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SAFEGUARDING CONSUMER RIGHTS IN A TECHNOLOGY DRIVEN MARKETPLACE

Abstract

Although online technology — including artificial intelligence ('AI') technology — is increasingly regulated in Australia, there are numerous challenges facing regulators in the area of consumer rights. Consumers may be negatively impacted in various ways by online technology, such as the mining and exploitation of their personal data, instances of automated decisions posing risks to their privacy, new forms of misleading or deceptive conduct online, and the anti-competitive consequences of AI-led market collusion. This article considers the impact of online technology on consumer rights in the context of the current Australian regulatory framework, by focusing on the *Competition and Consumer Act 2010* (Cth) and the *Australian Consumer Law*, the recommendations made in the *Digital Platforms Inquiry Final Report*, and the effect of the recently introduced Consumer Data Right legislation. It investigates whether the reach of Australia's existing laws, together with the recommendations of the *Digital Platforms Final Report*, will be adequate to protect consumer rights in the future, finding that ongoing vigilance against technology related abuses is required of regulators and consumers in a technology driven marketplace.

I Introduction

Developments in artificial intelligence ('AI') engineered technology have increased risks to consumers in a number of ways, often amplified by a lack of awareness on the part of online platform users. It has been established that there is a substantial disconnect between how consumers think their data should be treated and how it is actually treated.[1] For example, digital platforms such as Google

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1   Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 3 ('*DPI Final Report*') <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>.

and Facebook have been found to employ AI to utilise users' personal information for marketing purposes, causing the Australian Competition and Consumer Commission's ('ACCC') *Digital Platforms Inquiry Final Report* ('*DPI Final Report*') to recommend more oversight of digital platforms.[2] Consumers are increasingly affected by breaches of the *Australian Consumer Law* ('*ACL*')[3] by online marketing organisations, such as misleading or deceptive conduct perpetrated by comparison websites.[4] In addition, consumer rights could be adversely affected by online AI-led market collusion and breaches of the *Competition and Consumer Act 2010* (Cth) ('*CCA*') in the digital marketplace.[5]

This article assesses the impact of online — including AI-led — technology on consumer rights in the context of the current Australian regulatory framework, by focusing on the *CCA* and *ACL*, as well as the recommendations made in the *DPI Final Report*.[6] In addition, it considers the effect of the recent Consumer Data Right ('CDR') legislation, introduced by the Commonwealth government in August 2019.[7] The article investigates whether the reach of the existing laws, together with the recommendations of the *DPI Final Report*, will be adequate to protect consumer rights in the future, while also outlining how online threats to consumer welfare are likely to evolve in response to ongoing technological developments.

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[2]   Ibid 2.

[3]   *Competition and Consumer Act 2010* (Cth) sch 2 ('*ACL*'). To the extent that the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*') sets out equivalent consumer protection provisions applicable to financial products and services, the relevant sections of the *ASIC Act* are referenced in footnotes wherever their *ACL* counterparts are discussed.

[4]   See below Part IV.

[5]   Rod Sims, 'The ACCC's Approach to Colluding Robots' (Speech, Australian Competition and Consumer Commission, 16 November 2017) <https://www.accc.gov.au/speech/the-accc%E2%80%99s-approach-to-colluding-robots>; Ariel Ezrachi and Maurice E Stucke, 'Artificial Intelligence and Collusion: When Computers Inhibit Competition' [2017] (5) *University of Illinois Law Review* 1775.

[6]   The *DPI Final Report* has been followed by the Digital Advertising Services Inquiry and the Digital Platform Services Inquiry, both announced in February 2020, with the latter releasing its first interim report in September 2020 as an update to the *DPI Final Report* in relation to search and social media platforms: see Australian Competition and Consumer Commission, *Digital Platforms Services Inquiry* (Interim Report, September 2020) 1 <https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2020-interim-report> ('*DPSI Interim Report*').

[7]   *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth).

II The Increase of AI Technology in the Marketplace

In considering online technology in the context of this article, a broad view of AI is taken in investigating its impact on consumers. Artificial intelligence has been defined by John McCarthy as 'the science and engineering of making intelligent machines', especially intelligent computer programs,[8] while Ariel Ezrachi and Maurice Stucke define AI as 'software and computers capable of self-learning and intelligent behaviour'.[9] John Lennox notes that there is a difference between literal intelligence and its digital equivalent, noting that it is not truly 'intelligence' as most understand the term and distinguishing between various types of intelligence, eg, general intelligence (aligned with sentience, self awareness etc) and general *artificial* intelligence.[10] This article endorses the views of McCarthy, Ezrachi and Stucke, and supports Lennox's characterisation of general artificial intelligence as distinct from human intelligence. The term has been used to include tasks such as abstract reasoning, solving puzzles, time planning, recognising objects and sounds, speaking, translating, performing social or business transactions, creative work and controlling robots.[11] It should be differentiated from the term 'machine learning', which — as a subset of AI — denotes an added ability to automatically learn from data.[12] Machine learning ('ML') has been defined as a science that is 'concerned with the question of how to construct computer programs that automatically improve with experience'.[13] In this sense, ML systems can quickly apply knowledge and training from large datasets to excel at tasks such as facial, speech and object recognition and translation.[14] Instead of creating a software program with specific instructions to complete a task, ML allows a system to learn to recognise patterns on its own and make predictions.[15] These deep learning techniques are increasingly being applied by companies seeking to increase their customer base and revenue, which provides challenges for the existing legislative framework in dealing with consumer protections.

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[8]   John McCarthy, 'What Is Artificial Intelligence?', *Professor John McCarthy* (Web Page, 12 November 2007) <http://jmc.stanford.edu/articles/whatisai.html>.

[9]   Ezrachi and Stucke (n 5).

[10]   John C Lennox, *2084: Artificial Intelligence and the Future of Humanity* (Zondervan, 2020) 95.

[11]   Kristian Kersting, 'Machine Learning and Artificial Intelligence: Two Fellow Travelers on the Quest for Intelligent Behavior in Machines', *Frontiers in Big Data* (Web Page, November 2018) <https://www.frontiersin.org/articles/10.3389/fdata.2018.00006/full>.

[12]   Ibid.

[13]   Tom M Mitchell, *Machine Learning* (McGraw-Hill, 1997) xv.

[14]   Hope Reese, 'Understanding the Differences between AI, Machine Learning, and Deep Learning', *TechRepublic* (online, 23 February 2017) <https://deeplearning.lipingyang.org/wp-content/uploads/2016/11/Understanding-the-differences-between-AI-machine-learning-and-deep-learning-TechRepublic.pdf>.

[15]   Ibid.

One indicator of the increasing demand for ML and AI-related skills in the marketplace is the fact that there are currently more than 12,000 open positions on LinkedIn worldwide[16] that require TensorFlow expertise.[17] Vacant positions on LinkedIn requesting ML expertise further reflect its growing dominance in all businesses; for example, at present there are nearly 99,000 jobs worldwide according to LinkedIn that list 'machine learning' as a required skill.[18] Louis Columbus further asserts that the global market for ML is projected to grow to USD30.6 billion in 2024 (from USD7.3 billion in 2020).[19] This trend demonstrates a growing need for businesses to employ AI technology in order to remain competitive in the market.

The top five uses of ML in companies that have 10,000 employees or more have been identified as: generating customer intelligence or insights; improving customer experience; internal processing automation; retaining and interacting with customers; and reducing costs.[20] In this context, the International Data Corporation ('IDC') has forecast that spending on AI systems will reach nearly USD98 billion in 2023, to be led by the retail and banking industries,[21] which will affect consumers, given the consumer focus of the AI generated data. As stated by the IDC research director, '[a]rtificial intelligence and machine learning are top of mind for most organisations today, and IDC expects that AI will be the disrupting influence changing entire industries over the next decade'.[22]

Thus, and significantly, recent research undertaken by Algorithmia — a United States-based machine learning model deployment and management organisation, which hosts the largest public marketplace for algorithms — indicated that this expected growth in the use of AI technology will necessarily impact consumers.[23] This research also revealed that customer-centric applications of ML, such as generating customer insights and improving customer experience, are currently the most common use

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16   Louis Columbus, 'Roundup of Machine Learning Forecasts and Market Estimates, 2020', *Forbes* (online, 19 January 2019) <https://www.forbes.com/sites/ louiscolumbus/2020/01/19/roundup-of-machine-learning-forecasts-and-market-estimates-2020/#6a3f28d85c02>.

17   Tensor Flow is an end-to-end open-source machine learning platform: see *TensorFlow* (Web Page) <https://www.tensorflow.org>.

18   Columbus (n 16).

19   Ibid.

20   Algorithmia, *2020 State of Enterprise Machine Learning* (Report, October 2019) 5 <https://info.algorithmia.com/hubfs/2019/Whitepapers/The-State-of-Enterprise-ML-2020/Algorithmia_2020_State_of_Enterprise_ML.pdf?hsLang=en-us>.

21   Business Wire, 'Worldwide Spending on Artificial Intelligence Systems Will Be Nearly $98 Billion in 2023, According to New IDC Spending Guide' (Media Release, 4 September 2019) <https://www.businesswire.com/news/home/20190904005570/ en/Worldwide-Spending-on-Artificial-Intelligence-Systems-Will-Be-Nearly-98-Billion-in-2023-According-to-New-IDC-Spending-Guide>.

22   Ibid.

23   Algorithmia (n 20) 5.

of AI.[24] In some instances, this may be positive, resulting in enhanced customer experience and better communication; but it could also have negative implications, such as privacy and data breaches as well as consumer law breaches if the technology is implemented without the necessary checks and balances. It is unclear from Algorithmia's report whether these customer-centric functions take into account potential impact on consumer data and privacy. However, it has been recognised that in order to supplement the development of AI, controllers collect vast amounts of consumer personal data to enable algorithms to learn, as an algorithm cannot accurately learn from its environment without processing large amounts of personal data.[25] Since this is what is required for AI to work 'efficiently' or actually optimise certain functions, it raises real concerns for consumer privacy and data, especially when consumers are unaware of or oblivious to the implications of their data being collected. In the context of the *General Data Protection Regulation*[26] ('*GDPR*') in the European Union ('EU'), for example, there is a tension between the development of AI technologies which require the continual learning and use of data, including prior data, and the *GDPR* which allows consumers to withdraw their consent and use of personal data.[27]

The *Artificial Intelligence Index*, a report prepared by Stanford University researchers which 'tracks, collates, distils, and visualizes data relating to artificial intelligence',[28] acknowledges that

> [p]ublic concerns over the technology's threat to data privacy have grown over time, driven by news of mistaken identities during crime surveillance, biometric scans that can be applied to videos or photos without consent, and the idea of data ownership as it relates to social media platforms that utilize the technology.[29]

This trend is particularly concerning considering the significant impact AI may have on the end consumer and the fact that consumers are constantly targeted by

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24   Ibid 2.

25   Matthew Humerick, 'Taking AI Personally: How the EU Must Learn to Balance the Interests of Personal Data Privacy and Artificial Intelligence' (2018) 34(4) *Santa Clara High Technology Law Journal* 393, 395.

26   *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation*) [2016] OJ L 119/1 ('*GDPR*') is a regulation in European Union ('EU') law on data protection and privacy for all individual citizens of the EU and the European Economic Area ('EEA'). It also addresses the transfer of personal data outside the EU and EEA areas.

27   Humerick (n 25) 406.

28   Raymond Perrault et al, *Artificial Intelligence Index 2019* (Annual Report, Stanford Institute for Human-Centered Artificial Intelligence, December 2019) 4 <https://hai. stanford.edu/sites/default/files/ai_index_2019_report.pdf>.

29   Ibid 151.

marketers through the application of analytics and ML.[30] AI has been 'regarded as the 21st century equivalent of the late 19th century steam engine' because the algorithms apply to mass amounts of data, resulting in a transformation of the culture of consumption and production,[31] impacting widely on traditional methods of marketing. It has also been noted that digital profiling is one of the most commercially valuable results of AI technologies (ie, the ability to collect data by tracking online behaviour and then creating highly accurate predictions about individuals' 'behaviours, interests, preferences, and traits').[32] In a consumer law context this means that unfair practices can arise from digital profiling as there is more opportunity for the exploitation of an individual if AI technology can mine digital datasets that can predict a particular individual's preferences, tastes or vulnerabilities.[33] This is exacerbated by the fact that these profiling practices 'are highly opaque, dynamic, and largely operate hidden from public view'.[34]

The recorded uses of AI in marketing and data collection practices in consumer-centric applications can have significant implications for consumers, ranging from privacy concerns to unfair practices and potential breaches under consumer law. These issues may be further complicated by the lack of uniform regulation given the use of AI across territorial borders. Whilst many of the observations above relate to concerns and practices in jurisdictions outside Australia, in practice these activities are often being conducted across borders due to the global nature of the international marketplace. In the Parts below, this article considers the impact of AI technology on consumers in the Australian context.

III DIGITAL PLATFORMS: THE COLLECTION AND USE OF CONSUMER DATA

A *The Power of Digital Platforms: The Digital Platforms Inquiry*

The exploitation and monetisation of consumers' data by technology companies has been widely acknowledged,[35] identifying concerns about the misuse of consumer

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[30]   Maria Averina, 'How Artificial Intelligence Can Impact Your Consumer Habits', *Society30* (Blog Post, 15 September 2019) <https://society30.com/how-artificial-intelligence-can-impact-your-consumer-habits/>.

[31]   Karen Yeung, 'Five Fears about Mass Predictive Personalization in an Age of Surveillance Capitalism' (2018) 8(3) *International Data Privacy Law* 258, 259.

[32]   Ibid 258–9.

[33]   Ibid 261.

[34]   Ibid.

[35]   See, eg: Cesare Fracassi and William Magnuson, 'Data Autonomy' (2021) 74(2) *Vanderbilt Law Review* 327; Stuart A Thompson and Charlie Warzel, 'Twelve Million Phones, One Dataset, Zero Privacy', *The New York Times* (online, 19 December 2019) <https://www.nytimes.com/interactive/2019/12/19/opinion/location-tracking-cell-phone.html>; Sam Schechner and Mark Secada, 'You Give Apps Sensitive Personal Information. Then They Tell Facebook', *The Wall Street Journal* (online, 22 February

data. There have been a significant number of large-scale and damaging data breaches over the past few years which have exposed the personal information of billions of people,[36] illustrating the detrimental effect of mismanagement of personal data, especially where AI driven technology is applied. The business model of these digital platforms which provide 'free' services, where access is exchanged for personal data, has been labelled a 'critical' issue.[37] For AI technology to function efficiently, mass amounts of data are generally required to support marketable services such as consumer behaviour analysis, which may result in significant data privacy risks for consumers.

Recently, the ACCC found that the growth of today's leading digital platforms can be explained by

> a number of distinct contributing factors, including:
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> •   the transition of communications to the online world, and the rapid increase in the number of internet users in the past two decades;
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> •   the innovative, user-friendly services the platforms provide;
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> •   the role of network effects in building scale in platform user bases;
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> •   the ability of digital platforms to collect and harness user data for advertising purposes; and
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> •   the vertical and horizontal integration of platform businesses.[38]

The *Digital Platforms Inquiry* ('*DPI*'), conducted by the ACCC in 2019 and resulting in the *DPI Final Report*, examined the role and impact of digital platforms, including anti-competitive conduct, privacy concerns, copyright issues, the scope and scale of user information collected by platforms, and the risk of exploitation of consumer vulnerabilities.[39] The scope of the report was limited to digital search engines, social media platforms and other digital content aggregation platforms with its interrogation

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2019) <https://www.wsj.com/articles/you-give-apps-sensitive-personal-information-then-they-tell-facebook-11550851636>; Geoffrey A Fowler, 'I Found Your Data. It's for Sale', *The Washington Post* (online, 18 July 2019) <https://www.washingtonpost.com/technology/2019/07/18/i-found-your-data-its-sale/>; Carly Minsky, 'Is Consumer Protection Legislation Fit for Purpose?', *Financial Times* (online, 19 November 2019) <https://www.ft.com/content/3901dd14-ca55-11e9-af46-b09e8bfe60c0>.

36   Fracassi and Magnuson (n 35) 358; Saima Salim, 'The 21 Biggest Data Breaches of 2018', *Digital Information World* (online, 19 December 2018) <https://www.digitalinformationworld.com/2018/12/biggest-data-breaches-of-2018.html>.

37   Terry Flew, 'Platforms on Trial' (2018) 46(2) *InterMEDIA* 24, 27.

38   Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 43.

39   Ibid 1.

squarely focused on Google and Facebook,[40] both being prolific users of AI driven technology. The ACCC viewed Google and Facebook's access to personal data as constituting a significant competitive advantage, emphasising 'the volume, quality, granularity, and diversity of such data',[41] which allows these companies to generate revenue and thus offer their services for free. It has been stated that large platforms such as Google and Facebook are becoming increasingly central to media and information ecosystems,[42] and that the dominance of these digital platforms has 'rendered doing business with them unavoidable for news businesses, in contrast to, say, Bing or Twitter'.[43]

One of the key findings of the *DPI Final Report* was that digital platforms generate their revenue primarily from advertising, generally by collecting and harnessing user data to capture user attention.[44] This 'highly-targeted advertising' is precipitated by the platforms' large scale data collection practices.[45] The report also identified a lack of transparency around the collection and use of consumer personal data which led to a lack of choice regarding the use of such data by these platforms, particularly the ability of these platforms to sell data to third parties.[46] One of the points emphasised by the ACCC in its report was that Google and Facebook do not compete in a dynamically competitive market and that their position in the market raises a barrier to entry for new rivals or the expansion of any existing ones.[47] This limits consumers' choice of providers of the services Google and Facebook supply as well as their ability to choose more privacy-focused services — especially because these services operate largely as a result of the 'network effect' created by data sharing between organisations.

B *Use of Personal Data and Privacy Concerns*

The *DPI Final Report* identified privacy as a major area of concern in the use of consumers' personal information and data.[48] In particular, it was found that many consumers want to be able to opt out of certain types of data practices and that, while some digital platforms give consumers the impression that they provide extensive privacy controls, not all of them afford consumers meaningful control

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40   Ibid; Caron Beaton-Wells, 'Ten Things to Know about the ACCC's Digital Platforms Inquiry' (Research Paper No 834, Melbourne Legal Studies Research Papers Series, 13 August 2019) 2.

41   Beaton-Wells (n 40) 6.

42   Terry Flew and Derek Wilding, 'The Turn to Regulation in Digital Communication: The ACCC's Digital Platforms Inquiry and Australian Media Policy' (2021) 43(1) *Media, Culture and Society* 48, 49.

43   Ibid 50.

44   Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 43.

45   Ibid 46.

46   Beaton-Wells (n 40) 8.

47   Ibid 6.

48   Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 374.

over the collection, use and disclosure of their data.[49] As consumers have become more knowledgeable about the use of 'web cookies' tracking their usage,[50] digital platforms have broadened their development and use of other online tracking technologies such as web beacons or pixel tags, device or browser fingerprinting, facial recognition, mobile device tracking, cross-device tracking, and audio beaconing.[51] In a previous ACCC survey it was found that more than three in four digital platform users surveyed (77%) regarded the tracking of their online behaviour as a misuse of their personal information if it was used to create profiles or enable targeted advertising,[52] yet many consumers are unaware of the extent to which their personal data is being tracked. Significantly, the ACCC found that

> the existing Australian regulatory framework for the collection, use and disclosure of user data and personal information does not effectively deter certain data practices that exploit the information asymmetries and bargaining power imbalances between digital platforms and consumers.[53]

The report has highlighted the need for regulation to address these issues and protect consumers; however, regulators should guard against over-regulation which may limit the broader application of AI technologies, with some commentators suggesting a more 'holistic' regulatory approach.[54] Samsom Esayas and Dan Svantesson have noted that there has been increased attention on data privacy with some literature suggesting that data be considered as part of competition policy, and that '[o]ne approach gaining traction is to factor in data privacy as a non-price competition parameter'.[55]

Currently there is no right to privacy in Australia, which has contributed to the debate regarding regulation of data use.[56] Data privacy is regulated by the Australian

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[49]   Ibid.

[50]   Web cookies are a means for internet web browsers to track, personalise, and save information about each user's session, and are used to identify a user's computer when using a computer network: see *Macquarie Dictionary* (online at 7 September 2021) 'cookie' (def 3a).

[51]   Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 388–9.

[52]   Rebecca Varley and Neha Bagga, *Consumer Views and Behaviours on Digital Platforms* (Final Report, November 2018) 21 <https://www.accc.gov.au/system/files/ACCC%20consumer%20survey%20-%20Consumer%20views%20and%20behaviours%20on%20digital%20platforms%2C%20Roy%20Morgan%20Research.pdf>.

[53]   Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 374.

[54]   Samson Esayas and Dan Svantesson, 'Digital Platforms under Fire: What Australia Can Learn from Recent Developments in Europe' (2018) 43(4) *Alternative Law Journal* 275, 276.

[55]   Ibid 279.

[56]   Gerard Goggin et al, 'Data and Digital Rights: Recent Australian Developments' (2019) 8(1) *Internet Policy Review* 1, 6.

Privacy Principles ('APPs'),[57] which apply to any organisation or agency covered by the *Privacy Act 1988* (Cth) ('*Privacy Act*'), including government agencies and certain large or industry specific organisations. The 13 APPs govern standards, rights and obligations around: 'the collection, use and disclosure of personal information'; 'an organisation or agency's governance and accountability'; 'integrity and correction of personal information'; and 'the rights of individuals to access their personal information'.[58] Although the APPs regulate the use of personal information by certain large organisations, there is no provision for individuals to sue for breach of any of these principles, and it has been suggested that privacy and data protection in Australia is being addressed at a legislative level 'in a piecemeal way'.[59] Consumers are limited to the right to complain to the relevant organisation and then to the Office of the Australian Information Commissioner.[60]

C *The Consumer Data Right Legislation*

In addition to digital platforms such as Google and Facebook, financial technology companies in particular have been identified as '[u]sing a combination of big data, artificial intelligence and mobile computing' to become more efficient providers,[61] which may impact on consumers' ability to control their data. In Australia, the Commonwealth government has introduced the *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth) — commonly known as Consumer Data Right ('CDR') legislation — with a view to ensuring that consumers own their data.[62] Consumer data rights are rights of consumers to direct a supplier (such as their bank) to share information held about themselves with other suppliers for the purposes that they have authorised.[63] The legislation was the result of the Commonwealth government's *Review into Open Banking* in 2017,[64] and the Productivity Commission's report on *Data Availability and Use*,[65] which found that there was exponential growth in data and its use in the digital economy which put existing data protection frameworks in

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[57]   See: *Privacy Act 1988* (Cth) sch 1; 'Australian Privacy Principles', *Office of the Australian Information Commissioner* (Web Page) <https://www.oaic.gov.au/privacy/australian-privacy-principles> ('APP').

[58]   APP (n 57).

[59]   Goggin et al (n 56) 8.

[60]   Ibid 6.

[61]   Fracassi and Magnuson (n 35) 332.

[62]   Ibid 371.

[63]   See 'Consumer Data Right', *Australian Government: The Treasury* (Web Page) <https://treasury.gov.au/consumer-data-right>.

[64]   Australian Government, *Review into Open Banking: Giving Customers Choice, Convenience and Confidence* (Report, December 2017) <https://treasury.gov.au/sites/default/files/2019-03/Review-into-Open-Banking-For-web-1.pdf>.

[65]   Productivity Commission (Cth), *Data Availability and Use* (Inquiry Report No 82, 31 March 2017) <https://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf>.

need of reform.[66] In particular, one of the conclusions of the report on the state of the banking sector in Australia and how consumer data rights can be implemented was that 'aggressive new regulation' was required.[67] The resulting CDR legislation effectively introduced a right for Australian consumers to control their data and have greater capacity to intervene in the growing data economy.[68]

Prior to the CDR legislation, the only legislation that regulated privacy and data protection in Australia was the *Privacy Act*. Australian law had previously only focused on protecting 'personal information' under the APPs, which was in contrast to the EU protection of 'personal data'.[69] The *Privacy Act* defines 'personal information' as 'information or an opinion about an identified individual, or an individual who is reasonably identifiable';[70] however, the definition was called into question after the decision in *Privacy Commissioner v Telstra Corporation Ltd*,[71] which ultimately made no specific determination about whether metadata could be included as personal information.[72] As noted below, the Australian approach in CDR regulation of data now aligns with the European framework in relation to data rights, allowing Australian consumers to control their data in the marketplace.[73]

Although the CDR is intended to apply a framework to the entire Australian economy (whereas the EU approach is sector by sector),[74] it has been determined that the CDR will first apply to the banking sector, followed by the energy sector.[75] The telecommunications sector is currently proposed to follow after implementation of the CDR in the energy sector.[76] It has been noted that the CDR, while giving individuals the right to data portability, does not confer rights to privacy generally.[77] James Meese,

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66   Samson Yoseph Esayas and Angela Daly, 'The Proposed Australian Consumer Data Right: A European Comparison' (2018) 2(3) *European Competition and Regulatory Law Review* 187, 195, 200.

67   Fracassi and Magnuson (n 35) 371.

68   James Meese, Punit Jagasia and James Arvanitakis, 'Citizen or Consumer? Contrasting Australia and Europe's Data Protection Policies' (2019) 8(2) *Internet Policy Review* 1, 5.

69   Ibid 4.

70   *Privacy Act 1988* (Cth) s 6 (definition of 'personal information').

71   (2017) 249 FCR 24, which was decided on an earlier definition of personal information.

72   Ibid. In particular, the Court confirmed that assessing what is 'personal information' requires 'an evaluative conclusion, depending on the facts of any individual case' and that 'even if a single piece of information is not "about an individual" it might be about the individual when combined with other information': at 36 [63] (Kenny and Edelman JJ).

73   Meese, Jagasia and Arvanitakis (n 68) 5.

74   Ibid 6.

75   'Consumer Data Right', *Australian Competition and Consumer Commission* (Web Page) <https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0>.

76   Ibid.

77   Meese, Jagasia and Arvanitakis (n 68) 9.

Punit Jagasia, and James Arvanitakis have stated that '[w]hile there are privacy safeguards in place, the ultimate value of the reform is presumed to be generated through a consumer's greater purchasing power and ability to better choose between commercial competitors'.[78]

This is in contrast to the European *GDPR* which has protection of data privacy as its key focus, as a result of its fundamental human rights approach.[79] Therefore, the CDR remains limited in scope, and at the time of writing only applies to the Australian banking sector, where CDR measures are being implemented on a gradual basis.[80]

IV Consumer Protection in the Digital Environment

In 2018, the ACCC acknowledged that algorithms are 'fundamental to getting the most out of data and play a key role in how consumers benefit from the wealth of data now available', but also expressed concern about the impact of algorithms on the consumer experience.[81] It is not surprising, therefore, that a central focus of the *DPI* was to re-evaluate the protections provided to consumers by the *ACL* in relation to the current practices of digital platforms and other businesses, particularly those involving data collection and use.[82]

The *DPI Final Report* concluded that the *ACL* contains several effective tools for addressing business practices that may give rise to consumer protection issues in the digital marketplace.[83] Indeed, all businesses subject to the *ACL*, including those that operate online or utilise AI technology:

• are prohibited from engaging in conduct that is misleading or deceptive or is likely to mislead or deceive,[84] or from making false or misleading representations about their goods or services[85] (including incorrect or misleading statements about how user data is collected, used or shared);

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78   Ibid 11.

79   Humerick (n 25).

80   See Australian Competition and Consumer Commission, 'Consumer Data Right Goes Live for Data Sharing' (Media Release No 135/20, 1 July 2020) <https://www.accc. gov.au/media-release/consumer-data-right-goes-live-for-data-sharing>.

81   Australian Competition and Consumer Commission, 'ACCC to Further Increase Enforcement Work' (Media Release No 145/18, 3 August 2018) <https://www.accc. gov.au/media-release/accc-to-further-increase-enforcement-work>.

82   Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 498.

83   Ibid 436–7.

84   *ACL* (n 3) s 18. An intention to mislead is irrelevant to the contravention of s 18: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 216. The equivalent provision in respect of misleading or deceptive conduct concerning financial services is *ASIC Act* (n 3) s 12DA. A 'financial service' includes financial products: at s 12BAB(1AA).

85   *ACL* (n 3) ch 3 pt 3-1 div 1; *ASIC Act* (n 3) s 12DB.

- are prohibited from engaging in unconscionable conduct in connection with the supply or acquisition of goods or services;[86] and

- must comply with the unfair contract term provisions of the *ACL*[87] in respect of any consumer-facing terms of use and privacy policies (which the ACCC considers to be standard form contracts).[88]

By way of future-proofing the *ACL*, the focus of the *DPI Final Report* was on the tightening or introduction of *ACL* provisions dealing with unfair contract terms and unfair trading practices.[89] This Part considers those recommendations, but first examines a range of other issues that threaten to compromise the ability of consumers to make informed choices or expose them to exploitation in the digital environment.

A *Misleading Representations*

To date, the ACCC has enjoyed considerable enforcement success in targeting businesses which make false or misleading representations online, with the 'consumer watchdog' obtaining orders against defendant companies for, inter alia, pecuniary penalties,[90] injunctions,[91] corrective notices,[92] and review or implementation of compliance programs.[93]

Recent cases discussed below have involved breaches of ss 18, 29(1)(b), 29(1)(e), 29(1)(g), 29(1)(i), 34 of the *ACL*. Those provisions prohibit: misleading or deceptive conduct (s 18); false or misleading representations that services are of a particular standard, quality, value or grade (s 29(1)(b)); false or misleading representations that purport to be a testimonial by any person relating to goods or services (s 29(1)(e)); false or misleading representations that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits (s 29(1)(g)); false or misleading representations with respect to the price of goods or services (s 29(1)(i)); and conduct that is liable to mislead the public as to the nature or characteristics of any services (s 34).

For example, in *Australian Competition and Consumer Commission v Service Seeking Pty Ltd*,[94] the defendant company admitted to contraventions of ss 18, 29(1)(e) and

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[86] *ACL* (n 3) ch 2 pt 2-2; *ASIC Act* (n 3) ss 12CA, 12CB.

[87] *ACL* (n 3) ch 2 pt 2-3; *ASIC Act* (n 3) pt 2 div 2 sub-div BA.

[88] Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 437.

[89] Ibid.

[90] *ACL* (n 3) s 224. Currently, maximum penalties stand at $10 million, three times the benefit obtained from the breach, or 10% of annual turnover connected with Australia — whichever is higher.

[91] Ibid s 232.

[92] Ibid s 246(2)(d).

[93] Ibid s 246(2)(b).

[94] [2020] FCA 1040.

34 of the *ACL* in connection with its online tasking platform which allows customers to seek quotes for jobs — such as gardening, building or cleaning services — from businesses registered with the platform.[95] Specifically, Service Seeking admitted to falsely representing that thousands of reviews published on its platform were provided by customers, when in fact the reviews had been created by the businesses themselves.[96]

Similarly, in *Australian Competition and Consumer Commission v HealthEngine Pty Ltd*,[97] the defendant company admitted to breaches of ss 18, 29(1)(b), 29(1)(i), 34 of the *ACL* arising from the operation of its online healthcare directory. HealthEngine's online directory, which lists over 70,000 health practices and practitioners in Australia, allows prospective patients to search for and book appointments with health practitioners, and to access reviews from past patients about the quality and services provided by those practitioners.[98] However, HealthEngine admitted that it had declined to publish some 17,000 reviews, edited another 3,000 reviews to remove negative comments or add positive ones, and misrepresented to consumers the reasons why it had not published reviews for some health practices.[99] The company also admitted that it gave non-clinical personal information (eg, names, dates of birth, phone numbers and email addresses) of over 135,000 patients to third party private health insurance brokers without adequately disclosing this to consumers.[100] In this case, in addition to orders that HealthEngine pay a pecuniary penalty and review its compliance program, the company was also ordered to contact affected consumers to provide details of how they could regain control of their personal information.[101]

Interestingly, in the wake of key findings in the *DPI Final Report* that Google and Facebook hold substantial market power in the markets for online search services (including search advertising) and social media services (including display advertising),[102] the ACCC is vigorously challenging the conduct of these dominant platforms in Australia. For instance, in *Australian Competition and Consumer Commission v Google LLC [No 2]*,[103] the ACCC accused Google of misleading consumers in 2017–18 about the way it collected, kept, and used location data when certain Google account settings were enabled or disabled. The essence of the ACCC's argument was that Google had not properly disclosed that both the 'Location History' and 'Web & App Activity' settings had to be switched off if consumers did not want Google to collect, keep, and use their location data, and consequently that Google had dealt

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95   Ibid [1]–[3] (Jackson J).

96   Ibid.

97   [2020] FCA 1203.

98   Ibid [1]–[2] (Yates J).

99   Ibid.

100 Ibid [5].

101 Ibid [6]–[8].

102 Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 8–9.

103 [2021] FCA 367 ('*Google [No 2]*').

with this highly sensitive and valuable personal information without consumers consciously choosing to share their location data with Google.[104] In a decision hailed by the ACCC as 'a world-first' in consumer protection enforcement,[105] Thawley J found that Google's conduct contravened ss 18, 29(1)(g), 34 of the *ACL*.[106]

The ACCC has also launched proceedings against Google alleging it misled consumers regarding its use of their personal information online, including, in particular, on third party websites, in order to enhance the provision of targeted advertising to them.[107] The conduct in question involves a purported failure by Google to properly inform consumers, and obtain their explicit consent, when, in 2016, it began combining personal information in consumers' Google accounts with information relating to their activities on non-Google websites that used Google technology.[108]

In addition, the ACCC has instituted proceedings against Facebook for allegedly misleading consumers during 2016–17 by promoting and offering for free download the 'Onavo Protect' application as a secure means of managing their mobile data use.[109] While Facebook's representation that the virtual private network ('VPN') service provided by Onavo Protect would keep users' personal activity data 'private, protected and secret' is consistent with the general nature of VPNs, other critical information was not shared with consumers according to the ACCC.[110] Specifically, the ACCC is contending that Facebook failed to disclose that Onavo Protect also collected and aggregated significant amounts of users' data (such as records of every app they accessed and the amount of time spent using those apps) to support Facebook's own commercial purposes in identifying potential acquisition targets, thereby depriving consumers of the opportunity to make an informed

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104   Ibid [2] (Thawley J).

105   Australian Competition and Consumer Commission, 'Google Misled Consumers about the Collection and Use of Location Data' (Media Release No 47/21, 16 April 2021) <https://www.accc.gov.au/media-release/google-misled-consumers-about-the-collection-and-use-of-location-data>.

106   *Google [No 2]* (n 103) [330]–[332].

107   Australian Competition and Consumer Commission, 'Correction: ACCC Alleges Google Misled Consumers about Expanded use of Personal Data' (Media Release No 152/20, 27 July 2020) <https://www.accc.gov.au/media-release/correction-accc-alleges-google-misled-consumers-about-expanded-use-of-personal-data>.

108   Ibid.

109   Australian Competition and Consumer Commission, 'ACCC Alleges Facebook Misled Consumers when Promoting App to "Protect" Users' Data' (Media Release No 272/20, 16 December 2020) <https://www.accc.gov.au/media-release/accc-alleges-facebook-misled-consumers-when-promoting-app-to-protect-users-data#:~:text=Articles-,ACCC%20alleges%20Facebook%20misled%20consumers%20when,to%20'protect'%20users'%20data&text=The%20ACCC%20has%20instituted%20proceedings,mobile%20app%20to%20Australian%20consumers>.

110   Ibid.

choice about the collection and use of their personal activity data by Facebook and Onavo Protect.[111]

B *Comparison Websites*

Comparison websites are intended to provide consumers with a convenient means of comparing deals offered by competing businesses,[112] but concerns continue to be expressed about whether the representations on these websites are based on price and consumer benefit, or on commissions.[113] In keeping with the discussion in the preceding section, the *ACL* is well equipped to deal with misleading or deceptive conduct, and/or false or misleading representations, on the part of these websites. This is evidenced by the recent decision in *Trivago NV v Australian Competition and Consumer Commission*,[114] where the Full Court of the Federal Court held that the hotel comparison website, Trivago, had misled consumers about cheap hotel room rates, both on its website and in television advertising, in contravention of ss 18, 29(1)(i), 34 of the *ACL*.[115]

In upholding the findings of Moshinsky J at first instance,[116] the Full Court unanimously agreed that Trivago had misled consumers by representing that its website would quickly and easily identify the cheapest rates available for a hotel room in response to a user's search when, in fact, Trivago often did not rank hotel rooms based on the cheapest rates, but primarily prioritised rankings based on which hotels paid it the highest 'cost-per-click' fee.[117] In their Honours' joint judgment, Middleton, McKerracher and Jackson JJ also held that Trivago's hotel room rate comparisons, displayed through the use of strike-through prices or text in different colours, misrepresented that the comparison was between prices offered for the same room category in the same hotel when, in fact, the comparison was often between prices offered for a standard room and a luxury room at the same hotel, thereby creating a false

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111   Ibid.

112   Australian Competition and Consumer Commission, *The Comparator Website Industry in Australia: An Australian Competition and Consumer Report* (Report, November 2014) 1 <https://www.accc.gov.au/system/files/926_Comparator%20 website%20industry%20in%20Australia%20report_FA.pdf>.

113   Ibid 17–19. See also Australian Competition and Consumer Commission, 'ACCC to Further Increase Enforcement Work' (Media Release No 145/18, 3 August 2018) <https:// www.accc.gov.au/media-release/accc-to-further-increase-enforcement-work>.

114   (2020) 384 ALR 496 566–7 [278]–[282] ('*Trivago v ACCC*').

115   Ibid [2]–[3] (Middleton, McKerracher and Jackson JJ).

116   *Australian Competition and Consumer Commission v Trivago NV* (2020) 142 ACSR 338.

117   *Trivago v ACCC* (n 114) [220]–[221] (Middleton, McKerracher and Jackson JJ). Trivago operated its business such that it was paid by the featured hotels for each click it generated for them. This incentivised Trivago to promote the hotels that paid the highest amount per click, as opposed to those that provided the best value for customers.

impression of savings.[118] Finally, their Honours found that Trivago had misled the public to believe that its website provided an impartial, objective and transparent price comparison service in circumstances where it was not made clear to consumers that Trivago was receiving a 'cost-per-click' fee.[119]

In commenting on the decision at first instance, the ACCC said the case

> sends a strong message to comparison websites and search engines that if ranking or ordering of results is based or influenced by advertising, they should be upfront and clear with consumers about this so that consumers are not misled.[120]

Importantly, the case establishes that the *ACL*'s existing provisions are capable of applying to AI technology use, at least as long as the algorithms are easily identifiable or able to be understood.[121]

In another recent case, *Australian Competition and Consumer Commission v iSelect Ltd*,[122] the defendant company admitted liability under ss 18, 29(1)(g), 29(1)(i), 34 of the *ACL* for making false or misleading representations about the retail electricity comparison service offered through its commercial price comparison website.[123] Significantly, under iSelect's business model, the company does not charge consumers for use of its comparison service; rather, it is paid fees and commissions by its partner retailers when consumers who have used the comparison service purchase an energy plan through iSelect.

iSelect represented on its website that it would compare all electricity plans offered by its retail partners and recommend the most suitable or competitive plan.[124] However, the company admitted that it did not compare all available plans, did not necessarily recommend the most competitive plan, and did not disclose on its website that cheaper plans were available via its call centre.[125] iSelect also admitted that it had misrepresented the price of some of the plans it recommended to approximately

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118   Ibid [257].

119   Ibid [268].

120   Australian Competition and Consumer Commission, 'Trivago Misled Consumers about Hotel Room Rates' (Media Release No 4/20, 21 January 2020) <https://www.accc.gov.au/media-release/trivago-misled-consumers-about-hotel-room-rates>. See also Australian Competition and Consumer Commission, 'Trivago Loses Appeal after Misleading Consumers over Hotel Ads' (Media Release No 235/20, 4 November 2020) <https://www.accc.gov.au/media-release/trivago-loses-appeal-after-misleading-consumers-over-hotel-ads>.

121   Nathan Feiglin, 'Algorithmic Collusion and Scrutiny: Examining the Role of the ACCC's Information Gathering Powers in the Digital Era' (2020) 43(4) *University of New South Wales Law Journal* 1137, 1143.

122   [2020] FCA 1523.

123   Ibid [4] (Moshinsky J).

124   Ibid [8].

125   Ibid [10].

5,000 consumers due to a coding error which caused it to underestimate the cost of those plans by up to $140 per quarter.[126]

Trumpeting the AUD8.5 million pecuniary penalty imposed on iSelect by the Federal Court,[127] the ACCC said the case served as a salutary reminder that comparison websites must 'make it very clear if their recommendations are influenced or limited by commercial relationships' and showed that comparison websites have a responsibility to ensure 'their algorithms are correct' and to implement 'measures to prevent incorrect recommendations'.[128]

C *Personalised Pricing*

AI technology and sophisticated pricing algorithms enable businesses to mine and process vast quantities of consumer data (address, family, job, income, search history, spending habits, and more) and to set different prices for different consumers based on what the business thinks they are willing to pay.[129] This practice, known as 'personalised pricing', is simply price discrimination disguised by another name.[130] The concept is not a new one — gender-based pricing, such as charging different rates for male and female haircuts, is a longstanding example of price discrimination.[131] However, algorithms and big data create the potential for firms to 'hyper' discriminate by relying on extremely detailed information about consumers' characteristics and conduct, even moments of so-called 'willpower fatigue', to build user profiles that incorporate the likely 'reservation price' (ie, the upper limit of willingness to pay) of those consumers.[132] Uber, for instance, has acknowledged its use of

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126   Ibid [12], [53].

127   Australian Competition and Consumer Commission, 'iSelect to Pay $8.5 Million for Misleading Consumers Comparing Energy Plans' (Media Release No 211/20, 8 October 2020) <https://www.accc.gov.au/media-release/iselect-to-pay-85-million-for-misleading-consumers-comparing-energy-plans>.

128   Ibid.

129   Australian Competition and Consumer Commission, *DPSI Interim Report* (n 6) 101.

130   Ibid.

131   'Can Robots Collude?', *Gilbert + Tobin* (Web Page, 16 November 2017) <https://www.gtlaw.com.au/insights/can-robots-collude>. Another common example is differential pricing in fast-food chains depending on the areas in which particular stores are located.

132   Maurice E Stucke and Ariel Ezrachi, 'How Digital Assistants Can Harm Our Economy, Privacy, and Democracy' (2017) 32(3) *Berkeley Technology Law Journal* 1239, 1264; Kayleen Manwaring, 'Will Emerging Information Technologies Outpace Consumer Protection Law? The Case of Digital Consumer Manipulation' (2018) 26(2) *Competition and Consumer Law Journal* 141, 145; Rhonda L Smith and Arlen Duke, 'Inequality and Competition Law' (2019) 27(1) *Competition and Consumer Law Journal* 1, 18.

'machine-learning techniques to estimate how much groups of customers are willing to shell out for a ride'.[133]

There is no provision in the *CCA* or *ACL* explicitly prohibiting personalised pricing.[134] However, there are circumstances in which the practice may raise issues for consumers,[135] for instance: where a business falsely represents that all consumers visiting a particular website will be offered the same prices for the same products;[136] or where a business is alleged to have acted unconscionably by using pricing algorithms to discriminate against vulnerable or disadvantaged consumers on the basis of real or perceived attributes 'relating to neighbourhoods, housing, job security, health and payment capacity'.[137]

With personalised pricing said to be prevalent online,[138] there is some irony in the fact that consumers concerned about the practice may find it is also AI technology — in the form of comparison websites, as discussed above — which offers the best opportunity of evening the scales. Algorithms may be used to determine the highest price a consumer is willing to pay, but they can also be used to find the lowest price at which a business is prepared to sell.[139]

D Search Engines

The way in which information and advertising is displayed in response to search queries on search engine results pages is attracting current scrutiny.[140] Given its 95% share of the market for general search services in Australia, this scrutiny is directed primarily at Google.[141] Google's approach is to present search results as 'organic results', which are the most relevant results for the search query according to its

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[133] Eric Newcomer, 'Uber Starts Charging What It Thinks You're Willing to Pay', *BloombergQuint* (online, 19 May 2017) <https://www.bloombergquint.com/markets/uber-s-future-may-rely-on-predicting-how-much-you-re-willing-to-pay>. See also Rangika Palliyaarachchi and Kanchana Kariyawasam, 'The Rise of Uber and Airbnb: The Future of Consumer Protection and the Sharing Economy' (2021) 28(1) *Competition and Consumer Law Journal* 1, 22–3.

[134] Australian Competition and Consumer Commission, *DPSI Interim Report* (n 6) 103.

[135] Such issues may include competition concerns arising from AI-led forms of pricing strategy. See below Part V for relevant discussion.

[136] Australian Competition and Consumer Commission, *DPSI Interim Report* (n 6) 103.

[137] Kate Mathews-Hunt, 'CookieConsumer: Tracking Online Behavioural Advertising in Australia' (2016) 32(1) *Computer Law and Security Review* 55, 66.

[138] Stucke and Ezrachi (n 132) 1264.

[139] Feiglin (n 121) 1142–3.

[140] Australian Competition and Consumer Commission, *DPSI Interim Report* (n 6) 62.

[141] Ibid.

algorithm (noting that businesses do not pay Google to appear in this category), and 'sponsored results' (ie, advertisements) for which Google has been paid.[142]

1 *Google Case*

Google's practices regarding search results first attracted the attention of the ACCC 10 years ago,[143] culminating in the High Court's decision in *Google Inc v Australian Competition and Consumer Commission*.[144] The case related to 'sponsored links' (as they were then known) that appeared on Google's search page in response to user queries. At the time, traders were able to add their competitors' names to Google's advertising algorithm ('AdWords'), to ensure that when a consumer searched for 'Harvey World Travel', for example, a sponsored link to 'STA Travel' would appear at the top of the search results under the headline 'Harvey Travel'.[145] The ACCC claimed that the sponsored links were misleading or deceptive because the link led to the advertiser's webpage rather than the webpage of the competitor whose trading or product name actually featured in the headline.[146]

In the Federal Court, Nicholas J rejected the ACCC's claim that Google had failed to differentiate between its organic search results and sponsored links, finding that ordinary and reasonable consumers who access the internet would have understood that sponsored links were advertisements and therefore different to Google's organic search results.[147] Turning to the 11 sponsored links in dispute in the case, his Honour determined that four were misleading or deceptive — the STA Travel advertisements, the Carsales advertisements, the Ausdog advertisement, and the Trading Post advertisement[148] — and that the first respondent, Trading Post Pty Ltd, one of the advertisers, was liable accordingly.[149] However, Nicholas J held that no liability attached to Google as ordinary and reasonable members of the relevant class of consumers would have understood that the search engine had not 'endorsed or

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142   A Daly and A Scardamaglia, 'Profiling the Australian Google Consumer: Implications of Search Engine Practices for Consumer Law and Policy' (2017) 40(3) *Journal of Consumer Policy* 299, 302.

143   *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498 ('*ACCC v Trading Post*').

144   (2013) 249 CLR 435 ('*Google v ACCC*').

145   Ibid 448–9 [25]–[26], 451 [35] (French CJ, Crennan and Kiefel JJ).

146   Ibid 442 [3] (French CJ, Crennan and Kiefel JJ); *ACCC v Trading Post* (n 143) 520 [85] (Nicholas J). The action was brought under *Trade Practices Act 1974* (Cth) s 52, the predecessor provision to s 18 of the *ACL* (n 3): *ACCC v Trading Post* (n 143) 502 [1] (Nicholas J).

147   *ACCC v Trading Post* (n 143) 536 [169], [173].

148   Ibid 550–1 [237] (STA Travel); 554 [251] (Carsales); 567 [317]–[318] (Ausdog); 572–3 [341]–[342] (Trading Post).

149   Ibid 575 [354].

adopted' any of the sponsored links, but was merely 'passing on' the advertising message.[150]

In the appeals that followed, the only question in issue was whether Google had itself engaged in misleading or deceptive conduct by displaying the sponsored links.[151] Notably, the ACCC did not challenge the trial judge's finding that ordinary and reasonable users of Google's search engine would have understood the difference between sponsored links and organic results,[152] nor did Google dispute the findings at first instance that four of the sponsored links were misleading or deceptive.[153]

The Full Court of the Federal Court unanimously held that Google had engaged in misleading or deceptive conduct,[154] reasoning that the search query had been 'made of Google and it is Google's response which is misleading'.[155] The High Court unanimously reversed the Full Court's decision, holding, as the trial judge did, that Google had not engaged in misleading or deceptive conduct.[156] Chief Justice French, Crennan and Kiefel JJ concluded that 'Google did not author the sponsored links; it merely published or displayed, without adoption or endorsement, misleading representations made by advertisers'.[157]

According to the ACCC, what is important about its case against Google is that four of the sponsored links were misleading, that the traders who used Google's AdWords algorithm to create those misleading links contravened Australia's consumer laws, and that Google subsequently ensured the practice no longer occurred.[158]

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[150] Ibid 542 [194].

[151] *Australian Competition and Consumer Commission v Google Inc* (2012) 201 FCR 503, 504–5 [2] (Keane CJ, Jacobson and Lander JJ) ('*ACCC v Google*'); *Google v ACCC* (n 144) 441 [1] (French CJ, Crennan and Kiefel JJ).

[152] *Google v ACCC* (n 144) 462–3 [81] (Hayne J). Daly and Scardamaglia have criticised this finding on the basis that it was made 'without reference to any actual evidence of Australian Internet users, their habits and their understanding of how Google operates and how it generates different kinds of search results': Daly and Scardamaglia (n 142) 305.

[153] *Google v ACCC* (n 144) 462–3 [81] (Hayne J).

[154] *ACCC v Google* (n 151) 524 [104] (Keane CJ, Jacobson and Lander JJ).

[155] Ibid 522 [93].

[156] *Google v ACCC* (n 144) 460 [73] (French CJ, Crennan and Kiefel JJ), 474 [124] (Hayne J), 491 [166] (Heydon J).

[157] Ibid 442 [3] (French CJ, Crennan and Kiefel JJ). Justice Heydon took the same position: at 481 [146]. Justice Hayne found that consumers 'would not understand Google to be making the representations which the trial judge found to be misleading or deceptive': at 463 [82].

[158] Sims (n 5).

2 *Increased Prominence of Non-Organic Search Results*

The renewed interest in how Google's search results are presented stems from recent research suggesting that non-organic search results (including sponsored results) now constitute an increasing proportion of overall search results at the expense of organic search results.[159] This phenomenon has been exacerbated by a growing difficulty in differentiating between organic and sponsored results, which has increased the propensity for users to click on the latter links (ie, rarely is a sponsored link identified with any prominence and in such a format that it is clearly distinguished from organic search results), thereby further contributing to the 'crowding out' of organic traffic.[160]

Websites are incentivised to be positioned as highly as possible on a search engine results page because consumers are known to focus their attention on the highest ranking search results,[161] especially the top three or four results.[162] This behaviour is even more pronounced on mobile devices.[163]

Accordingly, for businesses seeking to reach consumers online (ie, through Google Search), shifts in the balance of sponsored and organic results may lead to businesses spending more heavily on search advertising, further entrenching the presence of sponsored results.[164] This increased expenditure could harm businesses that would ordinarily use the funds for other purposes, potentially reducing their competitiveness. It could also result in consumer harm. If businesses spend more on search advertising, rather than relying on organic results, then eventually this can be expected to be passed on to consumers in the form of higher prices.[165] Moreover, exposing consumers to fewer organic results also arguably reduces the level of choice made available to them.[166]

E *Unfair Contract Terms*

The *DPI Final Report* found that bargaining power imbalance in the relationship between consumers and digital platforms means that many consumers have no real

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[159]   Jan Krämer and Oliver Zierke, 'Paying for Prominence: The Effect of Sponsored Rankings on the Incentives to Invest in the Quality of Free Content on Dominant Online Platforms', *SSRN* (Article, 24 April 2020) 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3584371>.

[160]   Australian Competition and Consumer Commission, *DPSI Interim Report* (n 6) 66.

[161]   Ibid 64.

[162]   Competition & Markets Authority (UK), *Online Search: Consumer and Firm Behaviour* (Report, 7 April 2017) 86 [6.6(a)] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/607077/online-search-literature-review-7-april-2017.pdf>.

[163]   Australian Competition and Consumer Commission, *DPSI Interim Report* (n 6) 65.

[164]   Ibid 67.

[165]   Ibid.

[166]   Ibid 68.

choice but to join or use these platforms and accept the terms of use offered.[167] Moreover, this imbalance allows digital platforms to include potentially unfair terms in their standard form contracts with consumers (or small businesses) via terms of use or privacy policies.[168]

Part 2-3 of ch 2 of the *ACL* ('unfair contract terms')[169] specifies that a 'standard form contract' — effectively a contract prepared in advance by a supplier[170] — will qualify as a 'consumer contract' if it involves the sale of goods, services or land to an individual predominantly for their personal, domestic or household use or consumption,[171] or as a 'small business contract' if the sale is to a business employing fewer than 20 persons and the upfront price payable under the contract does not exceed $300,000 (or $1 million if the contract has a duration of more than 12 months).[172] A term of such a contract will be 'unfair' if it causes a significant imbalance in the parties' rights or obligations under the contract, is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, and would cause detriment to a party if it were to be applied.[173]

However, it is not currently a contravention of the *ACL* to include unfair terms in standard form contracts, meaning that no penalties can be sought for this conduct per se. At the time of writing, if a particular term is declared unfair, it is simply void[174] —hence the ACCC's concerns that the existing unfair contract terms regime does not provide sufficient deterrence.[175]

For this reason, the *DPI Final Report* recommended that the *ACL* be amended so that the inclusion of unfair terms in standard form consumer or small business contracts would be prohibited and attract the imposition of pecuniary penalties in order to increase the deterrent effect of the law.[176] The recommendation has implications on an economy-wide scale for all businesses that deal with consumers and small businesses, not simply those that operate on digital platforms. In responding to this

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[167]   Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 400.

[168]   Ibid 497.

[169]   See also *ASIC Act* (n 3) pt 2 div 2 sub-div BA.

[170]   Ibid s 12BK; *ACL* (n 3) s 27.

[171]   *ACL* (n 3) s 23(3); *ASIC Act* (n 3) s 12BF(3).

[172]   *ACL* (n 3) s 23(4); *ASIC Act* (n 3) s 12BF(4). The note to s 12BF of the *ASIC Act* (n 3) extends the application of the relevant provisions to 'insurance contracts'.

[173]   *ACL* (n 3) s 24(1); *ASIC Act* (n 3) s 12BG(1).

[174]   *ACL* (n 3) s 23(1); *ASIC Act* (n 3) s 12BF(1). However, this is now changing: see below nn 178–82 and accompanying text.

[175]   Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 441.

[176]   Ibid 497.

recommendation, the Commonwealth government undertook to consult on a range
of policy options to strengthen the unfair contract term protections in the *ACL*.[177]

On 9 November 2020, following a lengthy public consultation process, the Common-
wealth government published a *Regulation Impact Statement*, proposing significant
reforms to the existing unfair contract terms regime.[178] Key reforms included making
unfair contract terms unlawful and giving courts the power to impose pecuniary
penalties up to the maximum set out under the *ACL*,[179] and creating a rebuttable
presumption that a contract term is unfair if the same or a substantially similar
term has previously been used by the same entity or in the same industry sector and
declared by a court to be unfair.[180] In the latter scenario, the term will be presumed
to be unfair unless the contract-issuing party is able to adduce evidence to demon-
strate why it was not unfair in the particular circumstances of the case.[181] Exposure
draft legislation to give effect to these reforms was released by the Commonwealth
government on 23 August 2021.[182]

F *Unfair Trading Practices*

During the course of the *DPI*, the ACCC identified a range of business practices that
it considers cause significant detriment to consumers, but which do not fit neatly
within the existing provisions of the *ACL*.[183] These practices evolved in conjunc-
tion with the significant growth in the amount and variety of consumer data being
collected, and increased sophistication in data analysis that allows for even greater
targeting of consumers by businesses.[184] The practices in question include

- businesses collecting and/or disclosing consumer data without express informed
  consent;

- businesses failing to comply with reasonable data security standards, including
  failing to put in place appropriate security measures to protect consumer data;

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[177]   Australian Government, *Regulating in the Digital Age: Government Response and
        Implementation Roadmap for the Digital Platforms Inquiry* (Report, 2019) 19 <https://
        treasury.gov.au/sites/default/files/2019-12/Government-Response-p2019-41708.pdf>
        ('*Regulating in the Digital Age*').

[178]   Department of the Treasury (Cth), *Enhancements to Unfair Contract Term Protec-
        tions: Regulation Impact Statement for Decision* (Impact Statement, September 2020)
        <https://treasury.gov.au/publication/p2020-125938> ('*Regulation Impact Statement*').

[179]   Ibid 6.

[180]   Ibid 6–7.

[181]   Ibid 7.

[182]   Treasury Laws Amendment (Measures for a Later Sitting) Bill 2021 (Cth): Unfair
        Contract Terms Reforms (Exposure Draft, 23 August 2021) <https://treasury.gov.au/
        sites/default/files/2021-08/c2021-201582_edl.pdf>.

[183]   Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 498.

[184]   Ibid.

- businesses unilaterally changing the terms on which goods or services are provided to consumers without reasonable notice, and without the ability for the consumer to consider the new terms, including in relation to subscription products and contracts that automatically renew;

- businesses inducing consumer consent to data collection and use by relying on long and complex contracts, or all or nothing click wrap consents, and providing insufficient time or information to enable consumers to properly consider the contract terms; and

- business practices that seek to dissuade consumers from exercising their contractual or other legal rights, including requiring the provision of unnecessary information in order to access benefits.[185]

Accordingly, the *DPI Final Report* recommended that the *ACL* be amended to include a general prohibition of unfair trading practices, noting that similar laws apply in other jurisdictions such as the United States and the EU.[186] In the ACCC's view, this is critical to addressing the problematic business practices listed above.[187]

This would be a new provision in Australia and the ACCC has recommended that the scope of any such prohibition 'be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance'.[188] At a minimum, it is expected that the new prohibition would

- protect both consumers and small businesses;

- operate in addition to existing protections, including the prohibitions against unconscionable conduct and misleading or deceptive conduct;

- focus on conduct that causes significant detriment to consumers or small businesses; and

- attract the same maximum civil pecuniary penalties that apply under most of the *ACL*.[189]

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185   Ibid.

186   Ibid 498, 439–40.

187   Ibid 499. The same view is taken in JM Paterson and E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44(1) *Journal of Consumer Policy* 1, 14.

188   Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 498.

189   Gilbert + Tobin, *Competition and Consumer Regulation: Review of 2019 and Insights for 2020* (Report, March 2020) 27 <https://www.gtlaw.com.au/insights/australian-competition-consumer-law-insights-2020> ('*Competition and Consumer Regulation*'). See also Paterson and Bant (n 187).

However, at least at the outset, the new prohibition 'would necessarily be broader and more uncertain in its application than existing protections against specific unfair practices and the case law that has developed around unconscionable conduct' and misleading or deceptive conduct.[190] This is hardly optimal when the recommendation for reform is based on the ACCC's view that existing *ACL* provisions are not fully fit for digital purpose.[191]

The Commonwealth government has noted, but not specifically responded to, this recommendation, instead referring to the separate work on this issue currently underway through Consumer Affairs Australia and New Zealand.[192]

G *Competitive Markets*

As its title makes clear, the *CCA* is both a competition regulation and consumer protection statute. The goals and functions of these two areas of law are 'mutually-reinforcing'.[193] Competition law facilitates competitive markets so as to increase consumer choice and enhance consumer welfare; and consumer law protects consumers' ability to make free and informed choices that maximise their own utility, thereby promoting competitive markets.[194] It follows that competition law is an equally critical tool in addressing the detriment to consumers of AI-driven market abuses.[195] The next Part of the article explores this issue.

V AI-Led Market Collusion

'Collusion' encompasses any form of agreement or coordination among competing firms with the objective of raising profits to a higher level than would be possible without such agreement or coordination.[196] Also known as cartel conduct, collusion is typically either explicit or tacit.[197] Explicit collusion arises where two or more industry competitors, through an express agreement, work together to control prices or output.[198] In contrast, tacit collusion occurs where rival firms, usually in markets where there are fewer competitors, engage in anti-competitive cooperative

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190   Gilbert + Tobin, *Competition and Consumer Regulation* (n 189) 27.

191   Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 498.

192   Australian Government, *Regulating in the Digital Age* (n 177) 19.

193   Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 139.

194   Ibid.

195   See generally Nathalie A Smuha, 'From a "Race to AI" to a "Race to AI Regulation": Regulatory Competition for Artificial Intelligence' (2021) 13(1) *Law, Innovation and Technology* 57.

196   OECD, *Algorithms and Collusion: Competition Policy in the Digital Age* (Report, 2017) 19 <http://www.oecd.org/daf/competition/Algorithms-and-colllusion-competition-policy-in-the-digital-age.pdf>.

197   Ibid.

198   Ibid.

behaviour through the apparently independent pursuit of their own profit-maximising strategies.[199]

The complexity in this area has increased in line with rapid technological developments, including wholesale computerisation of the marketplace and the proliferation of big data, which have created an environment where firms are investing in AI technologies to assist with 'pricing decisions, planning, trade, and logistics'.[200] Traditionally, humans would monitor market activity and decide whether, and by how much, to raise or lower the prices of their goods or services.[201] Now, however, with the use of pricing algorithms, AI systems can respond to changes in market conditions almost instantaneously.[202] In simple terms, if a competitor increases or decreases their prices, an algorithm can monitor this and match that price immediately.[203]

Competition authorities are able to deal with explicit collusion by adducing evidence of an agreement to cooperate which has the purpose or effect of achieving a desired anti-competitive outcome. However, tacit collusion is much more difficult to establish — suspicions may arise, but typically the only available evidence is each firm's decision to follow a particular profit-maximising strategy. This is a challenge for regulators as the business environment shifts from a world 'where executives expressly collude in smoke-filled rooms to a world where pricing algorithms continually monitor and adjust to each other's prices and market data'.[204] In particular, there are concerns that AI pricing systems could:

- facilitate, or discretely give effect to, price fixing arrangements;[205]

- make detection of price fixing arrangements more difficult;[206]

- result in supra competitive price levels for products;[207] and

- collude with other AI systems without any human interaction, either by design or as an unintended consequence of their operation.[208]

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199 Ibid.

200 Ezrachi and Stucke (n 5) 1776.

201 Ibid 1780.

202 Francisco Beneke and Mark-Oliver Mackenrodt, 'Artificial Intelligence and Collusion' (2019) 50(1) *International Review of Intellectual Property and Competition Law* 109, 111.

203 Feiglin (n 121) 1139.

204 Ezrachi and Stucke (n 5) 1782.

205 Michael S Gal, 'Algorithms as Illegal Agreements' (2019) 34(1) *Berkeley Technology Law Journal* 67, 73.

206 Emilio Calvano et al, 'Artificial Intelligence, Algorithmic Pricing and Collusion', *SSRN* (Article, December 2019) 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304991>.

207 Beneke and Mackenrodt (n 202) 114.

208 Ezrachi and Stucke (n 5) 1795.

A *Types of AI-Led Collusion*

To date, four categories of AI-led collusion, whether explicit or tacit, have been identified.[209]

1 *Messenger*

The first category ('messenger')[210] is a form of explicit collusion that makes use of AI technology to execute an agreement between two or more rivals to collude.[211] What distinguishes this category from the other three is that the competitors have already agreed to form a cartel and the use of AI technology merely facilitates their collusion.[212]

An example of this can be seen in *United States v Topkins*,[213] where the defendant, David Topkins, an executive of an ecommerce seller of posters, prints and framed art, had agreed with co-conspirators to fix the prices of certain posters sold in the United States through the website, Amazon Marketplace.[214] In furtherance of the agreement, the defendant and his co-conspirators wrote computer code to implement pricing algorithms for the sale of the posters with the goal of coordinating changes to their respective prices.[215]

2 *Hub and Spoke*

The second category ('hub and spoke')[216] is another form of explicit collusion.[217] It involves a scenario where rival firms use the same third party AI pricing technology, effectively creating a hub and spoke cartel where the common algorithm becomes

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209   Ibid 1782–3. The same four categories are widely cited in the competition law literature. See, eg: Rob Nicholls and Brent Fisse, 'Concerted Practices and Algorithmic Co-ordination: Does the New Australian Law Compute?' (2018) 26(1) *Competition and Consumer Law Journal* 82, 86–7; Ulrich Schwalbe, 'Algorithms, Machine Learning, and Collusion' (2019) 14(4) *Journal of Competition Law and Economics* 568, 572–5; Feiglin (n 121) 1144–5.

210   Ezrachi and Stucke (n 5) 1784.

211   Ibid 1782.

212   Nicholls and Fisse (n 209) 88.

213   United States, 'Plea Agreement', filed in *United States of America v David Topkins*, CR 15-00201 WHO, 30 April 2015 <https://www.justice.gov/atr/case-document/plea-agreement-462>.

214   Ibid 3.

215   Ibid 4. See also Department of Justice (US), 'Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution' (Press Release No 15-421, 6 April 2015) <https://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace>.

216   Ezrachi and Stucke (n 5) 1784.

217   Ibid 1782.

the de facto 'hub' used by the competitors (the 'spokes') to coordinate their pricing decisions.[218]

In the same way that competitors cannot communicate directly with one another to fix prices, they also cannot use an intermediary to reach such an agreement.[219] If it can be shown that competing firms each entered into separate agreements with the supplier of a particular pricing algorithm, and did so with the common understanding that their fellow competitors would use the identical algorithm, that evidence could be used to prove collusion among the competitors.[220]

3 *Predictable Agent*

The third category ('predictable agent')[221] is more complex because it involves the unilateral development of pricing algorithms that respond to competitor action or movement in a set, or predictable, manner.[222] This can lead to tacit collusion in circumstances where each firm appreciates, when configuring its pricing algorithm, that the optimal profit maximising strategy may be to follow the price increases of their competitors when possible, and each firm is aware that if other competitors implement similar algorithms, then a pricing equilibrium may be established above competitive levels.[223]

4 *Digital Eye*

The fourth category ('digital eye'),[224] which is even more complex than the third, again involves the unilateral design of pricing algorithms.[225] The difference here, however, is that the AI system is capable of significant ML and will make autonomous pricing decisions based on trends and behaviour in the market.[226] Such AI systems may decide that following the price increases of competitors is the most effective strategy for avoiding a price war or maintaining higher profits.[227] This would mean that firms could engage in tacit collusion without any 'human intention' of doing so.[228]

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218   Nicholls and Fisse (n 209) 95.

219   United States, Note No DAF/COMP/WD(2017)41 to 127th OECD Competition Committee, *Algorithms and Collusion* (21–23 June 2017) 6 [16] <https://one.oecd.org/document/DAF/COMP/WD(2017)41/en/pdf> ('*Algorithms and Collusion*').

220   Ibid 6 [17].

221   Ezrachi and Stucke (n 5) 1784.

222   Nicholls and Fisse (n 209) 97.

223   Ezrachi and Stucke (n 5) 1791.

224   Ibid 1784.

225   Ibid 1783.

226   Ibid.

227   Nicholls and Fisse (n 209) 100.

228   Ezrachi and Stucke, 'Artificial Intelligence and Collusion' (n 200) 1795.

Among the four categories of AI-led collusion, the last one stands out as presenting unique challenges for regulators. On its face, the idea that firms which leave pricing decisions to efficient and autonomous AI systems can be accused of collusion may suggest regulatory overreach.[229] Moreover, there is significant debate in this area over whether AI systems are even able to engage in tacit collusion.[230]

In 2017, an Organisation for Economic Co-operation and Development ('OECD') working paper found it was not possible to conclude, at that point in time, that AI pricing systems were capable of successful autonomous collusion.[231] However, the paper also noted that its research was time sensitive and, given rapid advances in technology, may quickly become outdated.[232] Subsequently, a 2019 study found that AI pricing systems 'systematically learn to play collusive strategies',[233] but that the degree of collusion decreases as the number of competitors rises.[234] The 2019 study found that AI systems typically coordinate prices which are lower than the monopoly level, but substantially higher than the competitive pricing equilibrium.[235] Based on the findings of the 2019 study, it is arguable that firms which utilise autonomous AI pricing systems are consciously adopting a collusive strategy, or at least a strategy that will trend towards collusion.

B *Relevant CCA Provisions*

AI-led collusion is difficult to police because most forms of anti-cartel legislation regard explicit collusion as the primary concern and thus prioritise provisions prohibiting rival firms from entering into agreements to engage in anti-competitive conduct.[236] This approach has been criticised for placing too much emphasis on the intention to engage in collusive behaviour and not enough on the manifestation of collusion in the form of anti-competitive market prices.[237]

Division 1 of pt IV of the *CCA* takes the traditional path, prohibiting parties that are, or are likely to be, in competition with each other from making or giving effect to a

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229   Ibid; Brent Fisse, 'Competition and Consumer Law: Algorithmic Market Coordination' (2018) 46(3) *Australian Business Law Review* 210, 212.

230   See Beneke and Mackenrodt (n 202) 110; Schwalbe (n 209) 568.

231   Ai Deng, 'When Machines Learn to Collude: Lessons from a Recent Research Study on Artificial Intelligence', *SSRN* (Article, 30 August 2017) 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3029662>.

232   Ibid 8.

233   Calvano et al (n 206) 3.

234   Ibid.

235   Ibid.

236   United States, *Algorithms and Collusion* (n 219) 6 [18]; Caitlin Davies and Luke Wainscoat, 'Not Quite a Cartel: Applying the New Concerted Practices Prohibition' (2017) 25(2) *Competition and Consumer Law Journal* 173, 176–8; Nicholls and Fisse (n 209) 83; Calvano et al (n 206) 2.

237   Calvano et al (n 206) 2.

'contract, arrangement or understanding' (ie, an agreement) that contains a 'cartel provision'.[238] The statutory definition of 'cartel provision' specifically includes provisions relating to fixing prices or restricting outputs in the production and supply chain.[239] However, reflecting the recommendations of the 2015 Competition Policy Review ('Harper Review'),[240] pt IV div 2 of the *CCA* goes further by prohibiting a corporation from engaging with one or more persons in a 'concerted practice' that has the purpose, effect or likely effect of substantially lessening competition.[241]

Interestingly, the Harper Review considered it unnecessary to introduce a legislative definition of 'concerted practice', reasoning that the word 'concerted' meant 'jointly arranged or carried out or co-ordinated' and hence a 'concerted practice' between market participants was 'a practice that is jointly arranged or carried out or co-ordinated between the participants'.[242] Taking this lead, the Explanatory Memorandum to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth), which introduced the concept of concerted practices to the *CCA*, explained that

> [a] concerted practice is any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition.[243]

Most commonly, concerted practices will involve a pattern of communication or cooperative behaviour between two or more businesses.[244] The concept is intended

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238   See *CCA* (n 3) ss 45AF, 44AG (offences); at ss 44AJ and 45AK (civil penalty provisions). The parallel regimes of offences and civil penalty provisions permit a 'proportionate' response by enforcement authorities, with criminal prosecution targeted at more serious cartel conduct: *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission Regarding Serious Cartel Conduct*, signed 15 August 2014, [1.2] <https://www.cdpp.gov.au/partner-agencies/memoranda-understanding-mou>.

239   *CCA* (n 3) ss 45AD(2)–(3).

240   Ian Harper et al, *Competition Policy Review* (Final Report, Department of the Treasury (Cth), 31 March 2015) <https://treasury.gov.au/publication/p2015-cpr-final-report>. The relevant recommendation was that 'section 45 of the *CCA* be extended to cover concerted practices which have the purpose, effect or *likely* effect of substantially lessening competition': at 89–90 (emphasis added).

241   *CCA* (n 3) s 45(1)(c).

242   Harper et al (n 240) 60.

243   Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) [3.19] ('Explanatory Memorandum to Competition and Consumer Amendment Bill').

244   See 'Anti-Competitive Conduct', *Australian Competition and Consumer Commission* (Web Page) <https://www.accc.gov.au/business/anti-competitive-behaviour/anti-competitive-conduct>.

to capture conduct that falls short of a 'contract, arrangement or understanding'.[245] Thus, a concerted practice may exist in the absence of any direct contact between the firms (eg, where firms communicate indirectly through an intermediary), and where none of the parties is obliged, either legally or morally, to act in any particular way,[246] but the conduct must go beyond a business independently responding to market conditions.[247]

It is not possible to provide a comprehensive list of all the circumstances that might amount to a concerted practice.[248] However, a business is particularly at risk of engaging in a concerted practice if independent decision-making is replaced or reduced by cooperation with its competitors regarding strategic commercial decisions such as: how the business determines the price of its products; where and to whom the business sells its products; whether the business bids for a tender and/or the terms of a tender; or the quantity of the product the business offers or produces.[249] Additionally, while parties to a concerted practice will often be competitors or potential competitors, this is not a legislative requirement. Depending on the nature of their involvement, other parties such as suppliers, distributors, and trade or professional associations may engage in a concerted practice.[250]

Unlike cartel conduct, which is prohibited per se, concerted practices are only prohibited if they substantially lessen competition in a market. Once conduct has been found to be a concerted practice, the central issue, and the determinant of whether the relevant conduct is prohibited under s 45 of the *CCA*, is whether the concerted practice has the purpose, effect or likely effect of substantially lessening competition.[251]

From a *CCA* compliance perspective, the following advice to businesses that utilise AI pricing systems remains instructive:[252]

- Maintain detailed and up-to-date records of the objectives of the pricing algorithm, and the ways in which those objectives will be achieved. Broad statements such

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245   Explanatory Memorandum to Competition and Consumer Amendment Bill (n 243) [3.21]; Davies and Wainscoat (n 236) 176; Nicholls and Fisse (n 209) 85.

246   Explanatory Memorandum to Competition and Consumer Amendment Bill (n 243) [3.22].

247   See 'Anti-Competitive Conduct' (n 244).

248   Australian Competition and Consumer Commission, *Guidelines on Concerted Practices* (Guidelines, 31 August 2018) [5.1] <https://www.accc.gov.au/publications/guidelines-on-concerted-practices>.

249   Ibid.

250   Ibid [2.3].

251   Explanatory Memorandum to Competition and Consumer Amendment Bill (n 243) [3.28].

252   Gilbert + Tobin, 'Can Robots Collude?' (n 131).

as 'optimise profits' or 'save costs' should be avoided; an objective of 'lessening competition' is likely to be problematic.

• Be alert to any impact that the use of the pricing algorithm may be having on competition in the relevant market, such as changes in market shares or market concentration.

• Consider whether other firms are using the same pricing algorithm. Bespoke or proprietary algorithms are unlikely to raise a hub and spoke issue, but off-the-shelf purchases or use of a common supplier could present risks. Retaining the ability to adjust and override the algorithm's operation may help to offset this.[253]

C *Role of the ACCC*

The ACCC is well aware of the debate around AI-led collusion. In 2017, Rod Sims, the ACCC Chair, delivered a speech on 'colluding robots' which traversed both the opportunities and threats posed by AI technology.[254] The upshot of Sims' address was that, no matter how anti-competitive conduct occurred, 'a legal hook' would be found in the *CCA* allowing the ACCC to take enforcement action and no firm would be able to avoid liability by saying, '"my robot did it"'.[255] In particular, Sims expressed confidence that the introduction of the concerted practices provision would, in appropriate cases, permit the ACCC to focus on considering whether there had been cooperation between competing businesses that substantially lessened competition, rather than fixating on the formalities of proving an agreement to collude.[256]

At present then, there are measures in place under Australian competition law to effectively deal with all forms of AI-led collusion. Possibly the greater challenge will be detecting the collusion in the first place.[257] In this regard, the following scenarios should at least raise 'red flags', prompting further investigation: where firms or pro-grammers use similar algorithms, data on market conditions or case studies, even though better algorithms, sources of data or case studies are available; where firms take steps to make it easier for competitors to observe their algorithms or databases; and/or where algorithms technologically 'lock' so that they cannot be changed.[258] It will be important for the ACCC to continue to monitor this space closely over the coming years.

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253 It is noted, however, that businesses may be unwilling to make any adjustments if likely to diminish their profits, which is the likely reason for AI pricing.

254 Sims (n 5).

255 Ibid.

256 Ibid.

257 Calvano et al (n 206) 2.

258 Gal (n 205) 113–15.

VI Conclusion

The far-reaching impact of online technology on consumer rights cannot be underestimated. The *DPI Final Report* has identified some of the effects on consumers of AI-led practices by large corporations such as Google and Facebook and has highlighted the need for regulation to address these issues and protect consumers. For example, the *DPI Final Report* recommended: broad reform of Australian privacy law and a strengthening of the protections in the *Privacy Act*; an enforceable code of conduct governing dealings between digital platforms and media organisations; a mandatory code on copyright enforcement by platforms; government-funded programs to improve digital media literacy in the community; and ongoing monitoring and investigation of conduct by digital platforms likely to cause consumer harm.[259] The extent to which these recommendations will be implemented remains to be seen.

The *DPI Final Report* also found an imbalance in bargaining power between consumers and digital platforms, such that many consumers were given no real choice but to join or use these platforms and accept the terms of use offered.[260] If the proposals in the Commonwealth government's *Regulation Impact Statement* relating to the treatment of unfair contract terms under the *ACL* were to be implemented, that would help to remedy this imbalance.[261] Similarly, implementation of the *DPI Final Report* recommendation that the *ACL* be amended to include a general prohibition of unfair trading practices would significantly assist in addressing problematic business practices online.[262]

In considering consumer data privacy, CDR legislation has been introduced in an attempt to provide Australian consumers with control over their personal data and align regulatory structures with the EU approach. However, the CDR legislation needs to be expanded to other sectors, as it remains limited in scope at the time of writing, only applying to the Australian banking sector where CDR measures are being implemented on a gradual basis.[263] A consultation was held in late 2020 regarding the CDR framework to be implemented in the energy sector, although it is unclear when such rules will be introduced.[264]

In relation to AI-led market collusion — another practice which adversely affects consumers — it has been noted that rapid technological developments and the

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[259] Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 31–6.

[260] Ibid 400.

[261] Department of the Treasury (Cth) (n 178).

[262] Australian Competition and Consumer Commission, *DPI Final Report* (n 1) 498.

[263] Australian Competition and Consumer Commission, 'Consumer Data Right Goes Live for Data Sharing' (n 80).

[264] See 'CDR in the Energy Sector', *Australian Competition and Consumer Commission* (Web Page) <https://www.accc.gov.au/focus-areas/consumer-data-right-cdr/cdr-in-the-energy-sector>.

growth of big data have combined to create an environment where firms are investing in complex AI algorithms to assist with their pricing decisions,[265] making collusion difficult to detect. Furthermore, the increase in AI systems capable of significant ML, which are able to make autonomous pricing decisions based on trends and behaviour in the market, poses a challenge for regulators, due to the evidentiary hurdles associated with tacit collusion.[266] On a positive note, the concerted practices provision in the *CCA* would allow the ACCC to consider whether there has been cooperation between competing firms that has the purpose, effect or likely effect of substantially lessening competition, rather than focusing on the formalities of proving an agreement to collude.[267] To help refute allegations of collusion or cooperation, it has been suggested that firms could provide information on how their algorithms operate, without disclosing trade secrets or opening their computer code to public scrutiny given that specific algorithms or code itself is proprietary information.[268]

In view of the observation that customer-centric applications of ML are currently the most common use of AI,[269] and the proliferation of AI-led technology on digital platforms, there remain numerous challenges facing regulators in the area of consumer rights. The adverse impact of irresponsible use of AI-led technology on consumers' personal data and privacy rights — as well as their ability to access fair and accurate product information and choices — can be significant. The findings in the *DPI Final Report* illustrated convincingly that not only is ongoing vigilance against online abuses required in a technology driven marketplace, but also that a proactive approach by regulators has become paramount.

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[265]   Ezrachi and Stucke (n 5) 1776.

[266]   See: Beneke and Mackenrodt (n 202) 110; Schwalbe (n 209) 568.

[267]   Sims (n 5).

[268]   Laura Rosenberger and Lindsay Gorman, 'How Democracies Can Win the Information Contest' (2020) 43(2) *Washington Quarterly* 75, 82.

[269]   Algorithmia (n 20) 2.