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Australian Communications Consumer Action Network (ACCAN)

ACCAN Communications Consumer Congress

Wednesday, 13 September 2023

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ANDREW WILLIAMS: And thanks very much to Minister Rowland. It's my very great pleasure to invite our first keynote presenter to the stage. That's probably a person who needs very little introduction at all. That's Gerard Brody. Gerard wears many hats but he's here today with his Chair of Consumers Federation Australia hat on primarily, but I think we will diverge to other areas as well. Please welcome Gerard to the stage.

GERARD BRODY: Well, thank you, Andrew. Thank you to all the ACCAN team for convening today and inviting me to speak. I would also like to acknowledge the Gadigal people of the Eora Nation, the traditional owners of where we are and the surrounding areas. It is a great honour to celebrate the diversity of first nations from around the country and their ongoing connections to land and waters. In preparing for today, I reviewed the recently published first nations digital inclusion plan which was released in July this year. I noted that ACCAN and its Indigenous steering committee were key contributors to that plan, its focus on equity is really aligned with what I would like to speak about today. If you haven't read it, I would encourage you to look at it. It proposes a range of actions to improve access to digital technology and communications to ensure services are affordable, to enhance digital capability and to act online safely. Across all those areas, equity is key.

I do also want to acknowledge the upcoming referendum on 14 October, the proposal to establish a Voice to Parliament in my view is aligned with the ethos of consumer advocacy, when we listen to local Indigenous communities, we make better policy decisions. Importantly, I think The Voice will give advice to government to deliver practical results. That is why I will be voting yes, like consumer advocacy, I know a Voice will make a difference.

Today, my topic is how consumer protection law and advocacy can drive fairness and equity. I want to focus on the recently released Treasury consultation proposing an unfair trading prohibition for Australia. This is a vital reform to help address unfairness and inequity across communications markets but also commerce more broadly. The Treasury consultation paper has been much anticipated. You might be surprised to know that an economy-wide prohibition on unfair trade practices was first recommended in a 1997 parliamentary inquiry report entitled "Finding the balance towards fair trading in Australia". The chapter of that report that recommended a prohibition on unfair trading began with a quote from William Shakespeare "The law hath not been dead although it hath slept". It is fair to say the development of the law related to unfair trading has been sleepy, given it is now 2023, some 26 years after that parliamentary committee recommendation.

The current consultation emerges not from a 26-year-old report, though, but from a report written six years ago, reviewing the Australian Consumer Law. That review recommended exploring whether the Australian Consumer Law adequately captured unfair conduct that was raised by submissions to the review. The submissions that led to the ACL review recommended, primarily by consumer advocacy organisations, pointed out many of the harmful practices were not clear breaches of existing laws, relating to misleading or unconscionable conduct, for example. I will come back to that point later on.

Following the ACL review, the ACCC took up the mantle in its 2019 report on digital platforms, formally recommended an unfair trading practice prohibition for Australia. The ACCC has repeated that recommendation in other inquiries and has focused in on the consumer harm in the online world. Specific concerns raised by ACCC included interface designs and strategies which impede choice and harm

consumers, engaging in excessive tracking collection and use of data, failing to comply with reasonable data security standards, including consent or agreement through very long contracts or providing insufficient time for people to consider the contractual detail in those all or nothing agreements.

Before jumping into some of the more detailed examples of unfair conduct, I wanted to outline why I think an unfair trading prohibition matters not just morally but economically. We all know consumer protection law is primarily aimed at making sure consumers are treated fairly and are not exploited by firms. This could be seen in the objective of the Competition and Consumer Act which houses the Australian Consumer Law, the relevant provision says that the purpose is to enhance the welfare of Australians through promotion of competition and fair trading and provision for consumer protection. Consumer protection law, however, has traditionally been aimed at making sure consumers have sufficient information but they're not misled, they can build trust in businesses and make well informed choices. Confident consumers, the theory goes, are believed to be instrumental to maintaining a healthy, competitive process, whereby firms that best satisfy consumer needs thrive. That is the traditional view economic view of consumer protection.

Anyone who has worked with consumers or in consumer advocacy knows there are fundamental problems with that analysis. I will cover two of them. The first is the idea of confident consumers. To be honest, I have rarely met a confident consumer. Almost every time we purchase goods and services in the consumer market place, we are at a disadvantage to the firm with which we're dealing. There are a range of reasons. Information overload. Today's information-rich world, consumers are often overwhelmed by the sheer volume of information available, it leads to confusion and uncertainty rather than confidence. Complex markets.

Many markets, even areas like telcos and utilities, the products and choices are inherently complex with different inclusions and allowances, making it difficult for people to fully understand their options and make confident decisions.

Manipulative marketing can also exploit consumer vulnerabilities and erode confidence. The second problem with the traditional economic view is this idea of consumer trust. Where people who have access to complete, accurate information about product services prices and the behaviour of market players, they can make informed decisions based on objective criteria and lead to trust in the market. This idea that consumers can ever trust firms is, in my view, a fallacy. Trust is difficult to define but it's often based on the idea of benevolence, that is we're trusting when we can believe a supplier is acting in our best interests.

The reality is, however, that consumers see examples every day of suppliers not acting in a way that is beneficial to them. It is in the news we read, it is in the consumer complaint data the ombudsman publishes, it is in our every day experience. This is not to say that businesses are inherently out to take advantage of consumers. I don't think that is always the case. It is just the reality of consumer mass markets in areas like telecommunications, utilities and retail banking. These are very large businesses, with high degrees of standardisation in their business models. In this context, many will necessarily face problems. Consumers are diverse and won't always fit the standard expected. Harm will particularly befall people experiencing vulnerability, as many will need extra help to access or engage with a business.

This idea of consumer trust is unrealistic, rather what's really required is mechanisms to ensure distrust doesn't become embedded. Where consumers are treated unfairly or see others being treated unfairly, they will begin to distrust the market and distrust, if left to

fester, will lead to people being less active and even disengaging from the market. This is particularly a problem if there is a sense that all companies in the market are just going to treat us the same way. Why bother shopping around?

Unfair treatment in this way drives a lack of competition and works against an effective market place. In addition to having an economic basis then, a prohibition on unfair trading is also good social policy. If enacted and enforced it can contribute to economic transactions and interactions being conducted in a way that's equitable, particularly benefitting those experiencing vulnerability or who are unable to protect their own interests. When transactions are conducted fairly, they can develop a sense of social cohesion and shared values within society. Ultimately, when individuals believe they are being treated fairly in economic transactions, it contributes to a more harmonious social environment.

That is enough of the theory. I would like to cover some of the consumer harms and a new prohibition on unfair trading might address why existing prohibitions aren't sufficient. In doing so, it is worth articulating the legal and economic principle behind a prohibition on unfair trading. What exactly are we protecting? To answer this, we can draw on international comparisons, there are already similar laws in the UK, the EU, Singapore and the United States and if you want to understand the detail of those laws in other countries, I will recommend an excellent report by the Consumer Policy Research Centre called How Australia Can Stop Unfair Business Practices. That report provides a helpful comparative analysis of the various laws and provisions internationally. Ultimately, when you look at all the laws and the gaps in ours, I think an unfair business practice is one which distorts or undermines the autonomy and economic choices of consumers, confuses them or inhibits them unreasonably.

To explain these types of practices that might offend that principle but don't necessarily breach existing consumer laws, I am going to cover four categories of harm. The first category I am going to talk about is manipulative design. Everyone will have heard of dark patterns, I think. Design features and functionalities built into user interfaces of web sites and apps that seek to influence consumer behaviour. The preferred term today is deceptive patterns or manipulative patterns, as we should be avoiding terms which inadvertently carry racist associations. I prefer manipulation, deception is already illegal under Australian Consumer Law, while manipulation is not necessarily so.

There are many examples of manipulative design, including ones I have seen on telecommunications web sites, creating urgency, including limited time or a stop clock on a web site that is common in the CPRC research, they found examples of a countdown timer running out, only to be replaced by another timer. Sneaking, putting products in a cart, even where a consumer hasn't bought them or clicked that they want to purchase them. Forced continuity, making it difficult to cancel, and the CPRC research from 2022 showed how difficult it was to unsubscribe from an Amazon service, some 12 or 13 clicks, I believe.

Rather than go through all the many examples of manipulative design, I thought I would direct you to one online service that helps exploit cognitive biases for profit. The Nudgify service, its web site claims, helps online stores by building social proof or FOMO nudges, things like low stock or high demand messages are very common, bolt-ons to e-commerce web sites. This, I think, is more than legitimate persuasion and appears to be designed to manipulate. There are many other frightening examples of trick questions, or hidden information in a really excellent new book by Harry Brignull called Deceptive Patterns. I would encourage you to read that.

Marketing is not unlawful. When does it turn into manipulation? The famous behavioural economist Kath Sunstein has written about this in an article and it is manipulate if it doesn't engage or appeal to peoples' capacity for deliberative choice. This sort of conduct fails to respect peoples' autonomy and it is an affront to their dignity. A key problem is peoples choices might fail to promote their own welfare and might stand to promote the welfare of the manipulator.

The next category I want to talk about is bundled together unfair pricing and product design. There are two issues under this category that I would like to highlight. The first is pricing that abuses loyalty. Last December, I received my annual insurance premium for my car. The renewal notice told me if I didn't take any action, my insurance would automatically be renewed by direct debit of some \$1200. I thought this was a pretty significant hike from the previous year, so I went online to the web site of the same insurer and sought a quote for the same car, put in my rego on the same terms, the same excess and it came back at an offer of \$645.93, more than \$500 less than the renewal price. This sort of pricing clearly exploits peoples' default bias and offends our autonomy.

The corporate regulator ASIC recently sued the insurer IAG, including alleging unfair conduct for enticing customers to renew their insurance using a price optimiser, that had the effect of allocating a smaller price increase to the policies that were predicted to be less likely to renew at higher prices and a larger price increase to the policies that were predicted to be more likely to renew at higher prices. The Australian Financial Review described it as sly but surely it is unfair.

When it comes to product design, I think about practices such as telecommunications products which require consumers to sign up for automatic direct debit payment, rather than allowing a choice of payment methods. Particularly for people who are financially constrained, direct

debits limits their ability to manage their finances and risks overdrawn account fees exacerbating hardship. It is pleasing to hear that Telstra recently announced it will change its practices so all customers will be able to choose from a number of different payment methods. When this was announced, I was reminded that the former Telstra CEO Andy Penn was one of the few business leaders to publicly support a new prohibition on unfair trading, which he did back in 2020. I look forward to other business leaders following his lead.

The third category I wanted to talk about is online safety, a hot topic at the moment. There has been a lot of focus on this issue from poor data practices, cyber security, risks for consumers, particularly large scam losses. While there are a range of reforms that are required to address harms and keep us safe online, an unfair trading prohibition, I think, could help. For example, an unfair trading prohibition could deal with the harms caused by poor cyber security standards or the inconsistent procedures banks, telcos and digital platforms have to protect us from scam losses. Where an entity has poor securities protection, or where they aren't keeping up with good practices to detect and prevent scam losses, this could be considered an unfair business practice. After all, such practices push unreasonable risk onto consumers, with many who experience scam losses or identity theft disengaging from online activity and transactions.

This clearly offends the principle that I referred to of upholding consumer autonomy and choice. Sometimes privacy protections are thought of as protecting the individual, but Carissa Veliz's terrific book *Privacy is Power* reminds us that privacy is a collective endeavour. Where our privacy and data is breached, businesses can treat us differently, not equally. Firms can price discriminate in a way that benefits them without making this clear. Firms can employ algorithms that risk unfair

discrimination. An unfair trading prohibition can work to ensure businesses aren't using data in a way that offends consumer autonomy and free choices.

The fourth category I want to talk about is customer service. I won't spend a long time on this area with Qantas in the news recently, we are all reminded of the frustrations of long phone queues being pushed into a customer's service channel that you don't want or can't access, or complaint processes designed to create fatigue.

One telco example I recently came across was that of the NBN provider Superloop. I had to despair at the irony of an Internet provider that would only allow you to disconnect by telephone. An unfair trade practice might be one that incorporates unnecessary barriers to service assistance. It is not respecting a customer's freedom of choice if they cannot access after sales service. In this way I think the prohibition can help drive equity. Customer service and complaints systems necessarily need to be built for everyone, including those that face barriers, or experience vulnerability in some way. Fairness does not mean to treat everyone equally or to treat everyone in the same way, but instead it should require businesses to recognise individuals' differences and treat them accordingly. That is equity.

Where does unfair trading fit in the existing Australian Consumer Law? As I mentioned, we do have a strong Australian and consumer law. However, there are gaps. We have the prohibition on misleading and deceptive conduct. This provision doesn't actually require a business to be up-front in its communication. Unfortunately, our regulators have lost cases involving nondisclosure of important facts. This has been held by the courts to be not misleading.

Second, there is the prohibition on unconscionable conduct and people often think of that provision when we are talking about

exploitation in the market. A key problem with that provision is its focus is on the conduct of the trader and whether it's outside the norms of accepted business practices. This means the prohibition largely addresses the rogue business, the one that's really out of step with mainstream business. That's important, but what it won't address is unfair conduct that's endemic across all providers in a particular market, or is common because that will be considered accepted business conduct.

The case that the ACCC took against Mazda in 2019 is a good example. This case focused on customer service processes, when vehicles were purchased and experienced faults, it is worth looking at the type of behaviour the customer service system agents put people through. The runarounds and the hoops that people had to go through. The court found that the delays and runarounds were "Appalling customer service" but the conduct was not found to be unconscionable. It seems the court felt that such customer service is pretty standard and not a sufficient departure from the norms of acceptable business conduct.

Third, we also have unfair contract term provisions, this is our existing law which references fairness. It is a really important provision that remedies the imbalance in standard form contracts, however, it doesn't extend its reach to other aspects of the customer business relationship. Marketing and advertising, product design and pricing that I have mentioned, after sales service.

An unfair trading prohibition which focuses on prohibiting business practices or conduct which distorts the free choice or rational economic decision-making of customers, I think, would compliment existing consumer protections and help drive good market outcomes. It is only if consumers are unrestrained in their choices, not hampered by unfair business conduct, can they make the choices that will drive markets to deliver what the community wants in a fair and efficient way. I think the

prohibition would be pro-competitive and recognise that we now live in a 21st century technology and services-based economy. For our economy to grow, we need competition to be effective and for markets to work. This can only happen if we're able to effectively stamp out unfair practices.

My final plea for everyone is to encourage you to make a submission to the current Treasury consultation but, more importantly, I think to raise this issue in your advocacy with decision-makers across the spectrum, whether it is the regulators, whether it is politicians, business, I think this is a reform that all of us can get behind. Thank you, very much. (APPLAUSE)

ANDREW WILLIAMS: Thank you, very much, Gerard, for that very thought-provoking presentation and no doubt it should stimulate a bit of conversation. We have still got 10 or 12 minutes to go and Gerard has very kindly offered to answer questions from the floor, so does anyone want to kick it off? The front here, Sam. David.

>> Thanks. A quick question - I think it is. Your average consumer would interpret the phrase a prohibition of misleading and deceptive conduct to mean that all those practices are outlawed. It seems to me that the issue isn't the law, it's the way the courts have been allowed to interpret the law and the reasonable standard test, so stuff that is clearly deceptive is allowed. The case you have given about unconscionable conduct and the law seems to be about society standards, not the business practices. The courts are the ones that are anti the consumer more than the law. My question is don't we just risk the same problem if we introduce an unfair practices provision that the courts will, again, just keep making it less effective and aren't there alternatives, such as a process of regulation

whereby the ACCC can declare certain practices to fall within the existing definitions and that be a disallowable instrument, as an example?
Thoughts on the alternatives to leaving it to the courts?

GERARD BRODY: I do agree with you, David, about the courts have read down a lot of the consumer protections in many of the cases. Misleading and deceptive, I think that deception, in particular, hasn't been really focused on by the courts, or even the regulators. Part of the reason there is it has been interpreted to require a knowingness and intentional to be deceiving. That has been met and there hasn't been a focus. Misleading, as I said, the courts have said it doesn't require a business to be totally up-front. Does it risk going down the same track? There is that risk and we have seen that with changes that have been made to the law around unconscionable conduct. I think parliament has gone back two or three times to that provision to make changes, to kind of say to the courts that it needs to be interpreted more broadly, but most recently, the High Court in the Cobalt decision, the one around the book-up practices in remote Aboriginal communities in SA, the majority of the High Court really read that provision down. I think there are other options that could be considered.

What you're suggesting, to give the regulator power to just declare, I think that would be a challenging reform. There is a real reticence to take away the rights of courts to interpret laws and make pronouncements around judgements but it is not impossible, I guess. It is one thing that could be considered and I think that would be a harder reform to progress compared to an unfair trading prohibition. I think if it is done well, we get a good, wide unfair trading prohibition that focuses not just on previous conduct but conduct that is going to be likely to have a prospective effect, that will send a signal to the courts to do something

different.

>> Hello. It is Fred from the Internet of Things Alliance. Thanks, Gerard, very interesting. Something that has come up in the EU and in the UK, whether dealing with what may or may not be a case - I am not sure it is - they have changed their consumer law to recognise there is a difference between online services and products which are physical and a new category which is the combination of the two, which we haven't dealt with here in Australia and where the consumer law is all very fine. When you are a good you are a good and the fact that it might have software and data in it that changes the good's behaviour after you've bought it, so it may be less secure or changes functionality or whatever it is over time, it is not actually recognised and it is not being considered under the online side of it by ACCC and the actions there. Where do you see that going? Surely, if we don't fix some of the fundamentals of the consumer law, then the corner cases that define an IOT service attached to a device is missed out?

GERARD BRODY: Yes. There are some challenges around the definitions when it comes to goods and services in some of the Smart products and whether they are a good or a service, I think there are questions there. I guess I am still much more attracted to an across the board rule that just covers all businesses and supplies, rather than categorising up this is online, this is in the offline world, like the EU has. That creates complexity for business as much as it does for community, I think. With the existing prohibition on unconscionable conduct, for example, which I think the unfair proposal should replicate, it doesn't actually apply to goods or services, it just says a business in trade or commerce should not engage in unconscionable conduct. If we had a similar provision around unfair

trading that said a firm should not engage in conduct that is or is likely to be unfair, the definitions of goods and services doesn't matter, it focuses on the conduct or the practice and whether that offends the principle I am talking about.

ANDREW WILLIAMS: Do we have any other questions from the floor?
Down the front.

>> Ron Shanks. I am retired now but have formally worked before on the government National Transport Commission on a number of legislation, where parliament has sought to try and direct business, or courts should I say, how to interpret very broad powers with use of examples in legislation, so there are examples of - you just have diverse examples that tries to explain the diversity of a general provision. I wonder if you have any comment on that?

GERARD BRODY: That is a really good question, Ron, because one of the options put forward in the consultation paper that Treasury has published - there are four options - one of the first ones is do nothing. The second one is change unconscionable conduct provision again. I don't think those two are going to work. The third and fourth, one is to have a general prohibition on unfair trade practices. But the fourth one is to have that complimented by, I guess, outright prohibitions on specific practices that might amount to unfair conduct. The example might be a subscription trap. We could just say that's considered to be an unfair practice. I am attracted to that approach, so both options. I think what that would do is create certainty for business as well. They know this particular practice, they don't have to interpret whether it is unfair or not, they know it is unfair but then having the catch all unfair provision for the

economy is always changing and businesses are coming up with new ideas all the time that sets a standard to support that.

ANDREW WILLIAMS: One more for David and then we will set up for the next one.

>> Another question which is, we are focused on the idea of prohibitions in the law, is it possible to in fact take a different approach and start putting in the law obligations on businesses, so that rather than saying "You can't do these things" start saying "You must do these things", such as you must ensure the consumer is able to exercise their autonomy. Phrase that how you will. Thoughts?

GERARD BRODY: That is a really interesting idea and it is something I have been thinking about, what is the difference between a prohibiting unfair conduct and a positive obligation to treat people fairly? Which one is better? I think that is something that I hope is explored through this consultation and the design of a new law works out which is the best one. I think there are some opportunities around positive obligations that might be even better than an unfair trading prohibition. I think it is worth exploring.

ANDREW WILLIAMS: No more bets? We are all done. So we can set up for the next one. On behalf of everyone, thank you for a thought-provoking presentation, Gerard, we are privileged to have you here. (APPLAUSE) We have two or three minutes. Relax, stretch your legs and just let us set up for the next panel, thank you.