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Strengthening Australian Consumer Protection in the era of Digital Platforms

Response to The Treasury's request for Feedback and Comments

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The Centre for AI and Digital Ethics at the University of Melbourne welcomes this opportunity to respond to The Treasury's Request for feedback and comments on the *Digital Platforms: Government consultation on ACCC's regulatory reform recommendations (Consultation Paper, December 2022)*.

Australia is in a critical moment with respect to evaluating the role and responsibilities of digital platforms with the opportunity to align our regulatory regime with research and best international practice. The ACCC's recommendations highlight the importance of developing robust and balanced regulatory tools to handle consumer harms that too often go unchecked.

Executive Summary of Recommendations

- We support the ACCC's proposal of instituting a notice-and-action mechanism for certain forms of harmful content *subject to detailed safeguards* to prevent abuse.
- We suggest that the implementation of a notice-and-action regime accompany reform and strengthening of Australia's unclear approach to platform intermediary liability.
- We agree with the ACCC's recommendation that Australia prohibit *unfair contract terms*, noting that Australian law already features strong protections.

* Indicates primary authorship

- We support the ACCC's recommendation that Australia introduce a further prohibition on *unfair trading practices* and recommend the inclusion of bright line rules to complete standards based approach.
- The ACCC queries as to whether its information gathering powers are sufficient.
    - We contend that it is more important to consider its analytic capabilities and that it is necessary to provide the ACCC with increasing hiring authority and funding for applied technical researchers and data-scientists.
    - We further note the need to protect the ACCC's research partners through law reform that bars platforms from retaliating against researchers acting in good faith, or otherwise limiting their platform access.
    - We recommend that the ACCC be given authority to solicit regular public reports of relevant statistics from large digital platforms and that the selection of appropriate statistics be development with input from the public.

8.1 Is the notice and action mechanism proposed by the ACCC for these consumer measures appropriate? Are there any alternative or additional mechanisms that should be considered?

The ACCC proposes a notice-and-action mechanism that requires platforms to "provide a way for individuals and entities to notify the platform about suspected scams, harmful apps and fake reviews" (what we term SCARS: "Scams, Corrupt Apps and Reviews") and that "platforms must promptly act in response to these reports".

It would be beneficial to impose such a regime, provided that the regime *includes safeguards to prevent the process from being weaponised*.

We identify three primary groups whose interests should be considered in evaluating the proposal:

1. internet users, who are both a) seeking to participate in platforms through the content they generate and b) vulnerable to SCARS
2. digital platforms, both small and large, who are a) concerned about the impact of SCARS insofar as the content impacts the value of their platform and b) concerned about liability risks stemming from user content
3. other businesses and individuals whose identities (and products) are appropriated in the production of SCARS

While much of the discussion here considers existing notice-and-action regimes in the context of copyright liability, we note that in this context there is the potential for a limited incentive alignment[1] between all the parties. Indeed, the larger platforms all maintain large and dedicated teams to improve both automated and manual content moderation.[2]

[1] See Wendy Seltzer, 'Free Speech Unmoored In Copyright's Safe Harbor: Chilling Effects Of The DMCA On The First Amendment' (2020) 24 *Harvard Journal of Law & Technology* 171, 181: "the agent-service provider does not share all the benefits of the principal-poster, the agent lacks a similarly strong incentive to take risks in defending posted material in the face of a complaint. Incentives may [also] be misaligned with social interests."

[2] Meta employs more than 15,000 reviewers around the world (to review content on Facebook and Instagram): 'Detecting Violations', *Meta* (Web Page) <transparency.fb.com/en-

However, despite this theoretical alignment, independent reports[3] and the ACCC's own investigations[4] suggest that platforms routinely fail to respond adequately when users and businesses report scams and other SCARS. We therefore agree with the ACCC that action is warranted to better protect Australian consumers and that a notice-and-action scheme would lead to better policing of SCARS.

The DMCA as a Model for Notice-and-Action

Notice-and-action regimes are not new and existing schemes are instructive as to the potential benefits and pitfalls of adopting one to tackle SCARS.

The "de facto global standard"[5] for a notice-and-action regime is §512 (in particular (b) to (d)) of Title II of the US Digital Millennium Copyright Act (1998).[6] The act provides relief from copyright liability to *service providers* that follow a proscribed procedure, which allows a legal person to request removal of material that infringes that person's copyright. This was mirrored in Australia in amendments to the Copyright Act 1968, Part V, Division 2AA, §116[7] and in major jurisdictions globally.[8]

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gb/enforcement/detecting-violations/>; Google employs over 10,000 content moderators: Sam Levin, 'Google to hire thousands of moderators after outcry over YouTube abuse videos' *The Guardian* (San Francisco, 5 December 2017).

[3] See Rupert Jones, 'Scammers can create fake business ads on Google 'within hours'' *The Guardian* (online, 6 July 2020) <https://www.theguardian.com/money/2020/jul/06/scammers-can-create-fake-business-ads-on-google-within-hours> but we additionally note significant weaknesses of the study which merit further independent investigation.

[4] *ACCC v Meta* (Federal Court of Australia, NSD188/2022, commenced 18 March 2022).

[5] Sharon Bar-Ziv and Niva Elkin Koren, 'Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown' (2017) 50(2) *Connecticut Law Review* 339, 343.

[6] Originally titled the "Online Copyright Infringement Liability Limitation Act" now codified in 17 USC § 512.

[7] See in particular §116AH (1), Conditions 4 and 5: "*The service provider must act expeditiously to remove or disable access to copyright material residing on its system or network if the service provider (a) becomes aware that the material is infringing; or (b) becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing.*" This division was added as part of the *US Free Trade Agreement Implementation Act 2004* (Cth) to harmonize Australian and US approaches.

[8] See Daniel Seng and Ignacio Garrote Fernández-Díez, 'Comparative Analysis of National Approaches to the Liability of Internet Intermediaries for Infringement of Copyright and Related Rights' (Research Paper, World Intellectual Property Organization), 58 [161].

In the absence of mitigating doctrine or statute, liability (both in the context of copyright infringement and with respect to scams and other malicious content) is a major concern to platforms that host user generated content.[9] Safe harbour provisions are therefore a reliable way for regulators and legislators to shape platform behaviour–and could be employed in the context considered by the ACCC.

The potential effectiveness of such an approach demonstrated by the large extent to which online services, even those notorious for hosting infringing content, now adhere (at least ostensibly) to a notice-and-action process substantially like those outlined in the DMCA.[10]

Clear Standards for Platform Liability

For the *carrot* of a safe harbour to be effective, there must be an effective *stick*: meaningful exposure to liability if a platform does not adhere to the proposed regime–either under consumer protection law or through civil liability.

The effectiveness of existing Australian consumer protection law in handling intermediary liability is unclear. while the ACCC is currently pursuing action against Meta for failure to moderate misleading advertisements,[11] a similar past action against Google was unsuccessful.[12] Similarly Australian law does not yet provide adequate clarity or stability with respect to the scope or nature of platform

[9] See eg, Geoffrey Manne et al, 'Who Moderates the Moderators?: A Law & Economics Approach to Holding Online Platforms Accountable Without Destroying the Internet' (2022) 49 *Rutgers Computer & Tech Law Journal* 26, 115; Edward Lee, 'Decoding the DMCA Safe Harbors' (2009) 32 *Columbia Journal of Law & Arts* 233, 233, where Lee claims it would be '...foolish, if not a breach of corporate fiduciary duty...' to not implement a DMCA safe-harbor compliant content moderation policy; Christoph Schmon and Haley Pedersen, 'Platform Liability Trends Around the Globe: From Safe Harbors to Increased Responsibility' *Electronic Frontier Foundation* (Article, 19 May 2022) <https://www.eff.org/deeplinks/2022/05/platform-liability-trends-around-globe-safe-harbors-increased-responsibility>.

[10] See for example, MEGA (a well-known host of infringing content) that maintains a detailed policy at 'Takedown Guidance Policy' *MEGA* (Webpage, 18 December 2022) <mega.io/takedown>.

[11] *ACCC v Meta* (n 4).

[12] *Google Inc v ACCC* [2013] HCA 1; (2013) 249 CLR 435. Also see generally See generally Liam Harding, Jeannie Paterson and Elise Bant, 'ACCC v Big Tech: Round 10 and Counting' *Pursuit* (online, 24 March 2022).

civil liability[13] to truly act as a motivator for platforms to adhere to a domestic notice-and-action regime. We therefore suggest that a notice-and-action regime must be accompanied by changes that ensure both the ACCC and civil litigation pose meaningful deterrents to wrongful conduct.

Trade-offs and Challenges

We outline significant issues to address in designing an effective notice-and-action regime.

Identified Harm: Overenforcement and Abuse

First, notice-and-action regimes can lead to overenforcement. Both those who report content and platforms now rely on automated systems for reporting and taking down content respectively.[14] Further there is an inherent asymmetry under current regimes: it is less costly to send a takedown notice than it is to dispute one–again causing overenforcement and opening the system up to abuse.[15]

Consumers also suffer through overzealous takedowns. As Bridy and Keller note: "The operator of a small business that customers find through Google or Yelp search results, the professional artist who promotes her paintings through Facebook, and the student looking for affordable books on eBay or Amazon suffer real harms when legal content is removed."[16] Not only may existing speech be censored, overenforcement also chills future speech and may cause broader social harms.[17]

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[13] Kylie Pappalardo and Nicolas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40(4) *Sydney Law Review* 469.

[14] Jennifer Urban, Joe Karaganis and Brianna Schofield, 'Notice and Takedown in Everyday Practice', (UC Berkeley Public Law research Paper No 2755628, 22 March 2017), 31 - 34.

[15] Consider the case where a competitor *C* to a firm, F, files automated take-down notices, without legitimate cause, to an intermediary. Firm *F* must now manually contest the notices, consuming far more time than it took the competitor to issue the notices. This behaviour may be tricky to deter should *C* be in a different jurisdiction. Yet, the structure of most notice-and-action regimes enables this type of gaming–particularly where one party does not have as easy access to counsel.

[16] Annemarie Bridy and Daphne Keller, 'U.S. Copyright Office Section 512 Study: Comments in Response to Notice of Inquiry' (Submission to regulatory inquiry, 31 March 2016) <http://dx.doi.org/10.2139/ssrn.2757197>, 2.

[17] Seltzer (n 1) at 171 highlights how the DMCA takedown provisions *de-platformed* candidates in the 2008 US Presidential Race.

Remedy: Counter-Notice Scheme

A consumer-friendly *counter-notice* process that allows persons to challenge a report is critical in minimizing the above harms.

When a platform receipts a notice, they must first notify the person who originally posted the content in question and remove access to the content.

The original poster of the content may submit a *counter-notice*, on receipt of which the platform should promptly[18] restore the reported content. As the content in the context of scams and other SCARS implicates a heightened risk to others on the platform (beyond IP rights),[19] we suggest that should the reporting party remain unsatisfied following receipt of the *counter-notice*, the reporting party may a) further contest the matter by notifying the platform and optionally b) request adjudication of the matter by the ombudsman anticipated elsewhere in the ACCC's recommendations.[20] Should the reporting party contest the counter-notice, the platform operator may *at their discretion* remove or preserve the content without sacrificing the platform's safe harbor. The scheme is designed to err in favour of preserving content, while providing an efficient notice-and-action mechanism to swiftly address SCARS.

Remedy: Oversight and Transparency

It is important that the ACCC retain oversight over the proposed scheme to ensure that firms availing themselves of the safe harbour are meaningfully meeting the requirements, that the scheme is effective, and that online speech is not overpoliced. Oversight authorities should therefore be appropriately codified in conjunction with the remainder of the scheme.

Platforms should also be required to lodge all received notices and counternotices, along with action taken, with a publicly accessible, ACCC-managed repository, ensuring that the public can meaningfully audit the

[18] The timeline used by the DMCA is 14 days: 17 USC § 512(g)(2)(C).
[19] Under the DMCA, if the reporting party still believes material is infringing following receipt of the counter-notice, the reporting may file a lawsuit at which point the platform again removes the potentially infringing material.
[20] Without precluding the availability of relief by a court.

impact of the scheme. Further, all notices and counternotices should be registered in machine readable format, to allow for automated analysis and evaluation.

Identified Harm: Burden on Operators

Notice-and-action also imposes a non-negligible burden on platforms, particularly those operated by smaller enterprises. We therefore recommend keeping the form of any notices and counter-notices *as similar as practical* to those used by other notice-and-action regimes.

Currently, platform operators receive a large volume of notices submitted by professional agents; notices which may bundle together thousands of instances of unrelated content.[21] Furthermore, a meaningful fraction of notices under existing schemes often fail to meet the required formalities or are otherwise in error.[22]

We note that bulk issuance of notices is a lesser concern here than under copyright regimes as there is not as large an economic incentive for firms to issue notices for SCARS (as compared to defending their IP). Nevertheless, we provide brief recommendations to help mitigate the risk.[23]

Remedy: Standardized Notice Format and Reasonable Response Times

To minimize the burden on platform operators we recommend that notices be divided into claims, each of which may address only meaningful related content, should be submitted online, and should refer to such content through an appropriate URI or equivalent locator.

To address claimants who frequently file erroneous or abusive claims we recommend that platforms be required to response to notices within a

[21] Daniel Kiat Boon Seng, 'The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices' (2014) 18 *Virginia Journal of Law and Technology* 369, 433 – 435.
[22] See generally Daniel Seng, 'Copyrighting Copywrongs: An Empirical Analysis of Errors with Automated DMCA Takedown Notices' (2021) 37 *Santa Clara High Technology Law Journal* 119, 398, finding that 5.5% of DMCA takedown requests do not meet the required formalities.
[23] Seng, 'State of the Discordant Union' (n 21).

reasonable time, where *reasonable* is given meaning by the nature of the content, the size and nature of the platform, and the prior submission history of the claimant. This could include a fixed period of *presumptive reasonableness.*

Tailoring Regulation to the Corresponding Harm

In designing the regime, it is insufficient to directly apply the model of the DMCA, or to attempt to provide a shield against broad forms of liability. Specifically, it is important to tailor notice-and-takedown regimes to distinguish between concerns around a) Child Sexual Abuse Material b) content that infringes on copyright or other IP rights c) disinformation d) and other SCARS. The character of the harms and nature of potential victims vary substantially–and thus the temptation to apply a one-size-fits-all notice and action regime is to be avoided.

In particular, the DMCA (and similar) maintains a "delicate balance of responsibilities between the copyright owner and the online service provider by unambiguously placing the primary responsibility… on the copyright owner".[24] This is appropriate for copyright, where the commercial interest of the copyright owner is at stake. However, in the context of protecting consumers from scams and malware a more appropriate notice-and-action regime needs to be coupled with baseline responsibilities for a platform. This is because the cost of scams on the platform are generally dispersed which lowers the incentive for an person to report scams or malware, unless the scam trades on that person's commercial interests.

The imposition of baseline obligations is in concert with the ACCC's fifth report which recommends "measures specific to digital platforms…including obligations on platforms to prevents and remove scams harmful apps and fake reviews".

Notice-and-Action Recommendations

Our recommendations are therefore as follows:

- To institute a notice-and-action regime for SCARS and to include therein:

[24] Seng, 'State of the Discordant Union' (n 21), 431.

  - that notices must include a URI and a reason that the claimant believes the content is covered by the regime;
  - to standardize the form of the notices to harmonize with other jurisdictions and forms of takedown notice (e.g., DMCA) where possible;
  - a procedure for issuing counter-notices that appropriately balances the need to remove scams against the risk of over-policing (see suggestion above);
  - a requirement that separate, unrelated claims be separately listed and justified;
  - that notices must be made publicly available, in machine readable format;
  - that a consumer be notified if the provider reasonably believes or has reason to believe that the consumer would sustain harm from the content;
  - to require that providers respond to notices within a reasonable time, with reasonableness depending on the size and nature of the platform and additionally, the number of erroneous or otherwise defective reports previously submitted by the reporter;
- To supplement the notice-and-action regime with a baseline set of standards to which a platform must adhere, in order to be protected by the safe harbour;
- To ensure that there are adequate pathways to for the ACCC or civil litigants to reach intermediaries under consumer law when the safe harbour does not apply;

1. Do you agree with the ACCC's conclusion that relying only on existing regulatory frameworks would lead to adverse outcomes for Australian consumers and businesses? What are the likely benefits and risks of relying primarily on existing regulatory frameworks?

The ACCC's fifth report recommends "economy-wide consumer measures, including a prohibition against unfair trading practices and unfair contract terms". We agree that both unfair trading practices and unfair contract terms should be prohibited.

Harm: Too Many Consumer Contracts are Anti-Consumer

Standard-form contracts are pervasive, controlling and constrain myriad aspects of our lives.[25] Consumers have little power to meaningfully negotiate their terms, withhold assent, or even comprehend the highly lawyered jargon.[26]

Consumers don't read contracts.[27] Further, it would not be rational for them to do so.[28] Concurrently, written contract terms appear to be trending in anti-consumer directions.[29]

All of these challenges extend to small businesses, who are particularly at the mercy of large digital platforms on whom they rely for a myriad of services that historically would not have been governed by complex contracts.

Remedy: Prohibition on Unfair Contract Terms

[25] David Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power' (1971) 84 *Harvard Law Review* 529; Robert Hillman and Jeffrey Rachlinksi, 'Standard Form Contracting in the Electronic Age' (2002) 77 *New York University Law Review* 429.
[26] See generally David Hoffman, 'Defeating the Empire of Forms' (Research paper No 23-04, University of Pennsylvania Institute for Law and Economics, 22 January 2023); Andrew Robertson, 'The limits of voluntariness in contract' (2005) 29(1) *Melbourne University Law Review* 179; Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness a Ground for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Law Review* 934, 937, 940; Geraint Howells, 'The Potential Limits of Consumer Empowerment by Information' 32(3) *Journal of Law and Society* 349; M Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 *Stanford Law Review* 211, 214.
[27] See eg, Ian Ayres and Alan Schwartz, 'The No-Reading Problem in Consumer Contract Law', (2014) 66(3) *Stanford Law Review* 545.
[28] Hillman and Rachlinksi (n 27), text to note 36; Generally, Omri Ben-Shahar and Carl Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press, 2014).
[29] Hoffman, 'Defeating the Empire of Forms' (n 26), 18

The ACCC notes that the above issues may be addressed by the current Australian Consumer Law[30] Unfair Contract Terms Law (UCTL),[31] together with recent enhancements made to the regime.[32]

We welcome the recent changes to the UCTL and are hopeful that the introduction of a prohibition on the use of unfair terms backed up by significant penalties, and clarification to ensure repeat use of such terms is taken into account, will better suppress the prevalence of such terms in consumer and small business contracts.[33]

However, we believe that these changes will not *entirely* ameliorate the incidence of unfair terms and the harms caused by them. The ACCC notes that many unfair contract terms go undetected, with minimal action taken by private litigants, thus leaving it solely to the ACCC to enforce the regime.[34]

As costs associated with litigating are prohibitively expensive for consumers and small businesses–the intended beneficiaries of the regime–we believe it is unlikely there will be any substantial change to this enforcement dynamic. Consideration of more efficacious solutions is therefore required.

Remedy: Render Low-value Contracts Unenforceable

Ex-post policing of contract terms fundamentally fails to address the systemic challenges faced by proliferation of low-value contracts into all

[30] *Competition and Consumer Act 2010* (Cth) sch 2 ('*ACL*').
[31] Ibid pt 2-3 (ss 24-28).
[32] Treasury Law Amendment (More Competition, Better Prices) Bill 2022; Department of Parliamentary Services, Parliament of Australia, 'Treasury Laws Amendment (More Competition, Better Prices) Bill 2022' (Bills Digest No 28 2022-23, 24 October 2022) 18-21.
[33] ACCC, 'Review of Unfair Contract Term protections for Small Business' (Submission, 21 December 2018); ACCC, 'Enhancements to Unfair Contract Term protections, Consultation Regulation Impact Statement' (Submission, March 2020). In both submissions the ACCC advocates for such enhancements to encourage greater compliance with the regime.
[34] ACCC 'Enhancements to Unfair Contract Term protections for Small Business' (n 33), pt 2.1: "Based on our experience, the majority of UCTs go undetected and are readily relied upon by the businesses offering them … This places a significant burden on regulators to detect and take action in relation to UCTs'."

spheres of life. Even should the prohibition on unfair terms succeed in a limited reshaping of the low-value contract environment, consumer behaviour is shaped by terms, regardless of whether they are legally enforceable or not.[35]

The deficiencies of reforms that target only unfair terms has been highlighted recently in both Australia and New Zealand, where after the introduction of such reforms, unfair terms remain prevalent in the contracts the reforms were intended to address.[36] Even should the ACCC step up policing under the amendments to the UCTL, its inherently limited resources mean that a more systematic solution is likely in order.

Noting the failure of alternative regimes, a more radical approach may be in order. We support reform akin to that suggested by noted contract theorist Professor David Hoffman, who makes a detailed case[37] for legislation that would render all written low-value contracts unenforceable. Though his proposal is tailored to the US contracting landscape, we believe it offers a rough blueprint to escape from the never-ending search for the consumer-contract holy grail.

Harm: Unfair Tradaing Behaviour Beyond Contract

While we consider the UCTL to be a useful tool in addressing substantive unfairness in consumer contracts, the current regime alone is insufficient as it does not target substantive unfairness in systematic business practices.

[35] See generally Meirav Furth-Matzkin, 'The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence', (2019), 70 *Alabama Law Review* 1031.
[36] ACCC, 'Enhancements to Unfair Contract Term Protections - Consultation Regulation Impact Statement' (Submission to regulatory inquiry, March 2020), pt 2.1. Victoria Stace, Emily Chan and Alexandra Sims 'New Zealand's unfair contract terms law fails to Incentivise business to remove potentially unfair terms from standard form contracts' (2020) 27 *Consumer and Competition Law Journal* 235, which found that the prevalence of unfair contract terms in New Zealand Increased from 2015 to 2018.
[37] See generally Hoffman (n 26)

The UCTL's focus on contractual terms, together with prohibitions on unconscionable conduct[38] and misleading and deceptive conduct,[39] leaves certain widespread, undesirable business practices underregulated.

Such practices identified by the Consumer Policy Research Institute (CPRC) include concealed data practices,[40] reliance on dark patterns to undermine consumer autonomy[41] and exploitation of vulnerable consumers through "design or indifference".[42]

These practices may not be captured by the prohibition against misleading and deceptive conduct, as the practices are exploitative but not necessarily misleading.[43] The high level of unconscionability required to enliven the prohibition on unconscionable conduct, as well as strictures of the equitable doctrine, may also fail to cover the practices.[44]

The UCTL will not be of assistance where these practices are employed in contexts not clearly governed by contractual relationships–for instance manipulative marketing strategies that target vulnerable consumers.[45]

Furthermore, at least in the case of undesirable privacy policies, it is unclear whether signing up to a 'free' digital service in exchange for data will give rise to a contractual relationship.[46]

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[38] ACL s 21
[39] ACL s 18
[40] CPRC, 'Unfair Trading Practices in Digital Markets – Evidence and Regulatory Gaps' (Research and policy briefing, December 20202), 6-8.
[41] Ibid 8-11.
[42] Ibid 11-13.
[43] Ibid 13
[44] Jeannie Paterson and Elise Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44 *Journal of Consumer Policy* 1, 5-10, 13-14; See also Jeannie Paterson, Elise Bant and Matthew Clare, 'Doctrine, policy, culture and choice in assessing unconscionable conduct under statute: ASIC v Kobelt' (2019) 13 *Journal of Equity* 81.
[45] CPRC (n 40) 14-15; Paterson and Bant (n 44) 12-14.
[46] Jeannie Paterson and Damian Clifford, 'Consumer Privacy and Consent: Reform in the Light of Contract and Consumer Protection Law' (2020) 94 *Australian Law Journal* 741, 750.

Remedy: General prohibition on unfair trading

We therefore support the ACCC's proposal to introduce a prohibition on unfair trading practices,[47] to better address the systematic business practices that harm consumers.[48]

A prohibition on unfair trading will prohibit a different standard of conduct,[49] referable to notions of fairness, which in the Australian context has been said to encompass such values as efficiency, honesty and fair conduct.[50] This will capture undesirable systematic conduct that mightn't otherwise be considered unconscionable or misleading.[51]

An unfair trading prohibition may also provide better *ex ante* regulation, by directing courts to adopt an objective evaluation of the conduct, rather than confining the inquiry to the individual plaintiff's circumstances.[52]

Finally, such a prohibition would also align the Australian Consumer Law with financial services and consumer credit regimes,[53] and may accord better with community expectations of fairness.[54]

Proposed model of an unfair trading prohibition

We are supportive of a model that adopts both 'bright line' rules, alongside standards-based safety net provisions,[55] as considered by the ACCC.[56]

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[47] ACCC, 'Digital Platforms Inquiry – Final Report' (Report, 2019), 498: 'Recommendation 21 – Prohibition against certain unfair trading practices'.
[48] Paterson and Bant (n 44), 4.
[49] Ibid 10.
[50] Ibid 11.
[51] Ibid.
[52] Ibid 12.
[53] Paterson and Bant (n 44), 11.
[54] Ibid 11, quoting House of Representatives Standing Committee on Industry, Science and Technology (1997), Recommendation 6.1 [6.73]; Jeannie Paterson and Gerard Brody, 'Safety Net Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models' (2015) 31 *Journal of Consumer Policy* 331, 352.
[55] Paterson and Brody (n 54).
[56] ACCC, 'Digital Platforms Inquiry – Final Report' (n 46), 500.

We support statutory language that directs focus to the objective impact of the unfair practice, and avoids an overly personalised analysis, to ensure scrutiny of the systematic nature of the conduct.[57]

[57] Paterson and Bant (n 44), 12, specifically similar language to the prohibition on misleading and deceptive conduct.

19. Do information gathering powers for the relevant regulator need to be enhanced to better facilitate information gathering from multi-national companies? What balance should a potential regime strike between compliance costs, user privacy and the regulators information needs?

We suggest that inquiring as to the *powers* of the ACCC is insufficient. Rather, it is necessary to concurrently extend the ACCC's capabilities to handle digital platform regulation.

ACCC Requires Expanded Technical Research and Data Capabilities

Multi-national digital platforms take great pains to avoid producing written documents of interest to consumer protection and competition regulators.[58] This hinders regulators who, despite being armed with mandatory process, may receive evidence of only limited use in their investigations. Useful evidence may often be connected to technical analyses of the decisions that platforms make with respect to content moderation and recommender systems. Example of such analyses might include: evaluations of the impact that a recommender system has on competitors' content or an internal analysis of the impact of technical/policy decisions on the presence of scams and misleading information.

In order to effectively investigate platforms, mandatory process is therefore best accompanied by applied research and data-analysis capabilities–capabilities that regulators worldwide are still in the process of developing. Concretely, building such capability requires the hiring of internal teams of computer and data scientists who can design and execute studies appropriate to the needs of the ACCC. The presence of internal technical expertise can benefit not only existing investigations and enforcement but may also generate leads for new investigations.

[58] Kim Lyons, 'Google training documents advise avoiding monopoly language' *The Verge* (online, 8 August 2020); Google 'Five Rules of Thumb For Written Communications' (Internal document, 16 August 2019) <https://www.documentcloud.org/documents/7016657-Five-Rules-of-Thumb-for-Written-Communications.html>: "Words Matter. Especially in antitrust law. Courts and regulators often focus on the intend behind a decision … To help ensure that what we write accurately reflects our intent, here are a few quick guidelines". The document discourages language that evinces anti-competitive, harmful or manipulative sentiments.

One small-scale model is the Office of Technology Research and Investigation (OTECH) at the U.S. Federal Trade Commission (FTC), created to "level[] the playing field and empower[] the FTC to better tackle abuses from technology companies."[59] The success of OTECH,[60] despite constrained resources has motivated legislation to fund fully staffed Bureau of Technology and the hiring of a Chief Technologist.[61] Australia should learn from this experience and move to fund similar expertise within the ACCC.

Protecting Platform Researchers in the Public Interest

Alongside its internal capacity, the ACCC (and counterpart consumer and competition protection agencies worldwide), rely on public interest organizations and researchers to both identify and study issues. The empirical data from these studies often forms a meaningful evidence base for enforcement action.[62]

Unfortunately, it is in platforms' interest to hinder researchers through overzealous enforcement of "Terms of Use".[63] In one indicative example, in 2021 Facebook

[59] 'FTC Seeks Technologists for New Research, Investigations Office' *Federal Trade Commission* (Media Release, 23 March 2015) <www.ftc.gov/news-events/press-releases/2015/03/ftc-seeks-technologists-new-research-investigations-office>.
[60] Omere Tene, 'With Ramirez, FTC became the Federal Technology Commission' *iapp* (Article, 18 January 2017) <https://iapp.org/news/a/with-ramirez-ftc-became-the-federal-technology-commission/> "OTech...has propelled the FTC's technical leadership and expertise beyond that of any other regulator in this space, not only in the U.S., but also around the world. OTech has strengthened the agency's ties to the academic community. It launched PrivacyCon, which in two years has already become one of the premier venues for presentation and discussion of cutting edge privacy scholarship".
[61] See the Discussion Draft of a bill to amend the FTC act, section 8, establishing a "Bureau of Technology" to be headed by a Chief Technologist: <https://www.wyden.senate.gov/imo/media/doc/Wyden%20Privacy%20Bill%20Discussion%20Draft%20Nov%201.pdf>.
[62] 'Compliance and enforcement policy and priorities', *ACCC* (Web Page) <https://www.accc.gov.au/about-us/australian-competition-and-consumer-commission/our-priorities/compliance-and-enforcement-policy-and-priorities>: 'Priorities are determined following external consultation and an assessment of existing or emerging issues ...', 'Market studies also support the ACCC to identify any market failures and how to address them … Publicising this work can … encourage public debate over competition and consumer matters and inform policy consideration'.
[63] Niva Elkin-Koren, Maayan Perel and Ohad Somech, 'Access to Platform Data and the Right to Research' in Jeannie Paterson, Damian Clifford and Kwan Ho Lau (eds) *Data Rights and Private*

permanently blocked the personal accounts of NYU Researchers investigating misleading advertisements on the platform.[64] Facebook responded to public criticism by claiming that they provide adequate tools to researchers who wish to study their platform. However even taking this claim at face value, the public ought not to be reliant on the good graces of platforms to ensure that platform research in the public interest can proceed.[65]

Facebook whistleblower Francis Haugen highlights the importance of research that more broadly evaluates these systems, noting that it is insufficient to "rely on the deletion or criminalisation of harmful content. Not only because that risks infringing on free speech, but because it doesn't work ".[66]

Therefore, alongside expanding the ACCC's information gather capabilities, it is important to consider law reform to protect the commission's potential research partners and their access to relevant information in the public interest.

Mandatory Reporting Regime for Large Platforms

In addition to protecting the ability of researchers to access and study platforms, an additional proposed reform is to require biannual public reporting of certain statistical data for large multinational platforms operating domestically.

Even were researchers protected from retaliation, certain data vital to the public interest are difficult or impossible to obtain with only general access to platforms. Examples of such data may include statistics in respect of content moderation

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Law (Hart Publishing, 2023) (forthcoming), pt II citing various business interests, and regulatory and reputational concerns as a reason for platforms restricting access; Axel Bruns, 'After the APIcalypse: Social Media Platforms and Their Fight against Critical Scholarly Research' (2019) 22(11) *Information, Communication & Society* 1544.

[64] Shannon Bond, "NYU Researchers Were Studying Disinformation On Facebook. The Company Cut Them Off" *NPR* (online, 21 August 2021) https://www.npr.org/2021/08/04/1024791053/facebook-boots-nyu-disinformation-researchers-off-its-platform-and-critics-cry-f

[65] See also Elkin-Koren, Perel and Somech (n 63) 'Access to Platform Data and the Right to Research'.

[66] Leigh McGowan, 'Facebook whistleblower calls for review of Ireland's data watchdog' SiliconRepublic.com (online, 23 February 2022) <https://www.siliconrepublic.com/business/facebook-whistleblower-frances-haugen-ireland-dpc-review-gdpr-online-safety>

conducted by a platform or political advertising. Without access to the data, it is also difficult to develop reforms that effectively target harms caused.[67]

Ensuring that the reports are generally available would not only help to inform public debate but would allow the ACCC to draw on the research and analysis capabilities from partners at public interest and research organizations.

The list of these statistics should be developed by the ACCC in consultation with the research organisations that need this information to effectively serve the Australian public. Haugen specifically calls for platforms to disclose risk assessments and mitigations which would help to address harms more precisely.

[67] Ibid; The difficulty in regulating from the outside is highlighted even by insiders. Digital platform whistleblower Francis Haugen notes that the debate around platform regulation is stifled by the inability of the public to "see behind the curtain" of its business.