in 2018; up to 64% 2020).



Q: Choose True, False or Don't know for the following statements as best reflects your opinion:

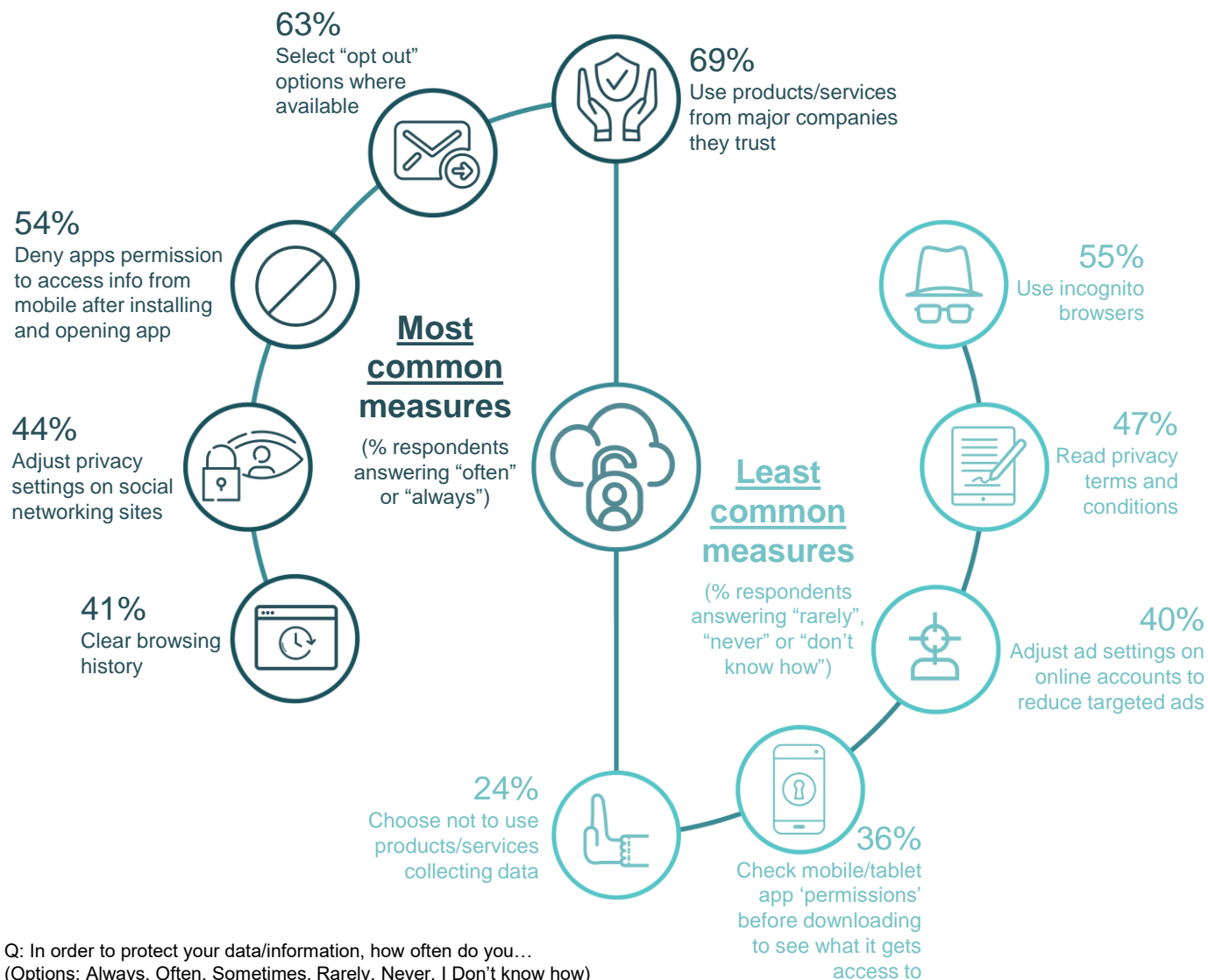
Note – totals may not add to 100% due to rounding

Figure 9 – Summary of measures consumers take to protect personal information (2020 survey respondents)

“Opting out” of data being shared with third parties (when provided) is the most common measure “always” taken by consumers to protect their information – with 30% reporting they always do this.

The next most common measures “always” taken by consumers were to “deny apps permission to access information after install” and “adjust privacy settings on social networking sites” (both 21% “Always”).

Compared to the 2018 survey results, there was a significant increase in the number of Australians who “Never” clear their browsing history (5% in 2018, 8% in 2020); and significantly fewer Australians who “Always” check app ‘permissions’ before downloading (21% in 2018, 17% in 2020).



Only 33% of consumers agree it's enough to be notified about data handling practices via Privacy Policies and T&Cs

A majority strongly agree or agree that companies should:

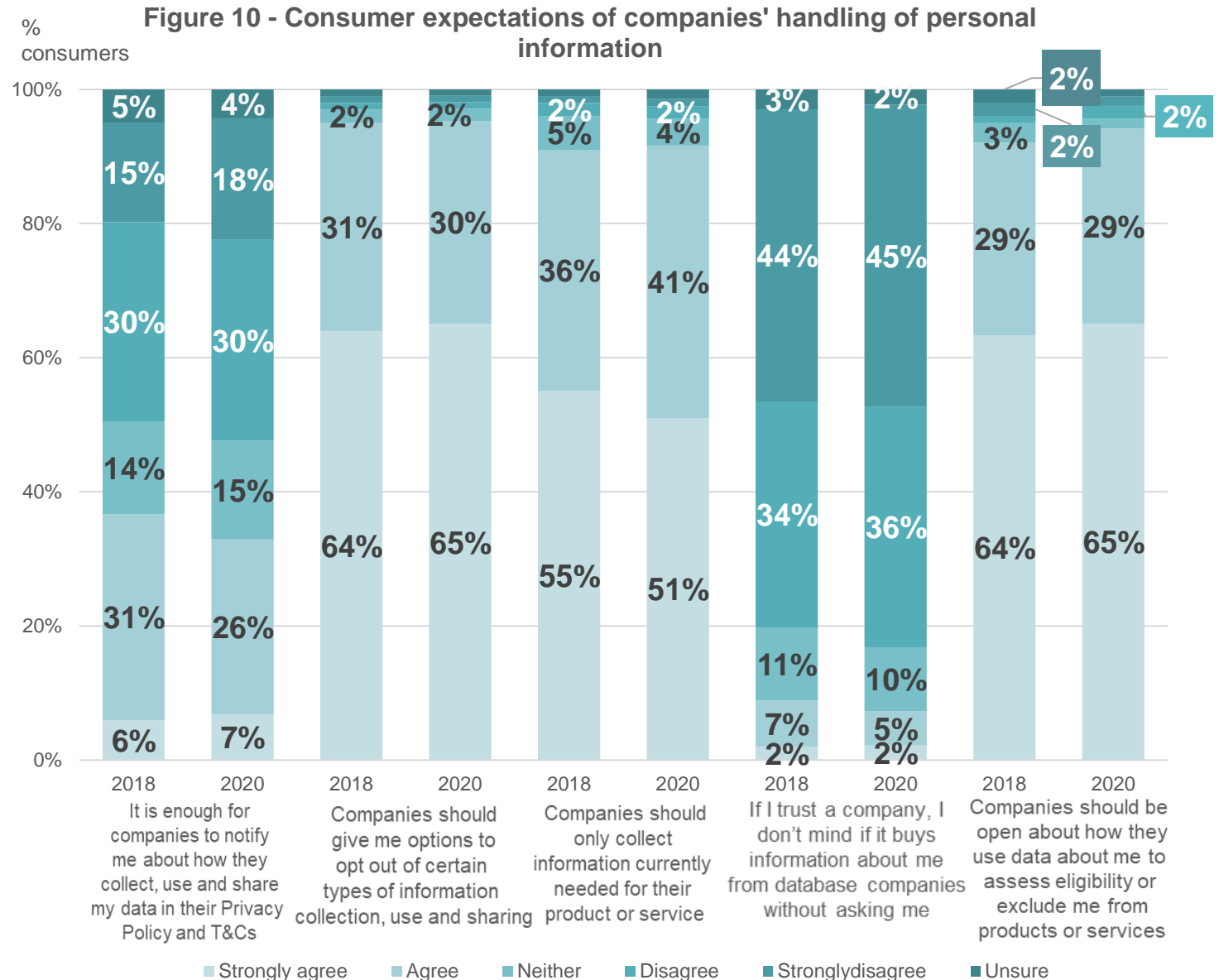
- Give options to opt out of certain types of information they can collect, use and share (95%)
- Be open about how personal data is used to assess eligibility or exclude them from products/services (94%)
- Only collect information needed for providing their products or services (92%).

"I just think they have control of way too much... the person/consumer can't do a thing about it."

92% consumers agree companies should only collect information they need for providing their product/service

"They need to be more transparent about how this kind of information is being used."

94% consumers agree companies should be open how they use data about them (e.g. assessing eligibility or excluding consumers)



Q: How strongly do you agree or disagree with the following regarding how companies should handle your data?

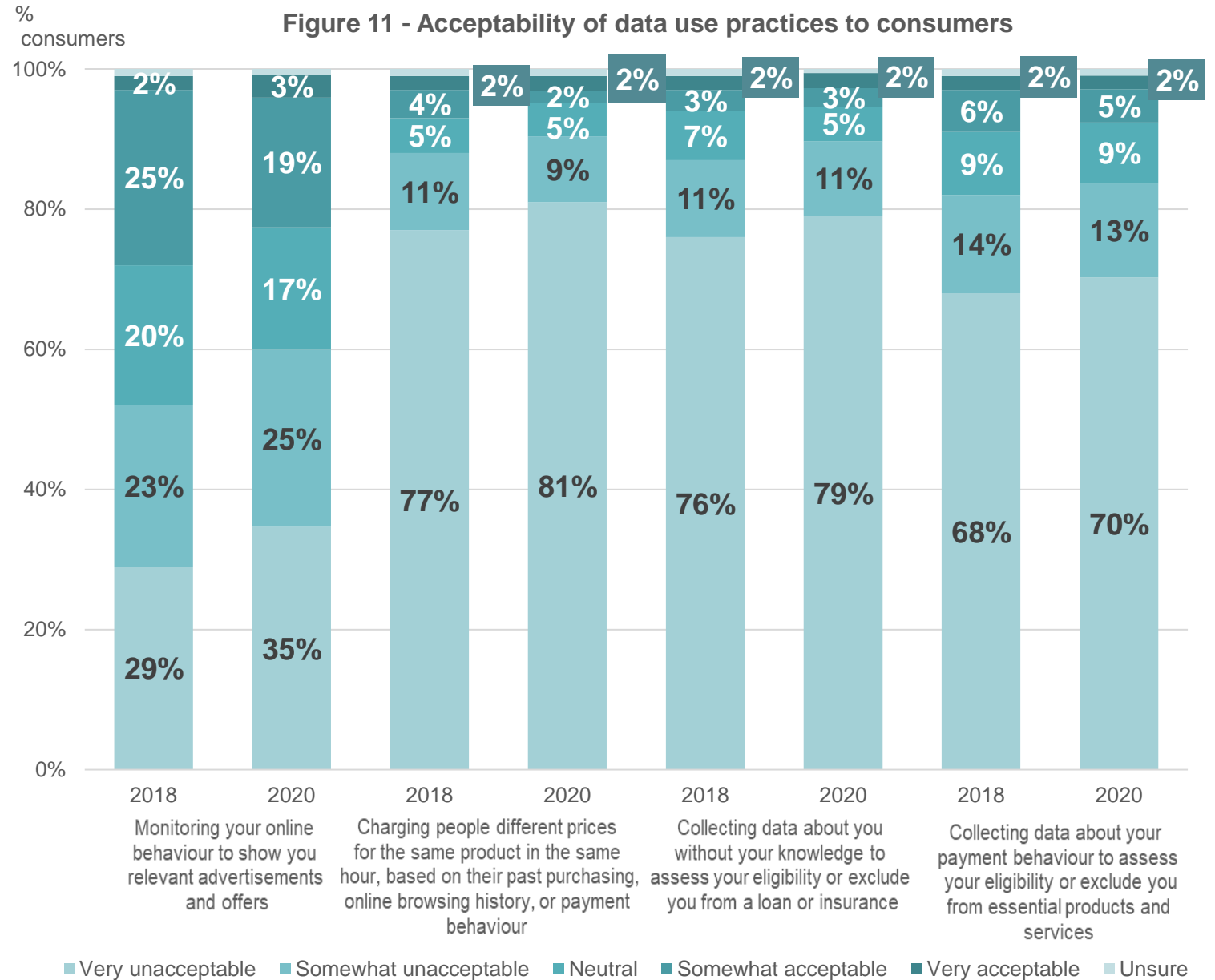
Note - data labels ≤ 1% are not shown

Opposition to ad targeting, personalised price discrimination and exclusion from products and services has increased since 2018

60% of Australians consider it very or somewhat unacceptable for their online behaviour to be monitored for targeted ads and offers – up from 52% in 2018.

90% of Australians rated the following practices as very or somewhat unacceptable:

- Charging people different prices based on past purchase, online browsing, and payment behaviours
- Collecting consumer data without their knowledge to assess their eligibility or exclude them from loans or insurance



Q: How acceptable or unacceptable do you find it for companies to use your data in the following ways?

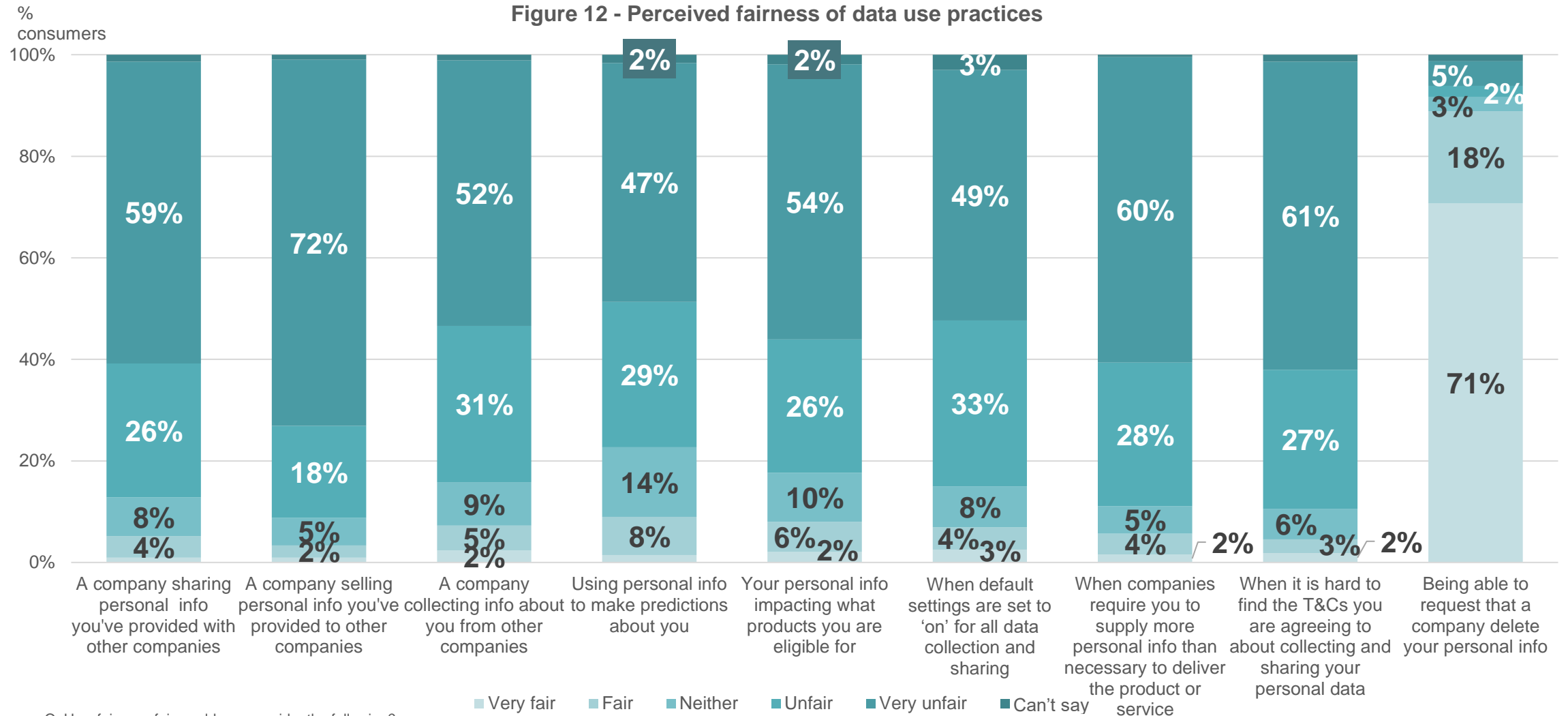
Please note – some data labels ≤ 1% are not shown

Part Three



Consumer expectations of digital marketplaces

A large majority of Australians consider that the ways in which companies can collect, use and share their personal information is unfair



Note – data labels ≤ 1% are not shown

Many data practices “cross a line” for consumers and are considered unacceptable

As shown in Figure 12 (p.25) a large majority of consumers consider many data handling practices to be either very unfair or unfair. These include companies:

- selling (90%) or sharing (85%) personal information they’ve provided to other companies
- requiring more personal information than is necessary to deliver a product or service (88%)
- collecting information about consumers from other companies (83%)
- using a consumer’s personal information to make predictions about them (76%)

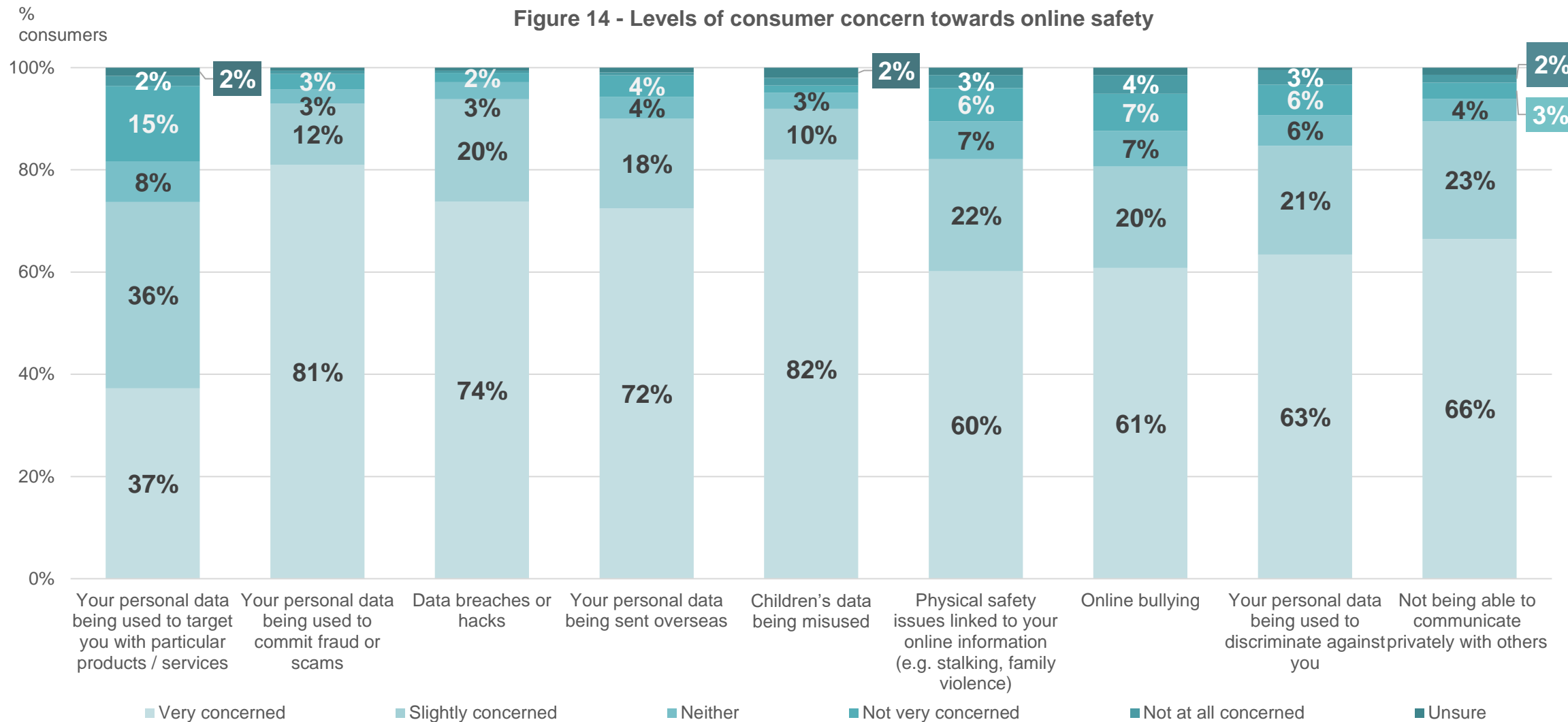
Figure 13 – Consumers’ “line in the sand” regarding data handling practices



Q: In your opinion, where is the line between acceptable and unacceptable behaviour of companies regarding personal data collection and sharing? Where do you draw your personal 'line in the sand'?

Australians are greatly concerned with online safety in general – with a majority holding concerns regarding all the issues raised in the survey

Figure 14 - Levels of consumer concern towards online safety



Q: Thinking now about online safety, how do you feel about the following?

Note – data labels ≤ 1% are not shown

Consumer concerns about online safety are highest regarding the safety of children, fraud and scams, data breaches and hacks; and personal data being sent overseas

Figure 14 (p. 27) shows how 9 out of 10 consumers were either very or slightly concerned about online safety regarding:

- Data breaches or hacks (94% of consumers)
- Personal data being used for fraud or scams (93%)
- Children's data being misused (92%)
- Personal data being sent overseas (90%)

Figure 15 – Consumer concerns regarding online safety



92% consumers very or slightly concerned about children's data being misused

“The risk to children is that they might give up too much information. They might have contact with unsafe people without the parents' knowledge”



89% consumers very or slightly concerned about not being able to communicate privately with others

“Why would you put a listening device in your own home? They say it's only active when you activate it, but the microphone is activated because the machine is listening. It activates at attention.”



82% consumers very or slightly concerned about physical safety issues linked to online information

“There's probably some gender differences there, like if I were a female who had an ex-partner who was stalking, I would definitely feel unsafe (with location tracking). Like if someone were to track me because they were mad at me or something.”

Q: There is a growing presence of children online (on social media, online purchases, using search engines). What risks, if any do you believe this presents to your safety and that of the children? (If risks mentioned) How did you learn about them?

Q: How about smart technologies / devices, such as Siri, Google Home, location apps, GPS devices, health trackers. What risks do you believe they present to your safety?

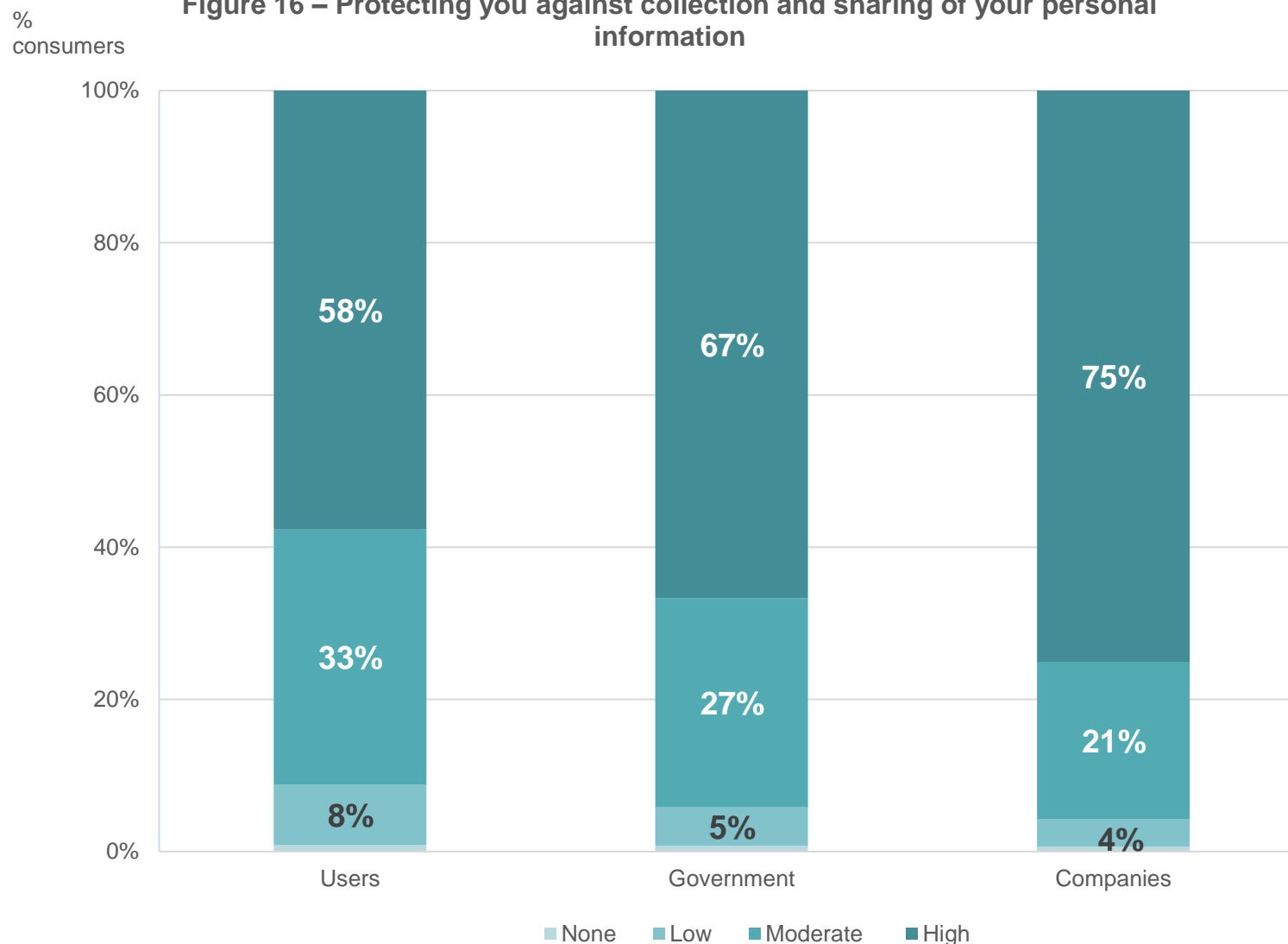
75% of consumers consider companies have the highest level of responsibility to provide protection against collection and sharing of personal information

67% of consumers also feel government has a high level of responsibility to protect consumers against collection and sharing of their personal information.

“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.”

67% consumers think government has a high level of responsibility in protecting consumers

Figure 16 – Protecting you against collection and sharing of your personal information



Q: What level of responsibility do you think each of the following (Users/Government/Companies) should have in relation to:

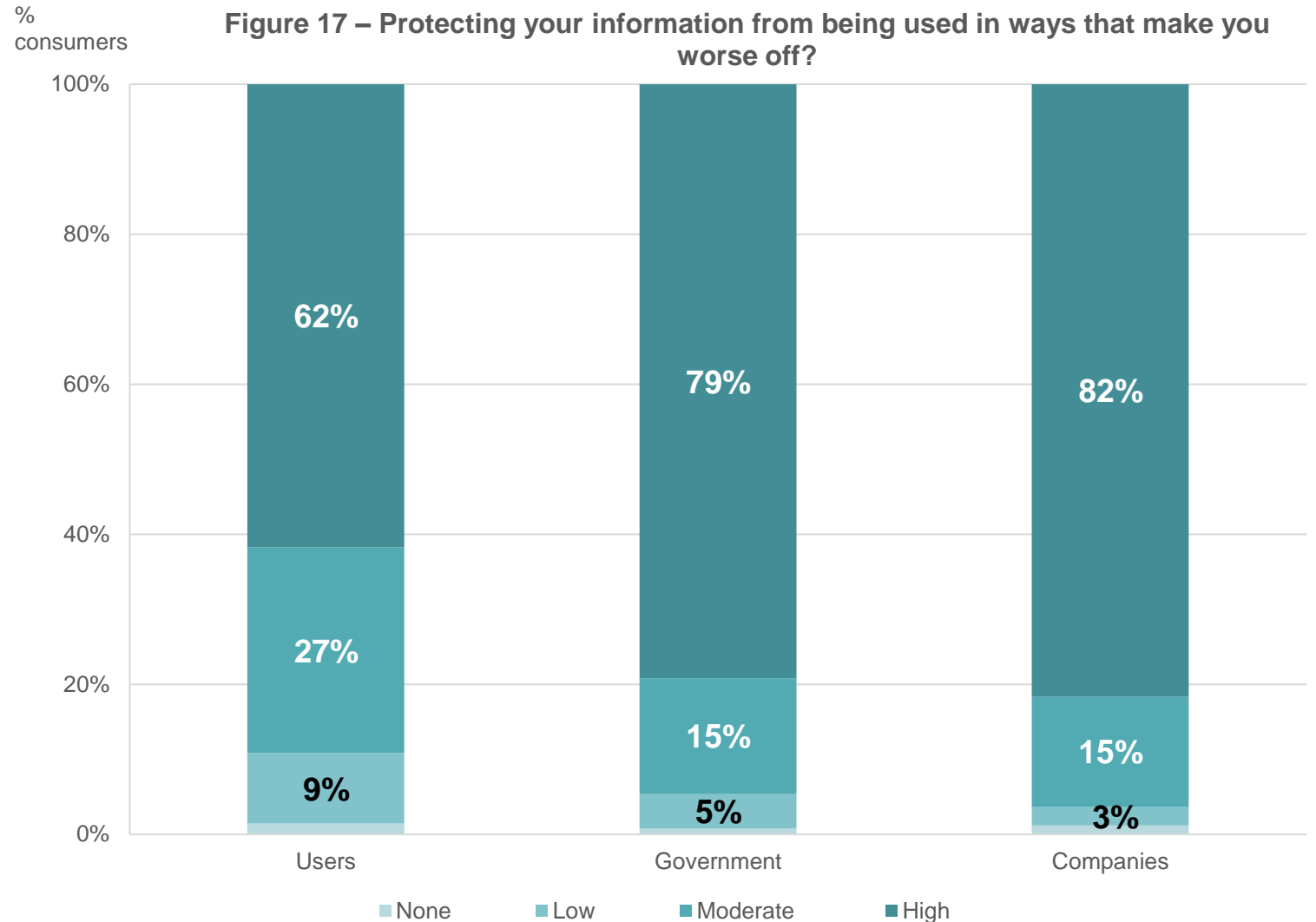
Note – data labels ≤ 1% are not shown

Consumers feel that both government (79%) and companies (82%) have high levels of responsibility to protect against personal information being used in ways that leave consumers worse off

Less consumers (62%), but still a majority, felt they had a high level of responsibility to protect themselves from being left worse off.

“Sometimes (targeted advertising) it can be unfair. I guess, (it) depends what you’re clicking into. Especially with things like Cash Converters and Wallet Wizard and those sorts of things directed towards low socioeconomic households, stuff like that. That’s dangerous, if you don’t know what to press.”

79% consumers think government have a high level of responsibility to ensure personal information is not used to make consumers worse off



Q: What level of responsibility do you think each of the following (Users/Government/Companies) should have in relation to:

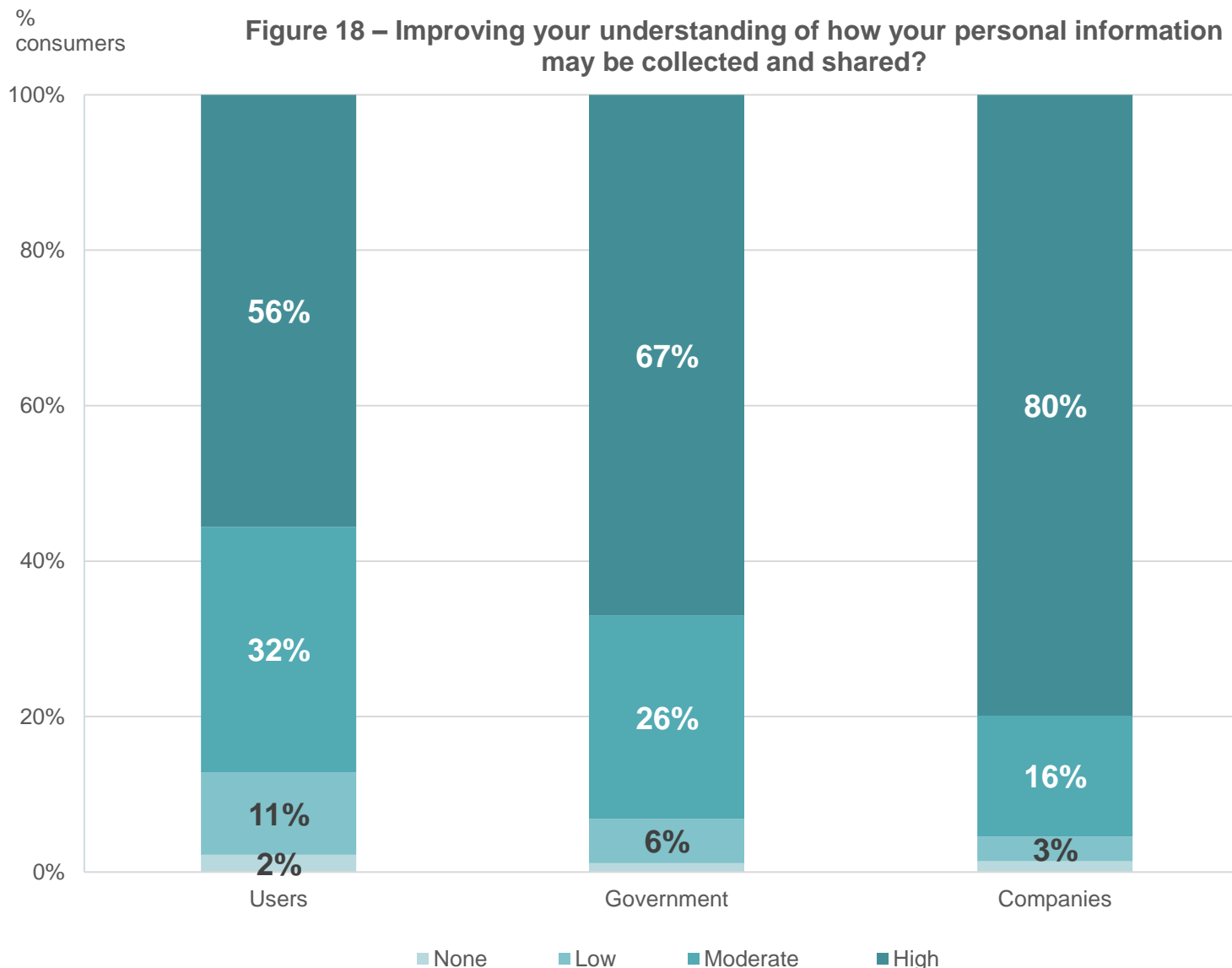
Note – data labels ≤ 1% are not shown

80% of consumers feel companies have a high level of responsibility to improve consumer understanding of personal information collection and sharing practices.

A large majority of consumers also felt government (67%) had high responsibility to improve consumer understanding of these practices.

“If you’re searching a company and going on to their website, and to get information, you have to put in your details, it’s your choice then you want to do it or not.”

56% consumers think they have a high level of responsibility to improve their understanding of how their information is collected and shared



Q: What level of responsibility do you think each of the following (Users/Government/Companies) should have in relation to:

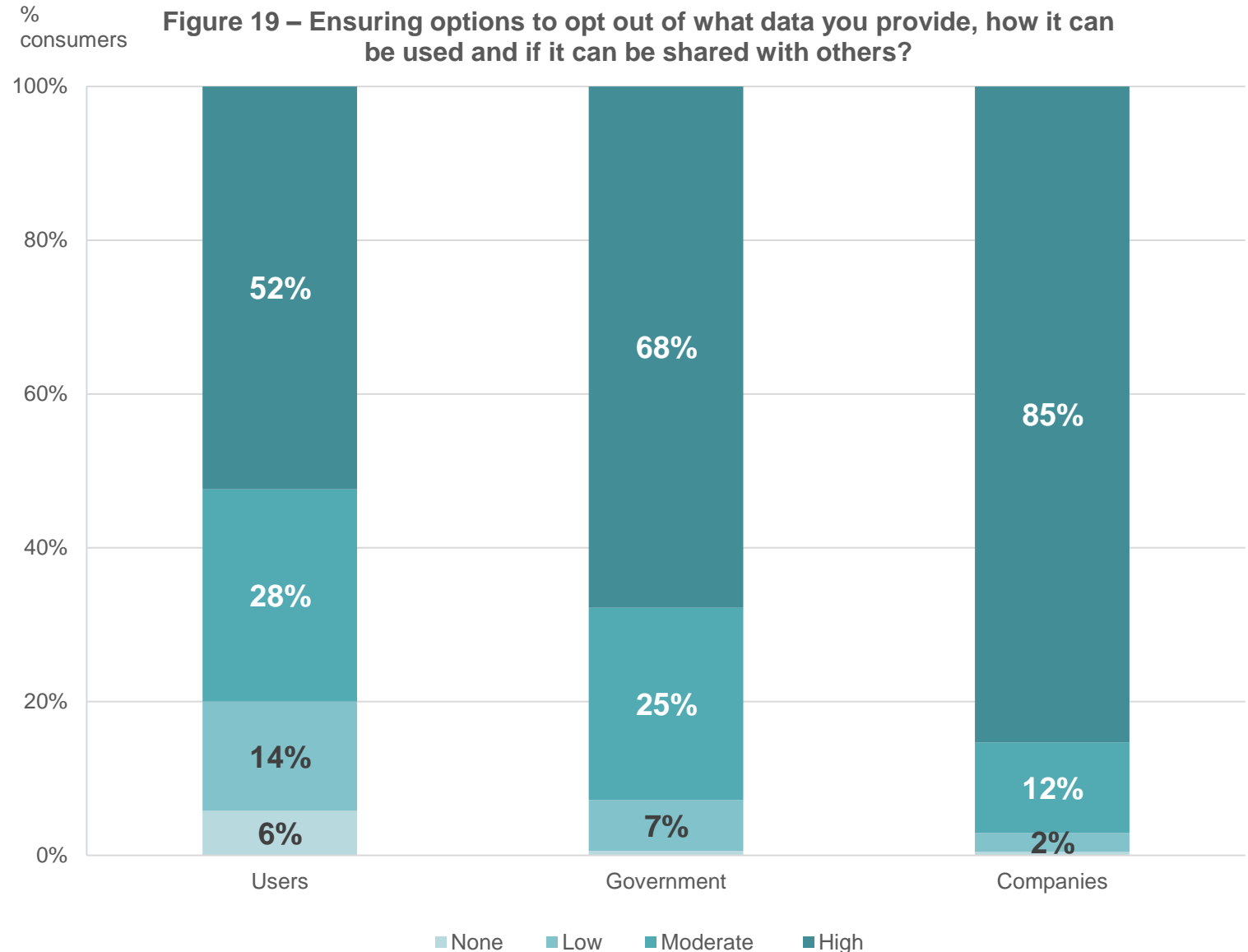
Note – data labels ≤ 1% are not shown

85% of consumer feel companies have the highest level of responsibility in ensuring they have options to “opt out” of different data collection, use and sharing practices

These results aligned with consumer sentiment regarding whether companies should give options to opt out of certain types of information they can collect, use and share (95% agreed with this – see Figure 10, p. 22).

“It’s just they literally make you jump through hoop after hoop to get it done. Just make it simple to opt out. Make it clear, make it obvious, make it easy.”

85% consumers think companies have a high level of responsibility to ensure there are options to opt-out



Q: What level of responsibility do you think each of the following (Users/Government/Companies) should have in relation to:

Note – data labels ≤ 1% are not shown

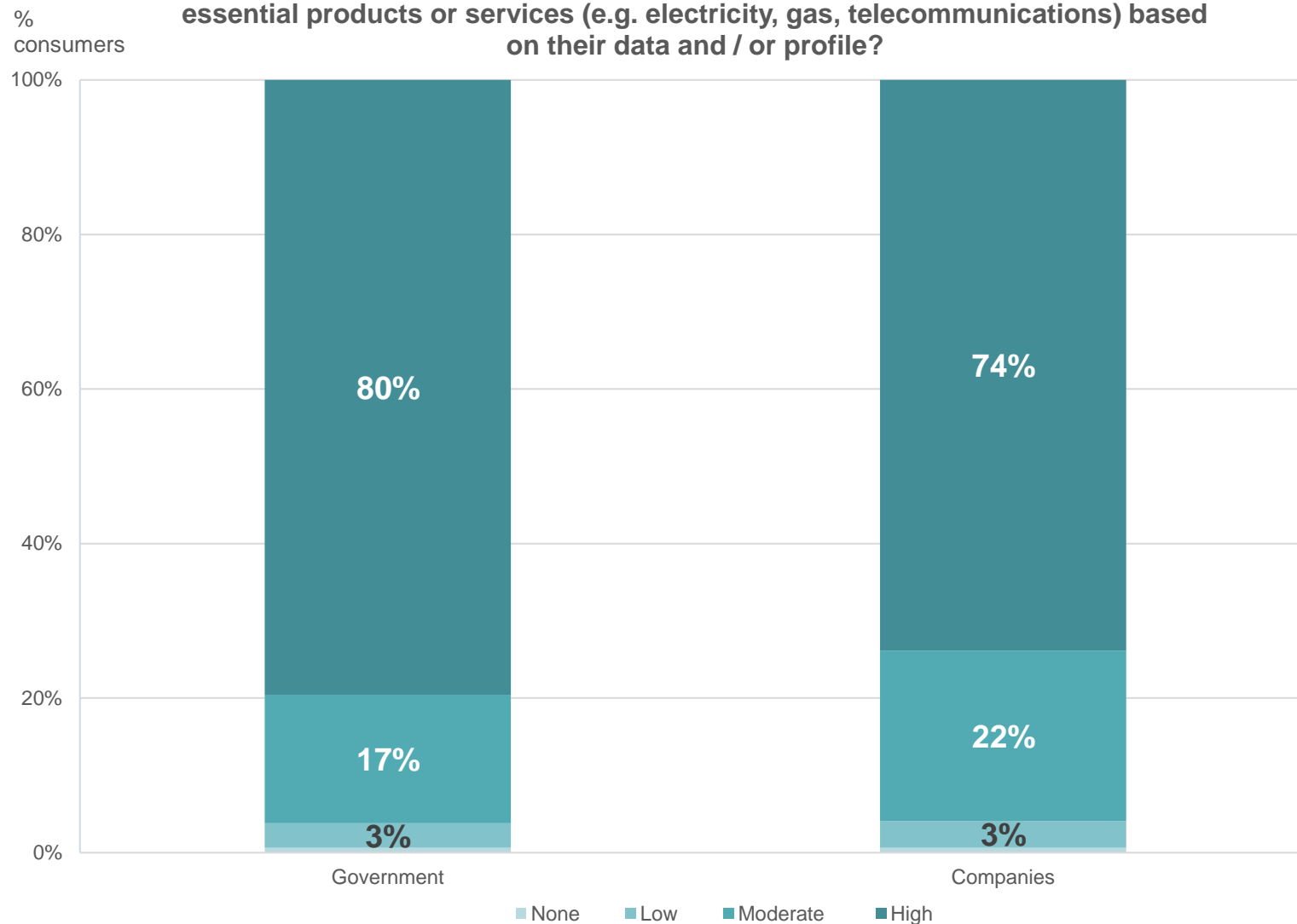
Consumers are looking to government to develop protections to prevent profiling that leads to exclusionary outcomes – with 80% feeling government has a high level responsibility in this space

Consumers by no means feel companies have no role in preventing exclusion, with 74% feeling they also have a high level of responsibility in relation to this issue.

“I suspect there are (rules in place), but I don’t really know... The industry may have done some sort of Code of Behaviour, I guess. But when industries can’t even pay people the proper award rate; well, I don’t have much faith in them self-regulating with this sort of stuff...”

80% consumers think government has a high level of responsibility to develop protections that prevent exclusionary outcomes

Figure 20 – Developing protections to ensure no one is excluded from essential products or services (e.g. electricity, gas, telecommunications) based on their data and / or profile?



Q: What level of responsibility do you think each of the following (Government/Companies) should have in relation to:

Note – data labels ≤ 1% are not shown

Part Four



Consumer policy insights

COVID-19 has accelerated growth of consumer participation in online environments and digital marketplaces

The COVID-19 pandemic, and associated public health restrictions, has meant that many consumers are spending more time online for work, education, shopping, socialising and entertainment (see p. 15).

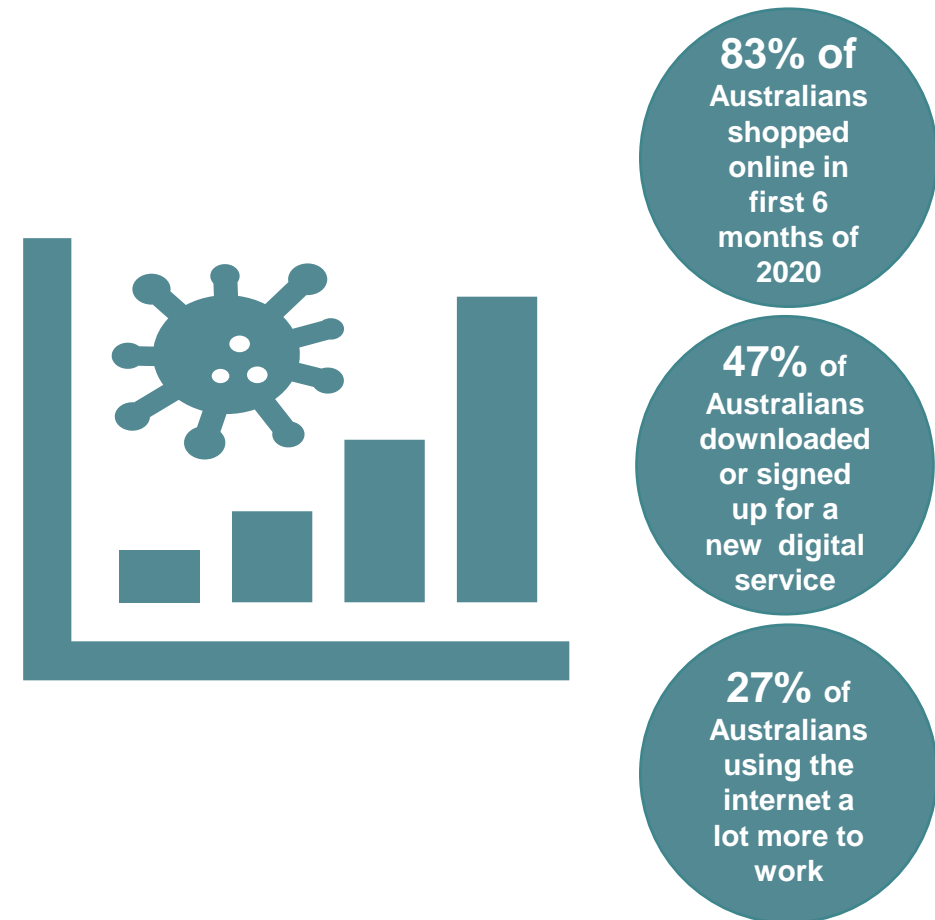
Digital marketplaces and innovations are providing clear benefits to consumers and the economy during COVID-19. However, the risks consumers face online and in digital marketplaces are heightened by increased usage of digital products and services, and subsequent increased volume of their personal data being collected by companies.

As outlined in CPRC's [*Consumers and COVID-19: from crisis to recovery*](#) research report – the pandemic has also created circumstances in which consumers are more exposed to exploitative practices online (in particular – scams, false claims, unsafe products and price gouging).



COVID-19 has increased the urgent need for reforms to Australia's consumer protections framework, so consumers aren't relying on analogue safeguards in an increasingly digital world.

Figure 21 – Changes in consumer behaviour due to COVID-19



At a time when reliance on them is growing, digital marketplaces have some serious shortcomings

Consumer engagement with Privacy Policies and T&Cs (that dictate how consumers' data is collected, shared and used when participating in digital marketplaces) has not improved in the past two years (see p. 18). At the same time, consumer discomfort and opposition regarding the data practices that Privacy Policies and T&Cs can permit has grown (see Figure 22).

These survey results back up the findings of the [Australian Competition and Consumer Commission's Digital Platforms Inquiry](#) (pp. 449 - 455) .

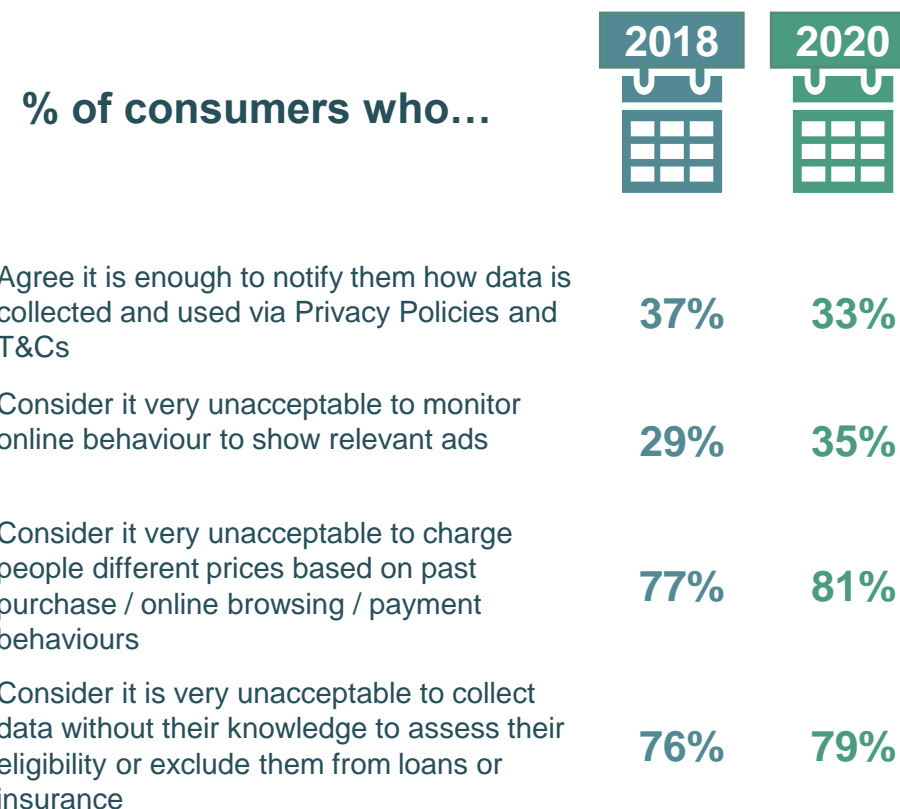
This inquiry found that company data practices are often characterised by:

- **Information asymmetries** that undermine a consumer's ability to assess whether services align with their privacy preferences
- **Bargaining power imbalances** that prevent consumers making genuine choices on how their personal information is collected, used and shared
- **Behavioural biases** that work against consumers' ability to select privacy options that better align with their privacy concerns



Australia's consumer protections need to be modernised so that consumers are protected against practices that unfairly exploit information asymmetries, bargaining power imbalances and behavioural biases.

Figure 22 – Changes in consumer attitudes regarding data handling practices



There's a chasm between how consumers expect to be treated in – and the practices that characterise – digital marketplaces

There is a disconnect between consumer expectations about being treated fairly, and many of the data handling practices that are common in digital marketplaces (see p. 25 and Figure 23).

Maintaining the regulatory status quo will not only cause this disconnect to widen, but it will also increase risks of direct consumer harms – whereby consumers are treated unfairly and/or have their privacy and safety compromised. These outcomes will erode trust and confidence in digital technologies and marketplaces.

Consumers feel that both companies and government have high levels of responsibility for ensuring they are protected in digital marketplaces. Reforms need to set clear standards of fairness, inclusion, safety and privacy– and incentivise companies to compete on this basis.



Reforms to consumer protections – such as unfair trading practice and contract term prohibitions, and a general safety provision, being added to Australian Consumer Law – as well updates to the Privacy Act, need to be progressed without delay.

Figure 23 - Common company data practices consumers considered to be unfair



Having their personal information being used to make predictions about them	76%
Companies collecting information about them from other companies	83%
Companies sharing personal information consumers have provided with other companies	85%
Companies selling personal information consumers have provided to other companies	90%
Requiring more personal information than necessary to deliver products/services	88%



For more information about this research please do get in touch.

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