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INDIE LAW FOR YOUTUBERS: YOUTUBE AND THE LEGALITY OF DEMONETISATION[1]

Abstract

YouTube has a de facto monopoly on over 95% of global public video communications. The YouTube business model is built on advertising revenue generated from content provided by uploaders, known as YouTubers — the vast majority of whom are small-timers. Advertising revenue is then split between the YouTuber (55%) and YouTube (45%). When a YouTuber does not meet the minimum threshold hours, or content is deemed by YouTube as inappropriate, a YouTuber cannot monetise that content. This is known as demonetisation. Many YouTubers complain they have been wrongly demonetised. This article argues, first, that despite foreign exclusive jurisdiction and choice of law clauses, an Australian court can hear a claim by Australian YouTubers under the *Australian Consumer Law* ('*ACL*'). Second, this article suggests that wrongful demonetisation may breach the consumer guarantees under the *ACL*, and third, that not providing reasons when a YouTuber is demonetised is unconscionable. Finally, this article concludes by arguing that clauses that allow YouTube to unilaterally vary its terms, and the monetisation policy, are unfair terms under the *ACL*.

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1 In this article, I refer to YouTubers as 'indie' (small-time) celebrities. This article discusses the ongoing dispute between YouTubers as indie celebrities, and YouTube, a powerful corporate entity. In this context, the term 'indie law' is intended to denote laws that protect weaker parties. While the relationship between YouTube and YouTubers is used to illustrate the context of a multinational platform's interaction with Australian users of the platform, nothing in this article is intended to constitute legal advice. The analysis is an academic exercise.

I Introduction

YouTube is a new ecosystem for entertainment. YouTube controls approximately 95% of public video communication in the world.[2] The new celebrities are called YouTubers. They are also known as indie celebrities, vloggers, and microcelebrities. One of the most popular YouTubers, Felix Kjellberg, known online as PewDiePie, has more than 100 million subscribers[3] and is worth approximately USD30 million.[4] While elite YouTubers can make about USD1 million a month,[5] the vast majority of YouTubers are small-timers.[6] To these smaller content creators, YouTube is a limited source of income. While YouTubers may promote a talent, what they actually sell is their personality. That authenticity is lucrative to advertisers,[7] and may be more persuasive than the haughtiness of a Hollywood endorsement.

But YouTube is the digital 'Wild West'.[8] In 2017, the first 'Adpocalypse' hit.[9] Adpocalypse is a neologism that describes how advertisers abandon YouTube when they

2 Greg Bensinger and Reed Albergotti, 'YouTube Discriminates against LGBT Content by Unfairly Culling It, Suit Alleges', *Washington Post* (online, 14 August 2019) <https://www.washingtonpost.com/technology/2019/08/14/youtube-discriminates-against-lgbt-content-by-unfairly-culling-it-suit-alleges/?noredirect=on>.

3 Julia Alexander, 'PewDiePie Becomes the First Individual YouTube Creator to Hit 100 Million Subscribers', *The Verge* (Web Page, 26 August 2019) <https://www.theverge.com/2019/8/26/20831853/pewdiepie-100-million-subscribers-youtube-tseries-competition> ('PewDiePie').

4 Dan Western, 'PewDiePie Net Worth', *Wealthy Gorilla* (Web Page) <https://wealthygorilla.com/pewdiepie-net-worth/>.

5 Tufayel Ahmed, 'How Much is Logan Paul Worth? YouTube Star behind Japan Suicide Forest Video Earns Millions from Videos', *Newsweek* (online, 3 January 2018) <https://www.newsweek.com/how-much-logan-paul-worth-youtube-star-behind-japan-suicide-forest-video-earns-769018>.

6 Matthias Funk, 'How Many YouTube Channels Are There?', *Tubics* (Blog Post, 13 November 2020) <https://www.tubics.com/blog/number-of-youtube-channels>; Mansoor Iqbal, 'YouTube Revenue and Usage Statistics (2021)', *Business of Apps* (Web Page, 14 May 2021) <https://www.businessofapps.com/data/youtube-statistics/>.

7 Anne Jerslev, 'In the Time of the Microcelebrity: Celebrification and the YouTuber Zoella' (2016) 10(1) *International Journal of Communication* 5233, 5240–5; Stuart Dredge, 'Why Are YouTube Stars So Popular?', *The Guardian* (online, 3 February 2016) <https://www.theguardian.com/technology/2016/feb/03/why-youtube-stars-popular-zoella>.

8 Mark Bergen, 'As YouTube Mulls Changes to Kids' Content, Rival Services See Opportunity', *IOL* (Web Page, 24 August 2019) <https://www.iol.co.za/business-report/international/as-youtube-mulls-changes-to-kids-content-rival-services-see-opportunity-31054726>.

9 Alex Sinke, 'YouTube's Demonetization Situation and the Adpocalypse', *Diggit Magazine* (online, 26 September 2018) <https://www.diggitmagazine.com/articles/youtubes-demonetization-situation-and-adpocalypse>.

are unhappy about YouTubers posting offensive content.[10] YouTube responded by imposing conditions for YouTubers to earn advertising revenue. This included raising the minimum threshold number of views required for a YouTuber to earn advertising revenue[11] and implementing tighter regulations on inappropriate content. YouTubers called the new conditions 'demonetisation'.[12] When a channel is demonetised, a YouTuber might not be reasons.[13] The channel may contain hundreds of videos. However, the objectionable passage(s) might not be pinpointed, nor detailed reasons given for demonetisation. The result of demonetisation policies has been that small-time YouTubers have lost what little advertising revenue they had.[14]

YouTubers understand the need to demonetise inappropriate content. Their concern is not the principle but its application. For example, YouTubers complain that demonetisation is wrongly applied to benign content,[15] that high-profile YouTubers are given more leeway, and that it lacks transparency,[16] and was introduced in a unilateral fashion.[17]

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10 Sangeet Kumar, 'The Algorithmic Dance: YouTube's Adpocalypse and the Gate-Keeping of Cultural Content on Digital Platforms' (2019) 8(2) *Internet Policy Review* 1, 2.

11 The current eligibility requirement for monetisation is 4,000 hours of 'watchtime' within the past 12 months and 1,000 subscribers: see Neal Mohan and Robert Kyncl, 'Additional Changes to the YouTube Partner Program (YPP) to Better Protect Creators', *YouTube Official Blog* (Blog Post, 16 January 2018) <https://blog.youtube/news-and-events/additional-changes-to-youtube-partner>. See also 'YouTube Partner Program Overview & Eligibility', *YouTube Help* (Web Page, August 2021) <https://support.google.com/youtube/answer/72851?hl=en>.

12 Julia Alexander, 'The Yellow $: A Comprehensive History of Demonetization and YouTube's War with Creators', *Polygon* (Blog Post, 10 May 2018) <https://www.polygon.com/2018/5/10/17268102/youtube-demonetization-pewdiepie-logan-paul-casey-neistat-philip-defranco?> ('The Yellow $').

13 Ibid.

14 Piper Thomson, 'Understanding YouTube Demonetization and the Adpocalypse', *LearnHub* (Blog Post, 14 June 2019) <https://learn.g2.com/youtube-demonetization>.

15 See, eg, Benjamin Goggin and Kat Tenbarge, '"Like You've Been Fired from Your Job": YouTubers Have Lost Thousands of Dollars after Their Channels Were Mistakenly Demonetized for Months', *Insider* (Web Page, 24 August 2019) <https://www.businessinsider.com/youtubers-entire-channels-can-get-mistakenly-demonetized-for-months-2019-8/?r=AU&IR=T>.

16 See, eg, Ford Fischer, 'I Filmed the Capitol Riots: YouTube Suspended Me for "Pushing" Election Disinformation', *Daily Dot* (Blog Post, 11 March 2021) <https://www.dailydot.com/debug/ford-fischer-youtube-primary-source/>.

17 See, eg, *Sweet v Google Inc* (ND Cal, Case No 17-cv-03953-EMC, 7 March 2018) ('*Sweet*').

YouTubers have unionised in Germany as 'FairTube'[18] to combat demonetisation.[19] They want fairness and transparency[20] and have the backing of Europe's largest trade union.[21] FairTube recommends that YouTube:

- Publish all categories and decision criteria that affect monetization and views of videos
- Give clear explanations for individual decisions, ie, which parts of the video violated which criteria in the Advertiser-Friendly Content Guidelines
- Give YouTubers a human contact person … to explain decisions that have negative consequences for YouTubers (and fix them if they are mistaken)
- Let YouTubers contest decisions that have negative consequences
- Create an independent mediation board for resolving dispute
- [Provide for the f]ormal participation of YouTubers in important decisions, for example through a YouTuber Advisory Board.[22]

The problem with demonetisation is that it is a blunt instrument being applied by a de facto monopoly. Part II of this article introduces YouTube and demonetisation.

The YouTube contract has a proper law of contract clause in favour of Californian law and an exclusive jurisdiction clause in favour of Californian courts.[23] In light of these clauses, Part III considers whether an Australian YouTuber will be able to (a) claim under the *ACL*[24] regarding demonetisation, and (b) start proceedings in Australia. The article answers 'yes' to both (a) and (b).

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18 See 'For Fairness and Transparency in Platform Work', *FairTube* (Web Page) <https://fairtube.info/en/>.

19 Scott Bicheno, 'YouTube Creators Unionize to Combat Demonetization and Censorship', *Telecoms.com* (Blog Post, 30 July 2019) <http://telecoms.com/498779/youtube-creators-unionize-to-combat-demonetization-and-censorship>.

20 G Torbet, 'YouTubers Are Unionizing, and the Site Has 24 Days to Respond', *Engadget* (Blog Post, 29 July 2019) <https://www.engadget.com/2019/07/29/youtube-union-ig-metall>.

21 Carmin Chappell, 'Thousands of YouTubers Want to Unionize, and They've Got the Support of Europe's Largest Trade Union', *CNBC Make It* (Web Page, 6 August 2019) <https://www.cnbc.com/2019/08/06/youtubers-want-to-unionize-and-theyve-got-the-support-of-ig-metall.html>.

22 Cal Jeffrey, 'YouTubers Union Demands More Transparency Regarding Demonetization', *Techspot* (Blog Post, 29 July 2019) <https://www.techspot.com/news/81190-youtubers-union-demands-more-transparency-regarding-demonetization.html>.

23 See below n 87 and accompanying text.

24 *Competition and Consumer Act 2010* (Cth) sch 2 ('*ACL*').

On the assumption that the *ACL* applies, Part IV–VI considers three substantive claims that Australian YouTubers could raise under the *ACL*,[25] namely whether:

(a) wrongful demonetisation of content by YouTube contravenes the consumer guarantees in the *ACL*;[26]

(b) YouTube's lack of transparency is contrary to the statutory[27] unconscionability provisions of the *ACL*; and

(c) the clauses relied on by YouTube to introduce demonetisation unilaterally are void as unfair terms under the *ACL*.[28]

This article concludes that a claim under (a) will face challenges, whereas claims (b) and (c) may succeed. While YouTube is used for illustrative purposes in the article, the issues raised are of relevance to a new paradigm — how does Australian law protect consumers when the business is a multinational digital platform?

II YouTube: The Only Theatre in Town

YouTube was founded in 2005.[29] It was acquired by Google in 2006,[30] which positioned YouTube as a haven for indie creators who did not quite fit into Hollywood.[31]

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25 The following issues are outside the scope of this article: competition law; the livelihood of YouTubers and worker protection; whether YouTube might owe fiduciary obligations with respect to demonetisation; whether wrongful demonetisation might be defamatory; and censorship and discrimination.

26 *ACL* (n 24) pt 3.2 div 1.

27 The present analysis does not rely upon common law unconscionability under s 20 of the *ACL*. When s 21 applies, s 20(2) provides that the prohibition on common law unconscionability 'does not apply to conduct that is prohibited by s 21'. It is also unclear whether common law unconscionability can be relied upon, given that the contract is governed by Californian law. It is argued below that statutory unconscionability is a mandatory law that cannot be excluded by a proper law of contract clause. Hence, whether s 20 applies does not need to be resolved.

28 *ACL* (n 24) ss 23–8.

29 Susan Wojcicki, 'YouTube at 15: My Personal Journey and the Road Ahead', *YouTube Official Blog* (Blog Post, 14 February 2020) <https://blog.youtube/news-and-events/youtube-at-15-my-personal-journey>. The first YouTube video was uploaded to the website on 23 April 2005: see 'YouTube A to Z: #HappyBirthdayYouTube', *Google Official Blog* (Blog Post, 29 May 2015) <https://blog.google/products/youtube/youtube-to-z-happybirthdayyoutube>.

30 'Google Buys YouTube for $1.65B', *NBC News* (online, 10 October 2006) <http://www.nbcnews.com/id/15196982/ns/business-us_business/t/google-buys-youtube-billion/#.XWSNk-gzY2w>.

31 Julia Alexander, 'The Golden Age of YouTube is Over', *The Verge* (Web Page, 5 April 2019) <https://www.theverge.com/2019/4/5/18287318/youtube-logan-paul-pewdiepie-demonetization-adpocalypse-premium-influencers-creators> ('The Golden Age of YouTube is Over').

In 2006, YouTube began using AdSense, that is, its proprietary algorithms, to monetise content by matching it to suitable advertisements.[32] Advertising revenue is split between the YouTuber (55%) and YouTube (45%).[33] Soon after this development, YouTubing became a career rather than a pastime for *successful* YouTubers.[34] By early 2017, one billion hours of YouTube content was watched every day.[35] In 2019, it was estimated that YouTube earned approximately USD15 billion a year in advertising revenue.[36] There are two billion YouTube users globally, and YouTube is valued between USD140–300 billion.[37]

There are about 22,000 YouTubers with one million subscribers and 230,000 YouTubers with 100,000 subscribers. Over 30 million YouTubers are small-timers with less than 100,000 subscribers. Their subscriber numbers vary from being considerable to negligible.[38]

When it comes to public video communication globally, it is fair to say that YouTube is the 'only theatre in town'. It has unparalleled power to influence and regulate content. In not adopting 'best practices' regarding demonetisation, which it may have done if it had competition, YouTube is acting like a monopoly.[39]

In Australia, the entertainment industry is growing at a 'phenomenal rate'.[40] Advertising spending is estimated to reach AUD17.3 billion in 2021.[41] The YouTube

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32 Valentin Niebler, '"YouTubers Unite": Collective Action by YouTube Content Creators' (2020) 26(2) *European Review of Labour and Research* 223, 223.

33 Karin van Es, 'YouTube's Operational Logic: "The View" as Pervasive Category' (2019) 21(3) *Television and New Media* 223, 229.

34 PewDiePie left school and became a fulltime YouTuber: see Alexander, 'The Golden Age of YouTube is Over' (n 31).

35 Cristos Goodrow, 'You Know What's Cool? A Billion Hours', *YouTube Official Blog* (Blog Post, 27 February 2017) <https://blog.youtube/news-and-events/you-know-whats-cool-billion-hours>.

36 Nick Statt, 'YouTube is a $15 Billion-a-Year Business, Google Reveals for the First Time', *The Verge* (Web Page, 3 February 2020) <https://www.theverge.com/2020/2/3/21121207/youtube-google-alphabet-earnings-revenue-first-time-reveal-q4-2019>; Iqbal (n 6).

37 Iqbal (n 6).

38 Funk (n 6).

39 Whether YouTube has infringed the anti-competitive provisions of the *Competition and Consumer Act 2010* (Cth) is not within the scope of this article.

40 Elise Tornos, '6 Key Trends in the Australian Entertainment Industry and What They Mean for Grads', *GradAustralia* (Blog Post) <https://gradaustralia.com.au/advice/6-key-trends-entertainment-industry-what-they-mean-for-grads>; 'Data Analysis Finds Australia's Entertainment Sector Is Booming', *Which-50* (Web Page, 24 April 2017) <https://which-50.com/data-analysis-finds-australias-entertainment-sector-booming>.

41 > [N]ewspaper and free-to-air television advertising are expected to shrink by 8.9 percent and 4.7 percent respectively by 2021, [and] internet advertising is expected to grow by about 10 percent … [v]ideo game revenue [is now] far outstripping revenue within the film and music industries.
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> Tornos (n 40).

ecosystem contributed AUD608 million to the Australian economy in 2020.[42] In 2016, there were more than 100 Australian YouTubers that earned more than AUD100,000, and a further 2,000 that earned between AUD1,000–100,000.[43] To put this in context, there are over 4,000 physical performing artists in Australia.[44] In May 2021, YouTube had 16.5 million unique Australian visitors.[45] For advertising, YouTube makes use of location targeting,[46] meaning an Australian YouTuber with primarily Australian viewers is likely to have local advertisements.

A *YouTubers' Appeal to Advertisers*

YouTubers are redefining what it means to be a celebrity.[47] Many YouTubers are conventional entertainers. They sing,[48] dance,[49] perform and sometimes achieve mainstream success.[50] Most YouTubers, though, revel in being themselves. What YouTubers sell is their personality. That is what attracts audiences and advertisers. While not all YouTube content gives pleasure[51] — sometimes it provokes and exasperates, that is true of any entertainment. YouTube is considered a substitute[52] for TV, often competing and winning.[53]

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42 Oxford Economics, *A Platform for Australian Opportunity: Assessing the Economic, Societal, and Cultural Impact of YouTube in Australia* (Report, 2021) 3.

43 Johnny Lieu, 'YouTubers from This Country Are Killing It, Thanks to the Rest of the World', *Mashable* (Blog Post, 14 November 2017) <https://mashable.com/2017/11/14/australian-youtube-money-makers>.

44 Australian Bureau of Statistics, *Arts and Culture in Australia: A Statistical Overview, 2009* (Catalogue No 4172.0, 21 October 2010).

45 David Correll, 'Social Media Statistics Australia: May 2021', *Social Media News* (Web Page, 1 June 2021) <https://www.socialmedianews.com.au/social-media-statistics-australia-may-2021/>.

46 'Target Ads to Geographic Locations', *Google Support* (Web Page) <https://support.google.com/google-ads/answer/1722043?hl=en-AU>.

47 Jerslev (n 7) 5246.

48 The globally successful singer Troye Sivan started his entertainment career as a YouTuber.

49 'Top 100 Dance YouTube Channels on Dance & Choreography Videos/Tutorials', *Feedspot* (Blog Post, 26 February 2019) <https://blog.feedspot.com/dance_youtube_channels>.

50 Issa Rae's 'Awkward Black Girl' series would eventually lead to HBO's 'Insecure': 'Insecure', *HBO* (Web Site, 2021) <https://www.hbo.com/insecure>. See also Alexander, 'PewDiePie' (n 3).

51 See David C Giles, *Twenty-First Century Celebrity: Fame in Digital Culture* (Emerald Publishing, 2018) 131–53.

52 For discussion of how economists identify 'entertainment', see ibid.

53 Chloe Kenyon, 'How YouTube Has Changed the Entertainment Industry', *Huffington Post* (online, 2 March 2017) <https://www.huffingtonpost.co.uk/chloe-kenyon/youtube-entertainment-industry_b_9360434.html>.

The traditional celebrity is on a pedestal and socially distant. YouTubers are more relatable and celebrate their ordinariness.[54] The average person is now turning off from traditional celebrities and turning toward more 'normal' celebrities.[55] Their ordinariness and 'uber-authentic' nature[56] make YouTubers attractive to advertisers.[57] When a celebrity endorses a household item, we may wonder if they know anything about it. When a YouTuber endorses a product, it feels like a recommendation by a friend.[58] It is no surprise that for teenage purchasing decisions, YouTubers are more influential than traditional celebrities.[59]

B *Demonetisation*

In 2016, a rift emerged between YouTube and YouTubers. Inappropriate content was being uploaded by YouTubers. It included child abuse material, terrorist recruitment drives,[60] and videos depicting irresponsible behaviour by prominent YouTubers. The content led advertisers to withdraw paid advertisements from the platform.

The shift to content vigilance was precipitated by three 'Adpocalypses'. The first Adpocalypse was in 2017. PewDiePie, the YouTuber with the most subscribers at the time, uploaded a video in which he paid people to hold placards with anti-Semitic language.[61] The second was in 2018. Logan Paul, then a rising YouTuber, uploaded a video showing the body of a suicide victim in the Aokigahara Forest in Japan.[62] The third was in 2019. Steven Crowder, a conservative talk show host, uploaded a video where he made homophobic comments and jokes about another political YouTuber.[63]

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54 Dredge (n 7).

55 Kenyon (n 53).

56 Giles (n 51) 131.

57 Jerslev (n 7) 5240–5; Dredge (n 7).

58 Megan Farokhmanesh, 'YouTubers Are Not Your Friends', *The Verge* (Web Page, 17 September 2018) <https://www.theverge.com/2018/9/17/17832948/youtube-youtubers-influencer-creator-fans-subscribers-friends-celebrities>.

59 Susanne Ault, 'Survey: YouTube Stars More Popular Than Mainstream Celebs among US Teens', *Variety* (online, 5 August 2014) <https://variety.com/2014/digital/news/survey-youtube-stars-more-popular-than-mainstream-celebs-among-u-s-teens-1201275245/>.

60 Sinke (n 9).

61 Ibid.

62 James Vincent, 'YouTuber Logan Paul Apologizes for Filming Suicide Victim, Says "I Didn't Do It for Views"', *The Verge* (Web Page, 2 January 2018) <https://www.theverge.com/2018/1/2/16840176/logan-paul-suicide-video-apology-aokigahara-forest>.

63 Thomson (n 14).

In light of such poor behaviour, it is understandable that YouTube is regulating content through 'demonetisation'.[64] Following the first Adpocalypse, YouTube started regulating inappropriate content and introduced a minimum threshold of views and watchtime for monetisation.[65] When demonetised, content is not necessarily removed from the platform, but paid advertisements are withdrawn.

Under YouTube's current advertiser-friendly content guidelines,[66] inappropriate content includes:

- Inappropriate language
- Violence
- Adult content
- Shocking content
- Harmful or dangerous acts
- Hateful and derogatory content
- Recreational drugs and drug-related content
- Firearms-related content
- Controversial issues
- Sensitive events
- Incendiary and demeaning [content]
- Tobacco-related content
- Adult themes in family content.[67]

YouTube management explained that minimum threshold views were introduced in 2018 so that

64 The term 'demonetisation' was coined by YouTubers: Alexander, 'The Yellow $' (n 12).

65 Mohan and Kyncl (n 11).

66 'YouTube Channel Monetization Policies', *YouTube Help* (August 2021, Web Page) <https://support.google.com/youtube/answer/1311392?hl=en&ref_topic=9153642>.

67 'Advertiser-Friendly Content Guidelines', *YouTube Help* (Web Page) <https://support.google.com/youtube/answer/6162278>.

> bad actors can't hurt [the] ecosystem … Back in April of 2017, we set [an] eligibility requirement of 10,000 lifetime views … [and now] the eligibility requirement for monetization [is being changed] to 4,000 hours of watchtime within the past 12 months and 1,000 subscribers.[68]

This quotation does not establish a correlation between the appropriateness of content and the number of views. If anything, the Adpocalypses suggest the opposite. Salacious content by high-profile YouTubers attracts views.[69] That is not to suggest that small YouTubers should be allowed to post inappropriate content. However, smaller YouTubers may have been disproportionately punished for high-profile YouTuber misconduct. Small YouTubers allege that popular YouTubers who generate more advertising revenue receive special treatment.[70] Some of YouTube's content moderators allege that demonetisation decisions were frequently overruled when a high-profile YouTuber was involved and '[t]he operation was designed instead to protect the source of YouTube's revenue'.[71]

It is even alleged that the AdSense algorithm is designed to favour high-profile YouTubers.[72] One may surmise that YouTube does not want to incur the expense of filtering content unless there is a minimum amount of revenue involved. To an extent, that is understandable. Expense is a legitimate concern.

The impact of the Adpocalypses depended on the type of YouTuber. High-profile YouTubers were contrite, but it is not clear how much it affected them financially. Medium-sized YouTubers reportedly had their revenue substantially reduced.[73] Small-time YouTubers lost what little advertising revenue they had due to changes to the minimum hours of watchtime for monetisation.[74]

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68 Mohan and Kyncl (n 11).

69 Taylor Lorenz, 'What Won't the Nelk Boys Do?', *The New York Times* (online, 29 June 2021) <https://www.nytimes.com/2021/06/29/style/nelk-youtube.html>.

70 It has been suggested that Logan Paul was treated lightly after vlogging a dead body because of his status as a high-profile YouTuber. Two weeks after this incident, Logan Paul posted a video showing himself shooting dead rats with a taser, raising concerns that he had not learnt his lesson: see Abby Ohlheiser, 'Logan Paul Promised a "New Chapter" after Vlogging a Dead Body. Then, the YouTuber Tasered a Dead Rat', *Washington Post* (online, 10 February 2018) <https://www.washingtonpost.com/news/the-intersect/wp/2018/02/09/logan-paul-promised-a-new-chapter-after-vlogging-a-dead-body-then-the-youtuber-tasered-a-dead-rat>; Bensinger and Albergotti (n 2).

71 Elizabeth Dwoskin, 'YouTube's Arbitrary Standards: Stars Keep Making Money Even after Breaking the Rules', *Washington Post* (online, 9 August 2019) <https://www.washingtonpost.com/technology/2019/08/09/youtubes-arbitrary-standards-stars-keep-making-money-even-after-breaking-rules/>.

72 Maximilian Henning, 'FairTube Ultimatum Expires: YouTube Invites Unions to Talks', *Netzpolitik.org* (Web Page, 26 August 2019) <https://netzpolitik.org/2019/fairtube-ultimatum-expires-youtube-invites-unions-to-talks>.

73 *Sweet* (n 17) 2 (Chen J).

74 Thomson (n 14).

C *AdSense Terms*

Demonetisation was deployed by YouTube under the AdSense contract ('AdSense Terms') with YouTubers.[75] The AdSense Terms provide:[76]

- That the AdSense policies[77] are incorporated into the contract.[78] For content to be monetised, it must meet the advertiser-friendly[79] content guidelines;
- YouTube 'may modify the AdSense Terms [and Policies] at any time'.[80] If the YouTuber does not 'agree to any modified term, [they] have to stop using the affected Services' ('Variation Term');[81]
- Either party can terminate the agreement. For a YouTuber, 10 days' notice is required;[82]
- YouTubers only receive payment when they 'have remained in compliance with the AdSense Terms (including all AdSense Policies)';[83]
- All statistics are confidential apart from the gross payment figure;[84]
- There are exclusion of liability clauses to the maximum extent permitted by law;[85]
- The YouTube Partner Program terms are incorporated into the contract. One term provides that 'YouTube is not obligated to display any advertisements alongside … videos and may determine the type and format of ads available' ('Display Term');[86] and

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75 To be clear, as mentioned later in the article, a paid YouTuber must agree to both the general terms of service and the Adsense terms. The terms of service can be found at: 'Terms of Service', *YouTube* (Web Page, 10 December 2019) <https://www.youtube.com/t/terms?preview=20191210#a2219a5f68>. Updated terms of service come into force on 5 January 2022. The analysis in this article is with respect to the AdSense Terms, and not affected by the change.

76 'AdSense Online Terms of Service', *Google AdSense* (Web Page, 2021) <https://www.google.com/adsense/new/localized-terms> ('AdSense Terms').

77 'YouTube Channel Monetization Policies' (n 66).

78 'Adsense Terms' (n 76) cl 1. See also 'Terms of Service', *YouTube AU* (Web Page, 1 June 2021) <https://www.youtube.com/static?template=terms> ('YouTube Terms of Service').

79 'Advertiser-Friendly Content Guidelines' (n 67).

80 'Adsense Terms' (n 76) cl 4.

81 Ibid.

82 Ibid cl 6.

83 Ibid cl 5.

84 Ibid cl 11.

85 Ibid cls 12–14.

86 The Display Term was considered in *Sweet* (n 17) 6 (Chen J).

- There is a proper law of contract clause in favour of Californian law and an exclusive jurisdiction clause in favour of Californian courts.[87]

III Proper Law of Contract Clauses and Exclusive Jurisdiction Clauses

The proper law of contract and exclusive jurisdiction clauses raise preliminary questions as to whether Australian YouTubers can sue under the *ACL* and in Australia. The proper law is the system of law, for example Australian, that generally governs all aspects of the contract.[88] An exclusive jurisdiction clause states which court has jurisdiction. Whether a YouTuber can sue under the *ACL* in Australia is relevant to the few thousand YouTubers in Australia. It may also have implications for YouTubers globally. In the United States' ('US') decision in *Sweet v Google Inc*[89] ('*Sweet*'), YouTubers claimed that YouTube's unilateral change to its advertising terms and AdSense practices was unfair. The claim was dismissed. It was held that YouTube was entitled to make unilateral changes to the monetisation policy. The arguments that the Display Term was unfair, unconscionable, or subject to good faith were rejected.[90] *Sweet* is discussed below,[91] but as a result of this decision, it may be

> nearly impossible for a party to successfully sue Google/YouTube based upon their monetization policy changes, as YouTube's terms and conditions read that they can change their policies at will and that YouTube has no duty to display ads …[92]

In contrast, this article concludes that the Variation and Display Terms might be void in Australia under the *ACL*.[93] If a good claim can be made in Australia, it may change the tactical and legal landscape for YouTubers globally. Regarding platforms generally, there has been a rapid growth in online consumer transactions.[94] Many

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87 Clause 15 of the 'AdSense Terms' (n 76) provides that

> [a]ll claims arising out of or relating to the AdSense Terms or the Services will be governed by California law, excluding California's conflict of laws rules, and will be litigated exclusively in the federal or state courts of Santa Clara County, California, USA ...

See also 'YouTube Terms of Service' (n 78).

88 Neerav Srivastava, 'Heritage and Vitality: Whether the Rule in Antony Gibbs Is a Presumption' (2021) 29(2) *Insolvency Law Journal* 61, 63.

89 *Sweet* (n 17).

90 Ibid 7, 14.

91 See below Part VI.

92 Gwendolyn Seale, 'Making Sense of YouTube's Monetization Policies', *Law Journal Newsletters* (Blog Post, January 2019) <http://www.lawjournalnewsletters.com/2019/01/01/making-sense-of-youtubes-monetization-policies/>.

93 See below Part VI.

94 'The Top eCommerce Australia Statistics for 2021 and Beyond', *Commission Factory* (Web Page, 3 May 2021) <https://blog.commissionfactory.com/ecommerce-marketing/analysis-of-australian-ecommerce-statistics>.

Australian consumers are now subject to proper law of contract clauses and exclusive jurisdiction clauses, which are often in favour of US law and US courts. That means that Australian consumers are exposed to US policy. As a matter of respective policy, Australia places a greater emphasis on consumer protection,[95] whereas the US gives primacy to freedom of contract.[96] In *Sweet*, the first legal foray by YouTubers in the US was unsuccessful. In Australia, claims may succeed. Hence, the policy differences between Australian and US law are significant.

Australian consumers exist in a new paradigm where multinationals provide online products to Australian consumers pursuant to foreign proper law of contract clauses and exclusive jurisdiction clauses. In essence, this Part is stress-testing Australian consumer protections in this new paradigm. At issue is whether the *ACL* is still able to achieve its objective to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.[97] The broader concern is that widespread use of proper law of contract clauses and exclusive jurisdiction clauses alienates Australian consumers from their legal system and specifically the protection of the *ACL*. Those clauses may also debase the Australian market norms and the objects of the *ACL*.

This Part argues that: (a) the proper law of contract clause in the YouTube contract will not exclude the application of the relevant provisions of the *ACL*; and (b) despite the exclusive jurisdiction clause, an Australian YouTuber will be able to claim in Australian courts.

A *Proper Law of Contract Clause*

Under the proper law of contract clause,[98] a claim for breach of contract by a YouTuber against YouTube must generally[99] be established under Californian law.[100] The main

95 Richard Garnett, 'Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward?' (2017) 39(4) *Sydney Law Review* 569, 570, 599.

96 See, eg, *Sweet* (n 17). See also ibid 587.

97 *Competition and Consumer Act 2010* (Cth) s 2 ('*CCA*').

98 See above n 87 and accompanying text.

99 M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 463 [19.1], 484–8 [19.39]. Mandatory laws are a civil law concept and not well established in Australian courts. However, Australian academics are now framing the analysis in terms of 'mandatory' laws. See also Michael Douglas, 'Choice of Law in the Age of Statutes: A Defence of Statutory Interpretation After *Valve*' in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart, 2019) 201.

100 An Australian court hearing the claim could still apply Californian law. In this respect, foreign law is a question of fact and is presumed to be the same as the law of the forum, ie, Australian law, unless evidence is led to the contrary: *Homestake Gold of Australia Ltd v Peninsula Gold Pty Ltd* (1996) 131 FLR 447, 455 (Young J).

limitation on a proper law of contract clause is that it is overridden by a 'mandatory law'.[101] Mandatory laws are

> laws the respect for which is regarded by a country as so crucial for safeguarding public interests (political, social, or economic organization) that they are applicable to any contract falling within their scope, regardless of the law which might otherwise be applied.[102]

In addition, where there is a weaker party, special treatment might be called for regarding the proper law of contract clause.[103]

For an Australian YouTuber to claim under the *ACL*:

- the *ACL* must apply to demonetisation; and
- relevant provisions of the *ACL* must be mandatory laws such that they override the proper law of contract clause.

1 *Applicability of the ACL*

The *ACL* applies either extra-territorially to conduct outside Australia where the corporation[104] carries on business within Australia; or directly to conduct within Australia.[105]

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101 For a discussion of mandatory laws, see Davies et al (n 99) 484–93 [19.39]–[19.49].

102 Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 3rd ed, 2013) 248.

103 See Alex Mills, *Party Autonomy in Private International Law* (Cambridge, 2018) ch 9; Davies et al (n 99) 470–2 [19.10], 492 [19.48]. Beyond being overridden by a mandatory law, and weaker party protection, there are other overlapping reasons for challenging a selection of the proper law of contract clause. First, the proper law of contract clause might be contrary to public policy: see generally Angus Macauley, 'Contracts against Public Policy: Contracts for Meretricious Sexual Services' (2018) 40(4) *Sydney Law Review* 527. Second, the clause might be an attempt to evade local law and therefore lacks bona fides: see *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378, 384 (Hoare J). In Canada, the selection of a proper law of contract clause has to be made in good faith: see Mills (n 103) 455.

104 In Australia, the corporation that is the contracting entity is Google Asia Pacific Pte Ltd: see 'AdSense Terms' (n 76) cl 1.

105 See Philip Clarke and Sharon Erbacher, *Australian Consumer Law: Commentary and Materials* (Lawbook, 6th ed, 2018) [17-55]:

> When considering the application of the ACL to an e-commerce transaction involving the supply … of goods or services from outside Australia to a consumer … an initial matter for consideration should always be the proper territorial characterisation … If that conduct is properly regarded as having occurred only … 'outside Australia' [under s 5(1) of the *CCA*] … the ACL will apply to that conduct if it was engaged in by a corporation 'incorporated or carrying on business within Australia' … On the other hand, if the impugned conduct can properly be regarded as having occurred inside Australia, even though some, or even most of it, took place or emanated elsewhere, then the ACL will apply directly … and s 5(1) will not be relevant.

The *ACL*'s reach is consistent with State sovereignty.[106] To apply a local law in a foreign State risks intruding on its sovereignty.[107] Under the related territorial presumption, it is presumed that a statute has territorial, and not extra-territorial, application.[108] Further, for a State to legitimately regulate extra-territorial matters, there needs to be a proper nexus, for example, carrying on business in Australia.[109]

Let us *assume* that demonetisation is conduct that occurs outside Australia. If so, for the *ACL* to apply extra-territorially, YouTube must be 'carrying on business within Australia'[110] under s 5(1) of the *Competition and Consumer Act* ('*CCA*').[111] YouTube is carrying on business in Australia: it has many customers in Australia, has been carrying on business for many years, and is earning significant revenue from Australian consumers.[112] As the *ACL* applies extra-territorially, it is not necessary to consider whether it applies directly.

Alternatively, demonetisation is conduct in Australia and the *ACL* applies directly. This is probably the better view. For the reasons discussed below,[113] it will be assumed that monetisation is a 'service', not a 'good'.[114] For Australian YouTubers to claim

106 Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Hilliard, Gray, 1834) 19–20; Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press, 2009) 51–3. See also ibid [17-55].

107 The modern approach views contract law as a private matter between the parties, although the parties are still subject to a State's regulations. See Srivastava (n 88) 63.

108 *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 601 (Dixon J); Douglas (n 99) 213; John Goldring, 'Globalisation and Consumer Protection Laws' (2008) 8(1) *Macquarie Law Journal* 79, 83.

109 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 13–14 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); Russell V Miller, *Miller's Australian Competition and Consumer Law Annotated* (Thomson Reuters, 40th ed, 2018) [CCA.5.120].

110 The courts take a liberal approach to this. Carrying on business was established in the following cases: *Australian Competition and Consumer Commission v Hughes* [2002] FCA 270, regarding online advertising from overseas to Australian consumers; *Australian Competition and Consumer Commission v Chen* (2003) 132 FCR 309, regarding online overseas selling of bookings for the Sydney Opera House; *Australian Competition and Consumer Commission v Worldplay Services Pty Ltd* (2004) 210 ALR 562, regarding a pyramid selling scheme run from Australia but only for overseas customers; *Australian Competition and Consumer Commission v StoresOnline International Inc* [2007] FCA 1597, regarding a US-based company conducting seminars and workshops in Australia.

111 *CCA* (n 97).

112 See Oxford Economics (n 42) 3; *Australian Competition and Consumer Commission v Valve Corporation [No 3]* (2016) 337 ALR 647, 650–1 [4] (Edelman J) ('*Valve*').

113 See below Part IV(A).

114 *ACL* (n 24) s 2 (definition of 'services'), (definition of 'goods').

under the *ACL,* there must have been a 'supply' of services to them.[115] Section 2 of the *ACL* gives 'supply' a broad meaning, which includes to 'provide, grant or confer' — this suggests a movement from the supplier to the consumer. Such words, arguably, emphasise where the service will be supplied to the consumer, ie, Australia, rather than where it is developed. Hence, monetisation is arguably a service 'provided' in Australia to an Australian YouTuber.[116] *Australian Competition and Consumer Commission v Valve Corporation [No 3]*[117] ('*Valve*') provides analogical support for this.[118] In *Valve*, Edelman J rejected the argument that the supply of US computer software took place where the agreement took place (ie, in the US). His Honour held that the 'supply' took place where the Australian consumer downloaded the software.[119] Further, a conclusion that an overseas online service used by consumers in Australia is 'supplied' in Australia is consistent with the objects of the *ACL*.[120]

2 *Approach to Determining Mandatory Laws*

Having concluded the *ACL* applies to demonetisation, the next question is whether any of the relevant statutory provisions are mandatory such that they apply despite the proper law of contract clause. A statutory provision may expressly provide that it is a mandatory law.[121] Most statutory provisions, though, are 'generally worded'. At this point, academics differ as to how to determine whether the provision is a mandatory law.[122] Some favour the traditional classification approach:[123]

> [I]n a conflict of laws problem two separate sets of rules are applied: the choice-of-law rules of the forum, which [WR Lederman] describes as 'indicative rules' … [that] merely indicate the law which will supply the rule or rules settling

115 The relevant consumer guarantees, statutory unconscionability, and unfair contract term provisions all speak of a 'supply' of services: ibid ss 21(1)(a), 23, 60–1.

116 Ibid s 2 (definition of 'supply').

117 *Valve* (n 112).

118 Ibid 676 [137] (Edelman J). This aspect of the decision was not challenged on appeal: *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, 212–13 [83] (Dowsett, McKerracher and Moshinsky JJ).

119 *Valve* (n 112) 676 [137], 684 [178]–[180].

120 *CCA* (n 97) s 2. In *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033 ('*Home Ice Cream*'), the objects of the *ACL* were mentioned in the context of refusing a stay on the basis of an Illinois exclusive jurisdiction clause: at [18] (Greenwood ACJ).

121 Davies et al (n 99) 477 [19.20].

122 For a defence of the traditional approach, see: Maria Hook, 'The "Statutist Trap" and Subject-Matter Jurisdiction' (2017) 13(2) *Journal of Private International Law* 435; Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4(1) *Journal of Private International Law* 1. For support for the statutory interpretation approach, see Douglas (n 99) 201–28.

123 Hook (n 122) 436.

> the issue (the *lex causae*),[124] and the relevant rule or rules of the *lex causae* which [Lederman] describes as 'dispositive rules' since they will settle the issue between the parties.[125]

If Australian law is identified as the *lex causae*,[126] then Australian legislation will be applied despite the proper law of contract clause.[127]

The alternative approach is to apply ordinary statutory interpretation to determine whether a generally-worded provision applies in a mandatory fashion.[128] Ordinary statutory interpretation is the ascendant approach.[129] Martin Davies et al state:

> The *Valve* litigation may thus be understood as contemporary authority for the proposition that the purpose (or policy) of a statute may determine whether the statute should operate in a mandatory fashion. Although this proposition is controversial among private international law scholars, *in Australia, it is mandated by legislation* such as s 15AA of the *Acts Interpretation Act 1901* (Cth).[130]

For the *ACL* specifically, the traditional approach seems inappropriate. A justification for the traditional approach has been a presumption that the statute was subject to,[131] or did not consider,[132] existing choice-of-law rules. However, the *ACL* was passed in the 21st century global economy, is explicitly conscious of territorial issues,[133] and deals with 'matters of high public policy'.[134] Further, the editors of *Dicey, Morris & Collins on the Conflict of Laws* point out that the common law never developed a classification rule for consumer contracts,[135] a specific category in the *2008 Rome I*

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124 For example, formalities of marriage are governed by the law of the place of celebration.

125 Davies et al (n 99) 360 [14.2], citing WR Lederman, 'Classification in Private International Law' (1951) 29(1) *Canadian Bar Review* 3.

126 This is a term of art that refers to the law of the cause of action.

127 Keyes (n 122) 10–11: '[i]f the legislative provision … forms part of the law of the cause, then the court must apply it. If the legislative provision is not part of the law of the cause, then it is not applied'.

128 Douglas (n 99) 201–28; Davies et al (n 99) 470–2 [19.10].

129 While Hook prefers the traditional approach, she acknowledges that the statutory interpretation approach is in the ascendant: Hook (n 122) 436.

130 Davies et al (n 99) 484–8 [19.39] (emphasis added).

131 Hook (n 122) 440.

132 *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 423 (Dixon J), cited in Douglas (n 99) 217.

133 See, eg: *CCA* (n 97) s 5; *ACL* (n 24) s 67.

134 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 528–9 [99]–[103] (Gummow J), quoting *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248, 256 (Lockhart J).

135 AV Dicey et al, *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2018) [32-008].

Convention.[136] These circumstances leave little room for a presumption that the legislature did not consider choice-of-law rules in enacting the *ACL*.[137]

3 *Provisions of ACL That Are Mandatory Laws*

Hence, ordinary statutory interpretation will be applied to determine whether an *ACL* provision is a mandatory law. The provisions that are relevant to this article are the consumer guarantees in pt 3-2 and the general protections in ch 2. There are three general protection provisions in ch 2: misleading and deceptive conduct (s 18); unconscionability (s 21); and unfair contract terms (s 23).

The consumer guarantees in pt 3-2 are expressly mandatory laws. Sections 64 and 67 state that they cannot be 'excluded, restricted, or modified' by a term of the contract, such as a proper law of contract clause.[138]

The general protections in ch 2 of the *ACL* do not have a direct equivalent to s 67. Both Davies et al[139] and Michael Douglas[140] point out that this absence may suggest that the ss 21 and 23 protections are not mandatory. Nevertheless, there are good counterarguments.

First, to be clear, ch 2 does not state that its protections are not mandatory.

Second, the general protections in ch 2 may be characterised as rights that cannot be excluded. In *Home Ice Cream Pty Ltd v McNabb Technologies LLC*[141] ('*Home Ice Cream*'), s 18 was described as a right, and it was held that an Illinois choice of law clause 'cannot operate in such a way as to deprive [the plaintiff] of the rights it seeks to agitate under the [*ACL*]'.[142] The authorities on, at least, s 18 suggest that the provision is mandatory.[143]

Third, the objects of the *ACL* support the view that the general protections under ch 2 are mandatory laws. As Davies et al explain:

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136 Under art 6(1), the default position is that a consumer contract is governed by the law of the country where the consumer is habitually resident: *Regulation 2008/593/EC of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* [2008] OJ L 177/6, art 6(1).

137 The overzealous application of the presumption may raise separation of power concerns: Douglas (n 99) 220.

138 See also *Valve* (n 112).

139 Davies et al (n 99) 492 [19.48].

140 Douglas (n 99) 226–7 makes the point with respect to s 18 of the *ACL*.

141 *Home Ice Cream* (n 120).

142 Ibid [19] (Greenwood ACJ).

143 Douglas (n 99) 203.

> [T]he policy of a 'forum statute', as understood through orthodox principles of statutory interpretation, may play a determinative role in choice-of-law problems for cross-border contracts, particularly where the contract is the result of inequality of bargaining power.[144]

The objects of the *ACL* include consumer protection. The effect of proper law of contract and exclusive jurisdiction clauses may be to alienate Australian consumers, the weaker party, from pursuing legal remedies.[145]Allowing this to proliferate would be inconsistent with the objects of the *ACL*. To use an extreme example, if the general protections under ch 2 are not mandatory laws, all businesses — Australian and international — could start using proper law of contract clauses to avoid ch 2. The result would be that ch 2 is rendered otiose. Further there is a public dimension to the ch 2 protections in the *ACL*.[146] The Australian Competition and Consumer Commission ('ACCC') has regulatory powers concerning the ch 2 protections that extend beyond the parties.

Fourth, as for policy being 'particularly' important where there is an inequality of bargaining power, both ss 21 and 23 are directed at redressing inequality.[147] Historically, the essence of unconscionability is the exploitation of a weaker party.[148] Unfair contract terms are void under s 23 where one party is a consumer or small business.[149]

Fifth, regarding s 21 specifically on unconscionable conduct, in *Epic Games Inc v Apple Inc* ('*Epic*'), Perram J held that s 21 was a mandatory law,[150] although it is fair to add that the decision does not undertake a detailed analysis as to why. In any event, it is arguable that 'conduct' is broader than a contract, and parties cannot exclude 'conduct' provisions. A claim under s 21 does not depend on a pre-existing

144 Davies et al (n 99) 470–2 [19.10].

145 See, eg, *Océano Grupo Editorial SA v Murciano Quintero* (C-240/98) [2000] ECR I-4963 ('*Océano*').

146 *Epic Games Inc v Apple Inc* (2021) 392 ALR 66, 72 [23] (Middleton, Jagot and Moshinsky JJ) ('*Epic Appeal*').

147 See generally Mills (n 106) 460–1. See especially Davies et al (n 99) 470–2 [19.10], 492 [19.48].

148 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 36 [81] (Gageler J) ('*ASIC v Kobelt*'). For a discussion of unconscionability, see below Part V.

149 See, eg, *ACL* (n 24) ss 24–5.

150 [2021] FCA 338, [19] (Perram J) ('*Epic*'). Although the focus of the discussion was whether the competition provisions in pt IV of the *CCA* were mandatory laws, his Honour granted Apple a stay of proceedings pursuant to an exclusive jurisdiction clause. However, on appeal, the Full Court of the Federal Court of Australia exercised its discretion afresh and refused the stay: *Epic Appeal* (n 146). That said, Perram J's conclusion that s 21 was a mandatory law was not challenged on appeal: at 76–7 [48] (Middleton, Jagot and Moshinsky JJ).

contract.[151] Analogical support for a 'conduct' analysis can be found from cases on s 18 like *Valve*.[152] In *Valve*, Edelman J reiterated that the test for s 18 is objective.[153] The effect of a contractual provision, such as a proper law of contract clause, is not to exclude s 18, but to neutralise the misleading or deceptive conduct.[154] The cases on exclusion clauses in commercial contracts reach the same conclusion.[155]

Further, unconscionability is determined by reference to 'norms' of Australian society, and is, therefore, not an issue exclusively between the parties.[156] The ACCC can apply for a court to order, for example, that pecuniary penalties be paid to the government[157] and compensation be awarded to non-parties.[158] Hence, the regulation of unconscionable conduct in Australia is also a matter of public interest. In this respect, s 21 is similar to criminal laws, which are generally understood to be strictly territorial.[159]

Sixth, it is less certain whether s 23 on unfair contract terms is a mandatory law.[160] At common law, the proper law of a contract governs all aspects of a contractual obligation, including its validity.[161] In the instant case, this suggests that the unfairness of a term would normally be determined under Californian law. As per *Sweet*, that would mean the terms are not unfair.[162] The counterargument is that s 23 is a statutory regime that supersedes the common law. As a matter of policy, Australia is one of the few jurisdictions to extend unfair terms protection to small businesses expressly, for example, a YouTuber.[163] An interpretation that s 23 can be disapplied by a proper law of contract clause would be problematic. As Davies et al note, a proper law of contract clause designed to evade the operation of ss 21 or 23 might

151 *ACL* (n 24) s 21(1).

152 In *Valve* (n 112) it was held that a contractual term might neutralise the misleading or deceptive conduct, but it cannot be contracted out of: see above Part III(A)(1).

153 *Valve* (n 112) 689 [212]–[213].

154 *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1, 17 [37] (Stone J, Moore J agreeing at 4 [1], Mansfield J agreeing at 11 [17]); *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, [83] (Keane JA, Williams JA agreeing at [1], Atkinson J agreeing at [145]).

155 Miller (n 109) [ACL.18.420].

156 *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) [No 2]* [2017] FCA 709, [60]–[62] (Beach J) ('*ACCC v Get Qualified*').

157 See *ACL* (n 24) s 224.

158 Ibid s 227.

159 Goldring (n 108) 87–8.

160 Davies et al (n 99) 492 [19.48].

161 Ibid 463 [19.1].

162 *Sweet* (n 17) 7 (Chen J).

163 Stephen Corones et al, *Comparative Analysis of Overseas Consumer Policy Frameworks* (Report, Queensland University of Technology, Faculty of Law, April 2016) [2.1.1]. For the definition of a 'small business contract', see *ACL* (n 24) s 23(4).

itself be unconscionable or unfair.[164] If s 23 is not mandatory, Australian consumers may not have the benefit of an important protection. Section 23 of the *ACL* also has a public interest element, in that under s 250 the ACCC, as a regulatory body, can independently apply to have a term declared unfair. Looking at both sides, it is more likely than not that s 23 continues to apply despite the proper law of contract clause.

Hence, despite the proper law of contract clause, the consumer guarantees continue to apply, and this article will assume that ss 21 and 23 apply.

B *Exclusive Jurisdiction Clause*

Even though an Australian YouTuber can rely on provisions of the *ACL* under Australian law, that point might be academic if they cannot bring proceedings in Australia. A foreign court, assuming jurisdiction under an exclusive jurisdiction clause, may or may not apply the *ACL*'s mandatory laws. So, whether an Australian YouTuber can sue locally is practically important.

Since YouTube has a presence in Australia,[165] Australian courts have jurisdiction to hear a claim by YouTubers. YouTube can apply to stay those proceedings on the basis of the exclusive jurisdiction clause. The granting of a stay of the Australian proceedings is discretionary and such an application is unlikely to succeed.[166] When a party legitimately invokes Australian jurisdiction, they have a 'prima facie right to insist upon its exercise'.[167] So, generally, for a stay to be granted, it must be shown that the Australian forum is clearly inappropriate.[168] If there is an exclusive jurisdiction clause, the position is different in that a stay should be granted unless there are strong reasons for refusing it. However, (1) YouTube's exclusive jurisdiction clause is either void; and (2) even if not void, there are strong reasons for refusing the stay.

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164 Davies et al (n 99) 470–2 [19.10]. While a consumer might be able to challenge a proper law of contract clause on the grounds of unconscionability, it would be harder for a commercial party to do so.

165 *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156 lays down three conditions for a corporation to have a presence in Australia. First, the corporation must be carrying on business in Australia; second, the business must be carried on at some fixed or definite place; and third, the business has carried on for sufficient time: at 165 (Holland J). All three are satisfied in YouTube's case. For further discussion on the general principles of jurisdiction in personam, see ibid ch 3. For further discussion on the criteria for when a corporation has a presence in Australia, see ibid 846–52 [35.15]–[35.25]. Proceedings can be brought in the Federal Court or the Federal Circuit Court: see *CCA* (n 97) ss 138, 138A; proceedings can be brought in State or Territory courts: at s 138B.

166 Davies et al (n 99) 168 [7.38].

167 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 241, 243 (Deane J) ('*Oceanic Sun Line*').

168 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. See also Davies et al (n 99) 200–3 [8.13]– [8.19].

1 *Whether the Exclusive Jurisdiction Clause Is Void*

First, with respect to a YouTuber's claim for breach of the consumer guarantees under s 64 of the *ACL*, an exclusive jurisdiction clause is void to the extent that it 'has the effect of excluding, restricting or modifying' the application, or exercise, of the consumer guarantees. Under an exclusive jurisdiction clause, a consumer must pursue proceedings overseas. It is an obligation that can be contrasted with the relative ease of small consumer claims at local bodies[169] and the emergence of virtual hearings during the COVID-19 pandemic.[170] The decision of the European Court of Justice in *Océano Grupo Editorial SA v Murciano Quintero*[171] ('*Océano*') captures the effect of an exclusive jurisdiction clause on a consumer:

> In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause [them] to forgo any legal remedy or defence. Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action …[172]

An average Australian YouTuber is unlikely to be able to afford to fly to California to commence legal proceedings.[173] Hence, the exclusive jurisdiction clause is likely to be void regarding a consumer guarantees claim and cannot support YouTube's stay application.

If an Australian YouTuber could afford to travel to California, the exclusive jurisdiction clause would still be void if it can be shown that the Californian court will not enforce the consumer guarantees under the *ACL*.[174] As Byrne J said in a slightly different context:

> [I]t is a hard thing to turn away a litigant [due to an exclusive jurisdiction clause] who has properly invoked the jurisdiction of this court, [with respect to proceedings under the *Trade Practices Act 1974* (Cth)] particularly where the consequence of this must be that the litigant is precluded from enforcing rights which [they enjoy] as a person engaging in commerce in Victoria by virtue of legislation in force in this jurisdiction.[175]

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169 The Victorian Civil and Administrative Tribunal, for example.

170 See, eg, local county courts. See 'Virtual Hearings and Trials', *County Court of Victoria* (Web Page, 19 May 2021) <https://www.countycourt.vic.gov.au/going-court/virtual-hearings-and-trials>.

171 *Océano* (n 145).

172 Ibid I-4972 [22].

173 As a non-Californian resident, the YouTuber also potentially faces the restriction of having a security for costs order made against them: see 14 Cal CCP Code § 1030 (1988).

174 Garnett (n 95) 581.

175 *Commonwealth Bank of Australia v White* [1999] 2 VR 681, 705 [91] (Byrne J).

Therefore, an Australian court would hear a claim under the *ACL* for breach of consumer guarantees.

Second, as for a claim under the general protections at ch 2, the exclusive jurisdiction clause may be void under s 21 for being unconscionable,[176] or void under s 23 as an unfair term. Regarding s 21, this possibility was discussed by Perram J at first instance in *Epic*.[177]

Under s 23,[178] the exclusive jurisdiction clause is likely unfair. An exclusive jurisdiction clause has the potential to disenfranchise a YouTuber from making a claim. As per s 24, it causes a significant imbalance[179] in the parties' rights and causes detriment[180] to a YouTuber. It is hard to see why a Californian exclusive jurisdiction clause is reasonably necessary[181] for an organisation as large as YouTube with a significant revenue base in Australia.[182] This is especially so given that there are reasonable local alternatives such as arbitration. Section 25 provides examples of what might be an unfair term, one of which is a term that 'limits, or has the *effect* of limiting, one party's right to sue another party'.[183] An exclusive jurisdiction clause does not formally limit an Australian YouTuber's right to sue. As per the analysis above regarding s 64 and *Océano*, it may have that 'effect' under s 25.

Third, there are Australian dicta to the effect that a foreign court is not competent to determine issues under the *ACL*. In *Home Ice Cream*, Greenwood ACJ observed that a foreign exclusive jurisdiction clause 'does not, as a matter of principle, prevail over statutory protective provisions'.[184] Such an approach may elide the technical distinction between proper law and jurisdiction and has been criticised internationally.[185] However, as Alex Mills observes, it may be necessary to invalidate an exclusive

176 See *Epic* (n 150) [17] (Perram J).

177 In *Epic*, his Honour rejected the notion that the 'inclusion of [the exclusive jurisdiction clause] constituted unconscionable conduct on the part of Apple' since both parties were 'large corporations'. Justice Perram, however, left open the possibility that such a contractual clause could be unfair within the meaning of s 21 'if Epic were a consumer' under the *ACL*.

178 See below Part VI.

179 *ACL* (n 24) s 24(1)(a).

180 Ibid s 24(1)(c).

181 Ibid s 24(1)(b).

182 See Oxford Economics (n 42) 3.

183 *ACL* (n 24) s 25(k) (emphasis added). Under ss 267–70 of the *ACL*, an action can be brought against suppliers of services for breach of consumer guarantees. Sections 232, 236 provide for an injunction or damages respectively for a contravention of general protections under ch 2 (which includes the statutory unconscionability and unfair terms provisions).

184 *Home Ice Cream* (n 120) [19] (Greenwood ACJ).

185 Alex Mills states that 'Australian practice on this point has been viewed critically by some commentators, and there is at best mixed support for this approach in the United States': Mills (n 106).

jurisdiction clause to ensure that mandatory laws are not 'evaded through the combination' of proper law of contract clauses and exclusive jurisdiction clauses.[186]

If the exclusive jurisdiction clause is void, it will be hard for YouTube to show that the Australian forum is clearly inappropriate.

2 *If the Exclusive Jurisdiction Clause Is Not Void, an Australian Court Will Still Refuse Stay*

Even if the exclusive jurisdiction clause is not void with respect to a ch 2 claim, it seems that a stay will still be refused. Despite the exclusive jurisdiction clause, it is submitted that there are strong reasons for refusing the stay.[187]

First, there are a number of public policy reasons for refusing a stay. Even if the *ACL*'s mandatory laws do not void the exclusive jurisdiction clause, they are relevant to the discretion.[188] A mandatory law, by its nature, is likely to have a public policy dimension.[189] This is especially so where it is clear that the foreign court will not apply a mandatory Australian law.

Support for this proposition can be drawn from *Epic*.[190] Epic Games is a developer of gaming apps.[191] Apple requires that developers use Apple's in-app payment processing system, which entails a 30% commission to Apple for each payment.[192] Epic introduced its own in-app payment processing system for its popular game, Fortnite — thereby circumventing Apple's payment processing system.[193] In Australian proceedings, Epic alleged that Apple was contravening certain provisions of the *CCA*. Apple sought a stay. On appeal, the stay was refused on public policy grounds. The Full Court referred to mandatory laws being essential to the legal polity, and the need for Australia to maintain the integrity of its markets.[194] The Full Court concluded by noting that the result of proceedings might be particularly 'far reaching' in that they may adversely affect the 'state of competition in markets in Australia and very large numbers of Australians'.[195]

186 Ibid 482.

187 See *The Eleftheria* [1969] 2 All ER 641, 645 (Brandon J); *Oceanic Sun Line* (n 167) 230–1 (Brennan J), 259 (Gaudron J); *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 428–9 (Dawson and McHugh JJ) ('*Akai*'); *Faxtech Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320, [20] (Middleton J).

188 Davies et al (n 99) 361–2 [14.5]; Mills (n 106) 482.

189 *Epic Appeal* (n 146) 72 [23], 75–6 [42] (Middleton, Jagot and Moshinsky JJ).

190 Ibid.

191 Ibid 69 [4].

192 Ibid.

193 Ibid 69–70 [7], quoting *Epic* (n 150) [6]–[7] (Perram J).

194 *Epic Appeal* (n 146) 75–6 [42], 78 [54].

195 Ibid 87 [97].

Likewise, proceedings against YouTube are far reaching and would affect a large number of Australians. It would directly affect over 1,900 Australian YouTube channels and their local and global audiences.[196] YouTube's regulation of content is not just an issue between private parties; it raises the issue as to whether YouTube's approach aligns with Australian cultural norms.[197] A number of the issues in proceedings against YouTube would go to the general integrity of the Australian market. Platform transparency — and accountability — to Australian consumers has become an important issue. So too is the enforceability of unilateral variation clauses ('UVCs') in multinational platform contracts. A more general issue arising is the extent to which Australian online consumers should be subject to US consumer law and policy, as opposed to the stronger consumer protection regime of Australia.

Ubiquitous exclusive jurisdiction clauses that effectively disenfranchise Australian consumer are inconsistent with the objects of the *ACL*, and that, in itself, is a public policy concern.[198] There are local dicta that suggest — where a consumer is involved, unlike commercial parties[199] — an exclusive jurisdiction clause does not carry much weight.[200] Most Australian YouTubers will be 'consumers' under s 3(3) of the *ACL*. Under s 3(3)(a)(ii), a person acquires goods or services as a consumer if the amount paid did not exceed AUD100,000.[201] At least two-thirds of Australian YouTubers will come under s 3(3)(a)(ii).[202] As the Supreme Court of Canada put

196 This figure only includes Australian channels that have over 100,000 subscribers: Oxford Economics (n 42) 4.

197 *Epic Appeal* (n 146) 71 [13], 84–5 [87]. See also Katherine Daniell, *The Role of National Culture in Shaping Public Policy: A Review of the Literature* (Report, HC Coombs Policy Forum, June 2014) i.

198 For a discussion of the 'offends public policy' reason against granting a stay, see *Akai* (n 187) 445 (Toohey, Gaudron and Gummow JJ), cited in LexisNexis, *Halsbury's Laws of Australia* (online at 5 August 2021), 85 Conflict of Laws, '1 Conflict of Laws in General' [85-515].

199 See: *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* (2010) 79 ACSR 383, 394 [40] (Spigelman CJ, Giles JA agreeing at 404 [101], Tobias JA agreeing at 404 [102]) ('*Global Partners Fund*'), quoting *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* (2010) 267 ALR 144, 166 [118] (Hammerschlag J); *Global Partners Fund* (n 199) 398 [61] (Spigelman CJ, Giles JA agreeing at 404 [101], Tobias JA agreeing at 404 [102]), quoting *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 165 (Gleeson CJ).

200 *Knight v Adventure Associates Pty Ltd* [1999] NSWSC 861, [32]–[36] (Master Malpass); *Quinlan v Safe International Försäkrings AB* [2005] FCA 1362, [46] (Nicholson J). Cf *Gonzalez v Agoda Co Pte Ltd* [2017] NSWSC 1133, [126] (Button J): Justice Button suggested it was reasonable for a company to have one forum for its consumer disputes rather than multiple forums.

201 *Treasury Laws Amendment (Acquisition as Consumer: Financial Thresholds) Regulations 2020* (Cth) sch 1 item 3, inserting *Competition and Consumer Regulations 2010* (Cth) reg 77A.

202 Two-thirds of Australian YouTubers earn less than AUD100,000: see Lieu (n 43). That means they pay YouTube AUD45,000 (55% of their total advertising revenue) or less as part of their AdSense contract: see van Es (n 33) 229. I am assuming most of these

it in *Douez v Facebook* ('*Douez*'), not all exclusive jurisdiction clauses are created equal.[203] In refusing a stay, the majority stated:

> [C]ommercial and consumer relationships are very different … the *consumer context may provide strong reasons not to enforce forum selection clauses* … [because] the unequal bargaining power of the parties and the rights that a consumer relinquishes under the contract, without any opportunity to negotiate … [does not] suppor[t] certainty and security, [instead] forum selection clauses in consumer contracts may do 'the opposite for the millions of ordinary people who would not foresee or expect its implications'.[204]

For a YouTuber, the exclusive jurisdiction clause is part of the AdSense Terms, a standard click-wrap agreement. The AdSense Terms are presented on a 'take it or leave it' basis rather than being a 'meeting of the minds'.[205] It is most unlikely that a lay YouTuber will read the exclusive jurisdiction clause at the time of contracting.[206]

Second, a YouTuber might not be able to afford to claim overseas, and would therefore be unduly prejudiced.[207] The prejudice, as per *Océano*, is to forego a legal remedy.[208]

Third, while California has equivalent remedies, the remedies are broader in Australia.[209] For example, under s 23, Australia extends its unfair terms protection to small businesses. California does not.

YouTubers are paying YouTube less than AUD40,000 for the service. Therefore, at least two-thirds of YouTubers, with the actual ratio probably being much higher, are 'consumers' under the *ACL*. For successful YouTubers, who pay YouTube more than AUD40,000, it is questionable whether they are consumers, under *ACL* (n 24) s 3(3)(b), as demonetisation is unlikely to be a service is of a kind ordinarily for 'personal, domestic or household use'.

203 [2017] SCR 751, [33] ('*Douez*'). Unlike *Douez*, *Epic* concerned commercial parties. In *Epic*, the Federal Court considered that there was a public interest in holding a commercial party to an exclusive jurisdiction clause to which it had agreed: *Epic* (n 150) [17] (Perram J). Therefore, a YouTuber would be in a similar position to *Douez*. See also *ACCC v Get Qualified* (n 156).

204 *Douez* (n 203) [33] (emphasis added).

205 DW Greig and JLR Davis, *The Law of Contract* (Law Book, 1987) 22–3.

206 Jonathan A Obar and Anne Oeldorf-Hirsch, 'The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services' (2020) 23(1) *Information, Communication and Society* 128, 129–30.

207 For a discussion of the 'undue prejudice' reason for refusing a stay, see *Oceanic Sun Line* (n 167), cited in LexisNexis, *Halsbury's Laws of Australia* (n 198) [85-515].

208 *Océano* (n 145) I-4972 [22].

209 For a discussion on relief in local proceedings being unavailable in foreign proceedings, see *Akai* (n 187), cited in LexisNexis, *Halsbury's Laws of Australia* (n 198) [85-515].

Finally, the exclusive jurisdiction clause does not prevent the YouTuber from bringing proceedings in Australia for a breach of the consumer guarantees. To ask the YouTuber to bring claims under ch 2 of the *ACL* in California would create a multiplicity of proceedings, which would increase costs and create a risk of inconsistent findings. It is unlikely that a judge will allow such a fragmentation.[210]

Hence, regardless of approach, it appears that where a consumer is involved, Australian courts will refuse a stay.

In summary, provided a robust approach is taken, the *ACL* will apply despite the proper law of contract clause, and an Australian court will hear a claim by an Australian YouTuber. On that basis, this article turns to consider the substantive issues.

IV Wrongful Demonetisation

The first substantive issue is whether a wrongful demonetisation contravenes the due care and skill guarantee under s 60 of the *ACL*; or, the fit for purpose guarantee under s 61.

The following examples of wrongful demonetisation by YouTube provide context. Ford Fischer is a prominent political video journalist. In 2019, Fischer's entire channel was demonetised. After seven months of advocacy and the loss of his livelihood, YouTube apologised and remonetised the channel.[211] Unlike a small-time YouTuber, presumably, Fischer was able to leverage the support of the media.[212] In a second incident involving Fischer, his recording of the 6 January 2021 storming of the United States Capitol led to his channel being demonetised because it contained 'harmful content'.[213] There were other recordings of the incident that were not demonetised.[214] YouTube again apologised for its 'over-enforcement'.[215]

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210 Davies et al (n 99) 192 [7.89].

211 Soo Youn, 'Journalist, Teacher Get Caught up in YouTube's Struggles with Hate Speech', *ABC News* (online, 7 June 2019) <https://abcnews.go.com/Business/journalist-teacher-caught-youtubes-struggles-hate-speech/story?id=63529939>. Fischer has written about his demonetisation troubles: see Fischer (n 16).

212 Youn (n 211).

213 Joseph A Wulfsohn, 'YouTube's "Dangerous" Crackdown on Independent Journalists: "It Defies All Logic and Reason"', *Fox News* (online, 4 February 2021) <https://www.foxnews.com/media/youtube-cracking-down-on-independent-journalists> ('YouTube's "Dangerous" Crackdown').

214 See, eg, Fischer (n 16).

215 Joseph A Wulfsohn, 'YouTube Remonetizes Independent Journo's Account Hours after Fox News Runs Story on Its "Dangerous" Actions', *Fox News* (online, 4 February 2021) <https://www.foxnews.com/media/youtube-remonetizes-independent-journos-account-hours-after-fox-news-runs-story-on-its-dangerous-actions>; Wulfsohn, 'YouTube's "Dangerous" Crackdown' (n 213).

A *Whether the Guarantees Are Engaged*

Both ss 60 and 61 of the *ACL* are engaged when 'a person supplies, in trade or commerce, services to a consumer'.[216] As discussed, there has been a 'supply' of monetisation to YouTubers,[217] and two-thirds of YouTubers are 'consumers'.[218]

As to whether monetisation by YouTube amounts to 'goods' or 'services' under s 2 of the *ACL*,[219] there are two products provided by YouTube. One is the online platform for uploading content that is subject to the general YouTube contract. The other is monetisation of content if the YouTuber signs the AdSense Terms. It is the latter that is the focus of this article.

The definition of 'services'[220] in the *ACL* is open-ended. 'Services' include 'rights, benefits, privileges or facilities'.[221] Examples of 'services' include 'the performance of work (including work of a professional nature)'[222] and 'the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction'.[223]

Substantively, it is submitted that monetisation is a 'service'.[224] Like the examples of 'services' in s 2 of the *ACL*, demonetisation is not a physical product. In contrast, the examples of 'goods' are mostly physical.[225] The securing of advertising revenue is a 'benefit' under s 2.[226] YouTube can be described as performing 'work':[227] monetising involves generating advertising revenue by matching an advertiser to content. There is a parallel with professional services, such as an advertising professional or an accountant.[228]

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216 *ACL* (n 24) ss 60, 61(1)(a), (2)(a).

217 Ibid s 2 (definition of 'supply'); see above Part III(A)(1).

218 *ACL* (n 24) s 3(3); see above Part III(B)(2).

219 *ACL* (n 24) s 2 (definition of 'goods'), (definition of 'services').

220 Ibid s 2 (definition of 'services').

221 Ibid s 2 (definition of 'services' para (b)).

222 Ibid s 2 (definition of 'services' para (b)(i)).

223 Ibid s 2 (definition of 'services' para (b)(ii)).

224 A complication with concluding that monetisation is a service is that s 2 of the *ACL* includes 'computer software' in the definition of 'goods': ibid s 2 (definition of 'goods' para (e)). In *Valve* (n 112) 676–7 [137]–[142], it was held that a crucial feature in determining what was 'computer software' was whether the game could be played offline. If it could be used offline, then there must have been downloaded software instructing the computer: the software was a 'good'. Monetisation is not something that an Australian YouTuber uses offline. *Valve* (n 112) is to be distinguished.

225 See *ACL* (n 24) s 2 (definition of 'goods').

226 Ibid s 2 (definition of 'services').

227 Ibid s 2 (definition of 'services' para (b)(i)).

228 See Miller (n 109) [CCA.4.500] as to broad scope of service.

YouTube can also be described as a 'facilit[y]'[229] for monetisation of 'entertainment'.[230] Further, it is relevant that the AdSense Terms describe monetisation as a '[s]ervice'.[231]

Finally, YouTube is acting in 'trade or commerce'.[232] Pursuant to s 2, YouTube is undertaking a 'business or professional activity'.[233] Further, monetisation has a commercial character in that both YouTubers and YouTube profit.[234]

Hence, the consumer guarantees are engaged. The next question is whether wrongful demonetisation contravenes the consumer guarantees.

B *Due Care and Skill Consumer Guarantee*

The due care and skill consumer guarantee under s 60 of the *ACL* is analogous to negligence.[235] That is, s 60 focuses on a breakdown in the process.

Historically, a decision like demonetisation would likely have been made by an employee. Negligence under s 60 could be proven by showing a breakdown in the decision-making process. Perhaps the training the employee received was deficient, they spent too little time reviewing the demonetised video, or they misunderstood the distinction between hate and educational videos.

In modern times, it is YouTube's algorithm, AdSense, that makes a decision to demonetise. YouTube admits that its algorithm will get better with machine learning.[236] Similarly, Facebook has acknowledged that its content moderation algorithm needs to improve.[237] Let us say that an algorithm has failed to distinguish between bigoted and anti-bigoted content in an educational video.[238] Establishing negligent demonetisation by an algorithm is not easy. Wrongful demonetisation by

229 *ACL* (n 24) s 2 (definition of 'services' para (b)(ii)).

230 Ibid.

231 'AdSense Terms' (n 76) cl 1.

232 *ACL* (n 24) s 2 (definition of 'trade or commerce' para (b)).

233 Ibid s 2 (definition of 'trade or commerce').

234 Miller (n 109) [CCA.4.540].

235 Clarke and Erbacher (n 105) [13.10]; Miller (n 109) [ACL.60.20].

236 Erik Kain, 'YouTube Wants Content Creators to Appeal Demonetization, But It's Not Always That Easy', *Forbes* (online, 18 September 2017) <https://www.forbes.com/sites/erikkain/2017/09/18/adpocalypse-2017-heres-what-you-need-to-know-about-youtubes-demonetization-troubles/#13e7192f6c26>: 'an appeal gets sent to a human reviewer and their decisions help our systems get smarter over time'.

237 Nick Clegg, 'Facebook's Response to the Oversight Board's First Set of Recommendations', *Facebook* (Web Page, 25 February 2021) <https://about.fb.com/news/2021/02/facebook-response-to-the-oversight-boards-first-set-of-recommendations/>.

238 For a discussion of how YouTube treats bigoted and anti-bigoted content: see Thomson (n 14).

an algorithm is not likely to be a misunderstanding or an idiosyncratic application of policy, as may occur with an employee. An algorithm is a set of instructions to a computer. The reason for the wrongful demonetisation is probably systemic: it lies in the design of the algorithm. The remit given by management to the programmer may have negligently omitted an educational purposes exception.[239] If included, the programmer might have failed to code for it or written negligent code. But what is negligent coding? What amounts to reasonable care when coding? These are difficult questions. Apart from the legal test, delving into an algorithm to prove negligence is a practical obstacle. While it *may* be possible to rely on *res ipsa loquitur*,[240] in order to do so the plaintiff would have to show that the only reasonable explanation for wrongful demonetisation is an algorithmic breakdown. That, in itself, is a difficult task.

Rather than a forensic examination of the algorithms, a neater argument might be that the demonetisation process as a whole is flawed. A reasonable system should have some human supervision.[241] For many matters, algorithms may raise current standards. Analysing content is not *yet* one of them. The richness of human experience can be found in YouTube content.[242] Algorithms cannot currently vet such richness to the sophistication required; something that YouTube and Facebook admit.[243] So, not having some supervision, at least at this early stage, is inherently flawed. Interestingly, YouTubers suggest using crowdsourcing[244] to vet content,[245] perhaps as a way of managing costs.

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239 For instance, if an education video regarding Nazi Germany was misclassified: see Jim Waterson, 'YouTube Blocks History Teachers Uploading Archive Videos of Hitler', *The Guardian* (online, 6 June 2019) <https://www.theguardian.com/technology/2019/jun/06/youtube-blocks-history-teachers-uploading-archive-videos-of-hitler>.

240 Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (Oxford University Press, 4th ed, 2007) 459–60 [8.7.3.4].

241 Samir Chopra and Laurence White make a similar point when discussing liability for negligent supervision of a highly autonomous agent: see Samir Chopra and Laurence F White, *A Legal Theory for Autonomous Artificial Agents* (University of Michigan Press, 2011) 132–3.

242 Consider, for instance, how eminent the Facebook Oversight Board is. See: below Part V(C); 'Ensuring Respect for Free Expression, through Independent Judgement', *Facebook Oversight Board* (Web Page, 8 April 2021) <https://oversightboard.com/>.

243 In admitting that their algorithms will improve. See also Kain (n 236); Clegg (n 237).

244 Crowdsourcing is 'outsourcing a function or activity of an organisation to a network of people in the form of an open call': see C Devece, D Palacios and B Ribeiro-Navarrete, 'The Effectiveness of Crowdsourcing in Knowledge-Based Industries: The Moderating Role of Transformational Leadership and Organisational Learning' (2019) 32(1) *Economic Research* 335, 335.

245 Mike Masnick, 'YouTube and Demonetization: The Hammer and Nail of Content Moderation', *Techdirt* (Blog Post, 26 February 2019) <https://www.techdirt.com/articles/20190223/00430041656/youtube-demonetization-hammer-nail-content-moderation.shtml>.

C *Fitness for Purpose*

The consumer guarantee under s 61 of the *ACL* that a service be reasonably fit for purpose focuses on the result and quality rather than the process.[246] When content is wrongly demonetised, the quality of the monetisation service is in issue. However, whether s 61 is breached is not straightforward. If we approach each piece of content as a discrete unit, then wrongly demonetising a discrete unit would breach s 61. The alternative approach might be that s 61 requires that the general service level of monetisation be reasonably fit for purpose. YouTube may argue that it had made only one mistake and that it was generally meeting the service level standard.[247] Neither approach is satisfactory. The former is perhaps slightly preferable if we assume that some content is more valuable than other content. It highlights how each demonetisation decision may need to be judged discretely. That a toboggan run had a history of being safe was no defence when it was not safe for the specific transaction in question.[248]

In short, there are challenges to establishing a claim under the consumer guarantees.[249]

V Lack of Transparency as Unconscionable Conduct?

The second substantive issue is whether YouTube not being sufficiently transparent about a demonetisation decision is contrary to s 21 of the *ACL*.[250] When a YouTuber's

246 See generally Gail Pearson, 'Reading Suitability against Fitness for Purpose: The Evolution of a Rule' (2010) 32(2) *Sydney Law Review* 311.

247 If looking at the general service level is acceptable, then the question becomes what level of wrongful demonetisation amounts to AdSense not being reasonably fit for purpose? There is no comparator regarding acceptable service levels. See also Stephanie Overby, Lynn Greiner and Lauren Gibbons Paul, 'What is an SLA? Best Practices for Service-Level Agreements', *CIO* (Web Page, 5 July 2017) <https://www.cio.com/article/2438284/outsourcing-sla-definitions-and-solutions.html>.

248 *Gharibian v Propix Pty Ltd* [2007] NSWCA 151, [53]–[55] (Ipp JA).

249 Unlike negligence, *ACL* (n 24) s 267(4) does not limit the type of loss for which damages can be awarded. Damages have been awarded for such matters as disappointment distress: see, eg, *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326. It may also be possible to establish a claim based on stigma and loss of reputation. If a claimant has lost standing in the LGBTIQ+ community, that may support a claim for damages: Bensinger and Albergotti (n 2).

250 As mentioned, it may be difficult to argue that common law unconscionability, under s 20 of the *ACL* (n 24), survives the choice of Californian law. As the article submits that s 21 applies, the s 20 issue does not need to be resolved. As to the difficulties of being able to rely on Australian law for the purposes of an equitable claim where another choice of law rule, eg, proper law, exists, see Dicey et al (n 135) [2-037]:

> [T]he most persuasive authority tends to suggest that where an obligation which would be equitable in domestic law arises in connection with another legal relationship for which a specific choice of law rule exists, the equitable claim will be characterised as falling within the domain of that other relationship and governed by the same law.

entire channel is demonetised, only bare reasons are given.[251] The YouTuber is not told which passage(s) is objectionable. Nor are they given detailed reasons. The main category of advertising guideline purportedly infringed will be stated, for example, harmful content, but no more. Not surprisingly, *sometimes* a YouTuber does not know why they have been demonetised.[252] On other occasions, the reasons for demonetisation are obvious, such as where a specific video has previously been identified before the entire channel is demonetised.

A *Critical Matter*

It should be appreciated that YouTube's lack of transparency is a critical matter to YouTubers. It affects their existing video portfolio, livelihood, reputation, and the contents of proposed videos. David Hoffman, a 78-year-old YouTuber, repurposes content from his Academy Award-winning film career. He complained that he had been wrongly demonetised. In response, he received no explanation:

> Unfortunately, we cannot provide you specific details on what guideline your content has violated and also, we're not able to provide you where your channel does not comply with YouTube's YouTube Partner Program terms.[253]

Graham Elwood, a left-wing political commentator, was told that his YouTube channel was demonetised because the content was 'harmful to viewers' and 'focuse[d] on controversial issues'.[254] It was not stated which passage in Elwood's bank of 2,200 videos, built up over four years, was objectionable and why. Elwood estimates a further 10–12 political commentators were demonetised at the same time.[255] Content

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See also *A-G (England and Wales) v The Queen* [2002] 2 NZLR 91, 94 [30] (Tipping J):

> It would be anomalous to apply one system of law to an issue which would have arisen at law [such as the proper law pursuant to a proper law of contract clause], and another to an issue which would have been for the Courts of Equity to deal with [such as common law unconscionability].

See also Davies et al (n 99) ch 14.

251 Alexander, 'The Yellow $' (n 12).

252 Casey Neistat captures this well: '[n]ow, imagine this. Your boss doesn't tell you what's going on, you can't get in touch with your boss, you don't know how to get in touch with your boss. You look around for answers … there are no answers': Sinke (n 9).

253 An initial email spoke of 'duplication' but did not provide any details: see Goggin and Tenbarge (n 15).

254 Mohamed Elmaazi, 'US Comedian Graham Elwood Explains How YouTube "Demonetised" His Show for Alleged "Harmful Content"', *Sputnik* (online, 13 February 2021) <https://sputniknews.com/interviews/202102131082049822-us-comedian-graham-elwood-explains-how-youtube-demonetised-his-show-for-alleged-harmful-content/>.

255 Ibid.

that amounts to a 'controversial issue'[256] is too vague when it comes to a political commentator unless it identifies an objectionable passage.

Given the chorus of complaints, YouTube has added two manual options: YouTubers can submit content to YouTube before it goes live for vetting; and they can appeal a demonetisation decision.[257] But a pre-check may mean an opportunity is lost in an era of real-time information. As for an appeal, the onus is still on YouTubers to take matters forward without the benefit of reasons or even the specific passage being identified.

B *Approach to Unconscionability*

Historically, common law unconscionability was concerned with exploiting a special disadvantage by a stronger party.[258] It only protected against the most extreme forms of unfair conduct.[259] The traditional fact pattern of unconscionable conduct involved a weaker party entering into a contract because the stronger party had exploited their special disadvantage.[260] As to what was a 'special disadvantage':

> Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, *lack of assistance or explanation where assistance or explanation is necessary*.[261]

Section 20 of the *ACL* preserves common law unconscionability.[262] Section 21 creates a parallel statutory unconscionability. Section 21(1)(a) provides that a 'person must not, in trade or commerce' in the connection with the supply of goods or services 'engage in conduct that is, in all the circumstances, unconscionable'. Section 21(4)(a) expressly states that statutory unconscionability is 'not limited by the unwritten law', and it is designed to be broader than its common law equivalent.[263]

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256 YouTube describes 'controversial issues' as 'topics that may be unsettling for our users and are often the result of human tragedy': see 'Advertiser-Friendly Content Guidelines' (n 67).

257 'Request Human Review of Videos Marked "Not Suitable for Most Advertisers"', *YouTube Help* (Web Page) <https://support.google.com/youtube/answer/7083671?hl=en#zippy=%2Chow-to-appeal>.

258 *ASIC v Kobelt* (n 148).

259 Ruth Kooy, 'Identifying Unconscionable Conduct Post-Kobelt: Is Good Faith the Key to Interpreting the Statutory Unconscionability Provisions in Australian Law?' (2021) 28(1) *Competition and Consumer Law Journal* 75, 82.

260 See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 ('*Amadio*').

261 *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J) (emphasis added) ('*Blomley*'). In *Amadio* (n 260), Mason J affirmed these were exemplifications of when someone is at a special disadvantage: at 462.

262 *ACL* (n 24) s 20, but not with respect to conduct prohibited by s 21.

263 Kooy (n 259).

Section 22 provides a non-exhaustive list of factors to be considered when determining statutory unconscionability.[264] There remains a lack of consensus as to what statutory unconscionability means.[265] In *Australian Securities and Investments Commission v Kobelt* ('*ASIC v Kobelt*'), Gageler J laid down what is perhaps the closest to an accepted test, at least in Victoria.[266] His Honour described unconscionability as 'conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience'.[267] Justice Gageler concluded that statutory unconscionability did not dilute the gravity of common law unconscionability but enabled it to be applied to a broader range of fact patterns.[268] In *Australian Competition and Consumer Commission v Woolworths*, it was held that the norms in question might be industry standards rather than general social norms.[269] It has been argued that courts are adhering to the rigorous standards of the traditional common law doctrine and under-utilising the s 22 factors.[270] The more recent authorities do suggest that an unconscionability claim should be approached with circumspection.[271]

C *Lack of Transparency Far Outside Societal Norms*

Nevertheless, this article submits that a lack of sufficient transparency by YouTube is unconscionable in all the circumstances. YouTubers are the weaker party, sometimes dependent on monetisation for a livelihood, and on YouTube being transparent.[272] It has been clarified that a disadvantage, disability or vulnerability of which advantage is taken is not an essential requirement under s 21 but remains relevant to an assessment of statutory unconscionability.[273] YouTube is exploiting the fact that it makes the decisions and controls the relevant information. This is perhaps what

264 *ACL* (n 24) s 22.

265 In *ASIC v Kobelt* (n 148) the High Court was split 4:3 and there was a lack of consensus as to what unconscionability means. In *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200 ('*Jams 2*') the Victorian Court of Appeal stated that Gageler J's dicta should be followed unless the High Court says otherwise: at [90] (Beach, Kyrou and Hargrave JJA). Special leave to appeal to the High Court has been granted: see Transcript of Proceedings, *Stubbings v Jams 2 Pty Ltd* [2021] HCATrans 23.

266 See above n 265.

267 *ASIC v Kobelt* (n 148) 40 [92] (Gageler J).

268 Justice Gageler states Parliament's appropriation of unconscionability 'is indicative of an intention that conduct of the requisite gravity need not be found only in a fact-pattern which fits within the equitable paradigm of a stronger party to a transaction exploiting some special disadvantage which operates to impair the ability of a weaker party': ibid 39 [89].

269 [2016] FCA 1472, [129] ('*ACCC v Woolworths*').

270 Kooy (n 259) 78.

271 *ASIC v Kobelt* (n 148); *Jams 2* (n 265); *ACCC v Woolworths* (n 269).

272 Unless, of course, it is obvious why the YouTuber has been demonetised.

273 *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 388 ALR 577, 578 [4], 596 [80]–[84] (Allsop CJ, Besanko and McKerracher JJ).

French J would call a 'situational' disadvantage, as opposed to a 'constitutional' one such as infirmity.[274] It is, arguably, far outside societal norms as per Gageler J in *Kobelt*.[275] It is like being subject to disciplinary sanctions at work without being told what the infringing conduct was. There is an impact asymmetry. A lack of transparency can result in a YouTuber losing their livelihood, while for YouTube it is the incremental cost of providing limited reasons regarding a decision that has *already* been made. Much of the work has already been done. That being so, it is hard to see why YouTube could not state the specific passage(s) containing the objectionable content and provide a little more than the summary 'controversial issues' in cases like Elwood's. An explanation is called for.[276]

YouTube's highhanded approach can be contrasted with an analogous situation, being Facebook's new approach to content moderation.[277] Facebook has committed to providing more details when it removes content,[278] and accepts that any enforcement measure should be proportionate. Content should not be removed if a less intrusive measure is sufficient. Facebook will be launching a transparency centre[279] and preparing transparency reports.[280] It has appointed an independent oversight board[281] to review representative cases of content removal by Facebook. Four of the first five content removal decisions reviewed by the Board were overturned.[282] While the Board upheld the decision to suspend President Trump from Facebook,

274 See *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2000] FCA 1893, [9] (French J), quoted in *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301, 322–3 [64] (Gray, French and Stone JJ). See also Gleeson CJ's warning in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 63–4 [9]–[10] ('*ACCC v Berbatis*') that the shorthand of 'situational disadvantage' should not supplant the underlying statutory principle.

275 *ASIC v Kobelt* (n 148).

276 *Blomley* (n 261) 415.

277 For further discussion on the board's decisions, see: Jacob Schulz, 'What Do the Facebook Oversight Board's First Decisions Actually Say?', *Lawfare* (Blog Post, 29 January 2021) <https://www.lawfareblog.com/what-do-facebook-oversight-boards-first-decisions-actually-say>; Evelyn Douek, 'The Oversight Board Moment You Should've Been Waiting For: Facebook Responds to the First Set of Decisions', *Lawfare* (Blog Post, 26 February 2021) <https://www.lawfareblog.com/oversight-board-moment-you-shouldve-been-waiting-facebook-responds-first-set-decisions>.

278 Douek (n 277); 'Oversight Board Selects Case on Hydroxychloroquine, Azithromycin and COVID-19', *Facebook* (Blog Post, 1 December 2020) <https://about.fb.com/news/2020/12/oversight-board-selects-case-on-hydroxychloroquine-azithromycin-and-covid-19/>.

279 Clegg (n 237).

280 'Oversight Board Selects Case on Hydroxychloroquine, Azithromycin and COVID-19' (n 278).

281 See 'Ensuring Respect for Free Expression, through Independent Judgement' (n 242).

282 Schulz (n 277).

it stated that an indefinite suspension was not appropriate.[283] Facebook is also going to improve its algorithm.[284] Given Facebook's stance, it is not open to YouTube to argue that a lack of transparency is the industry norm.[285]

The s 22(1) factors under the *ACL* and common law cases[286] support the submission that YouTube not being sufficiently transparent about a demonetisation decision might be unconscionable.

On the parties' 'relative strength' under s 22(1)(a), a small-time[287] Australian YouTuber is up against one of the largest multinational companies. YouTube is a de facto monopoly[288] and perhaps the world's first information public utility company.[289] Further, YouTubers are looking to maintain a long-term relationship with YouTube. For some, it affects their livelihood. One disputed piece of content that is considered inappropriate can result in their entire channel being demonetised.

Another disparity in the parties' 'relative strength'[290] is the information asymmetry. YouTube has the information. YouTubers are dependent on it to be transparent, placing them at a 'situational' special disadvantage. Without clarification, they will be uncertain which of their current videos might be inappropriate and how to approach future videos.

More generally, the lack of transparency by platforms is a growing issue. One of the main objectives of consumer protection is to redress information asymmetry.[291] With proper information, consumers can make informed decisions and better understand their rights. The information asymmetry between businesses and

283 See 'Case Decision 2021–001–FB–FBR', *Facebook Oversight Board* (Web Page, 11 July 2021) <https://oversightboard.com/decision/FB-691QAMHJ/>.

284 See 'Ensuring Respect for Free Expression, through Independent Judgement' (n 242).

285 In this respect, *ACCC v Woolworths* (n 269) is distinguishable in that 'price gap' was a practice in the supermarket retail industry.

286 See above Part V(B).

287 As discussed above in Part II, two-thirds of Australian YouTubers earn between AUD1,000–100,000 a year: see Lieu (n 43).

288 Bensinger and Albergotti (n 2).

289 See generally Rex Chen, Kenneth L Kraemer and Prakul Sharma, 'Google: The World's First Information Utility?' (2009) 1(1) *Business and Information Systems Engineering* 53.

290 *ACL* (n 24) s 22(1)(a).

291 It was not until the 1960s that consumers were officially recognised as a body and systemic protection of consumers began. See: John F Kennedy, 'Special Message to Congress on Protecting Consumer Interest' (Speech, 15 March 1962); Jacob Ziegel, 'The Future of Canadian Consumerism' (1973) 51(2) *Canadian Bar Review* 191, 193–4; Jules Stuyck, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market' (2000) 37(2) *Common Market Law Review* 367, 368.

consumers is growing in the 21st century digital economy.[292] A lack of transparency exacerbates this.[293]

Under s 22(1)(b), YouTube has a 'legitimate interest' in demonetising inappropriate content. Society and advertisers would like to see content regulated.[294] Further, YouTube has a legitimate interest in positioning itself to maximise revenue. However, the issue is not regulating content. It is whether YouTube has a legitimate interest in not being transparent when demonetising. The analogy of disciplinary proceedings without reasons or natural justice illustrates this distinction. If the substantive demonetisation decision is ultimately justified, the process may still be unconscionable. When even the decision is wrong, and covered up by a lack of transparency, YouTube's actions are questionable. It is worrying that YouTube has made errors[295] and that Facebook's Oversight Board overturned four of the first five decisions before it.[296]

The appeal process does not remedy the problem. It still, unfairly, expects a YouTuber to appeal without the benefit of having the objectionable passage pinpointed to them. Further, a lack of transparency cannot be justified as a cost concern given that the objectionable passage has already been identified.

Another 'legitimate interest' of YouTube might be to avoid endless debates. If so, again, a lack of transparency goes beyond what is reasonably necessary. Debates can be brought to a close.[297] Reasons may legitimise YouTube's decisions, create precedents, and lead to better future content moderation. FairTube's recommendations[298] can be seen as a win-win. Developments at Facebook are, arguably, a better model.

Although s 22(1)(c) asks 'whether [a] customer was able to understand any documents', a lack of transparency, such that there is no documentation, is more serious.

Under s 22(1)(d), the lack of transparency may be considered an 'unfair tactic'. Not having the specific objectionable passage pinpointed is unfair. Case law refers to

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292 Consumer Affairs Australia and New Zealand, *Australian Consumer Survey 2016* (Report, 18 May 2016) 19–67 <https://consumer.gov.au/sites/consumer/files/2016/05/ACL-Consumer-Survey-2016.pdf>.

293 Australian Government Productivity Commission, *Review of Australia's Consumer Policy Framework* (Report No 45, 30 April 2008) 28.

294 See above Part II.

295 Goggin and Tenbarge (n 15).

296 See above Part IV.

297 One of FairTube's recommendations, for example, is an independent mediation board: Jeffrey (n 22).

298 See above Part II(B). See also 'For Fairness and Transparency in Platform Work' (n 18).

'exploitation'.[299] YouTube controls the information and the decision. A YouTuber is dependent on YouTube. Taking advantage of a lack of understanding,[300] clarity, or not providing 'assistance or explanation where necessary'[301] can amount to unconscionability.[302] As per the non-binding *United Nations Guidelines for Consumer Protection*,[303] not being transparent raises issues about fairness, accessibility of information, and whether due regard is shown to YouTubers' interest.

A related point is that demonetisation of the entire channel is a disproportionate and unfair response. Elwood's 2,200 videos were presumably acceptable for four years. Now they have all been demonetised.

Under s 22(1)(e), and a YouTuber's inability to *turn to a competitor*, YouTube is a de facto monopoly, and that aggravates the unfair tactic of not being transparent.

Regarding s 22(1)(f), small-time YouTubers allege partiality in favour of high-profile YouTubers.[304] A *difference in treatment* by YouTube supports the unconscionability claim.

Under ss 22(1)(g)–(h), legislation and applicable codes of conduct are relevant to an assessment of unconscionability.

Under ss 22(1)(j)–(k), YouTubers did not have the option to negotiate the contract, and YouTube can vary the terms unilaterally.

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299 *ACCC v Berbatis* (n 274) 63 [9].

300 *Amadio* (n 260) 477.

301 Miller (n 109) [ACL.20.60].

302 See *Wu v Ling* [2016] NSWCA 322, [95]–[110]. Although unconscionability was not established in this case, it contains discussion of the distinction between mere unawareness and improvidence on the part of the plaintiff, as opposed to when they suffer from a special disadvantage.

303 *United Nations Guidelines for Consumer Protection*, 70th sess, GA Res 70/186 (adopted 22 December 2015). Guideline IV(11) requires:

> (a) Fair and equitable treatment. Businesses should deal fairly and honestly with consumers at all stages of their relationship … (b) Commercial behaviour. Businesses … should have due regard for the interests of consumers and responsibility for upholding consumer protection … (c) Disclosure and transparency. Businesses should provide complete, accurate and not misleading information … Businesses should ensure easy access to this information … (d) Education and awareness-raising. Businesses should … develop programmes and mechanisms to assist consumers … to take informed decisions … (f) Consumer complaints and disputes. Businesses should make available complaints-handling mechanisms that provide consumers with expeditious, fair, transparent, inexpensive, accessible, speedy and effective dispute resolution.

304 Goggin and Tenbarge (n 15).

Under s 22(1)(l), not providing at least limited reasons for demonetisation is contrary to good faith, a matter discussed below.[305] It is arbitrary, uncooperative, and potentially undermines the bargain.

In summary, when a channel is demonetised, it is hard to see why, when the circumstances require, the objectionable video or passage cannot be pinpointed and reasons provided. YouTube is taking unfair advantage of its monopolistic position. The impact on YouTubers can be significant, and their vulnerability is being exploited. As for remedies, an injunction[306] could require YouTube to be sufficiently transparent.[307]

VI Unilateral Changes to Contract and Contractual Discretion

The final substantive issue is whether YouTube's Variation and Display Terms are unfair terms under s 24 the *ACL*, such that demonetisation lacks a legal foundation.[308] It will be recalled that the changes in the monetisation policy resulted in small-time YouTubers losing what little ad revenue they had.[309] It affected midsize YouTubers too. Fischer and Elwood lost their income; and in *Sweet*, the plaintiff's YouTube income was reduced from USD300–500 to USD20–40 per day.[310]

Demonetisation has purportedly been introduced pursuant to the Variation or the Display Terms.[311] Under the Variation Term, YouTube can vary the terms and policies, such as content policies, at any time. A policy change constitutes a change in the terms.[312] Under the Display Term, YouTube has a discretion as to which if any advertisements to display and how they should be displayed.[313]

Section 23 applies to the AdSense contract. Section 23 provides that a term of a 'consumer contract', or 'small business contract', in a 'standard form contract' is void if it is unfair.[314] The AdSense contract is a small business standard form

305 See below Part VI(B).

306 *ACL* (n 24) s 232.

307 As above, the minimum would be transparency regarding the specific objectionable passage(s) and provision of limited reasons, including the sub-guideline infringed.

308 This article does not consider whether YouTubers are employees or independent contractors of YouTube; and whether YouTubers can make a claim on that basis.

309 See Thomson (n 7).

310 *Sweet* (n 17) [2].

311 See above Part II(C).

312 'AdSense Terms' (n 76) cl 1.

313 See above Part II(C).

314 *ACL* (n 24) ss 23(1)(a)–(b).

contract.[315] The vast majority of Australian YouTubers are probably sole traders and so the AdSense contract will meet the criterion of a 'small business contract' under s 23(4).[316] A hugely successful YouTuber might not meet the small business criterion, but they do not need the s 23 protection.[317]

On the basis that s 23 applies, we can now consider whether the Variation and Display Terms are void as unfair terms. Under s 24(1) of the *ACL,* a term is unfair if

> (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
>
> (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
>
> (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In determining whether a term is unfair, under s 24(2) the court may take into account such matters as it thinks relevant, but it must consider the contract as a whole[318] as well as whether the term is 'transparent'.[319]

A *Variation Term*

The ACCC has targeted the use of UVCs by local businesses as unfair terms.[320] It has worked with *local* businesses to change their UVCs.[321] What is different about

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315 Ibid ss 2, 27. See also Clarke and Erbacher (n 105) 494–5 [8.65]. It is worth remembering Lord Reid's famous dicta in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 406:

> In the ordinary way the customer has no time to read [the standard contract] … and, if he did read them, he would probably not understand them. If he did understand and object to any of them, he would generally be told that he could take it or leave it. If he then went to another supplier, the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.

316 *ACL* (n 24) ss 24(4)(a)–(b) provides that a contract is a 'small business contract' if the contract is for a supply of goods or services and at least one party to the contract is a business that employs fewer than 20 persons. Also considered is whether the upfront price payable does not exceed $300,000 or the contract has a duration of more than 12 months and the upfront price payable does not exceed $1,000,000: at ss 24(4)(c)(i)–(ii).

317 So, we do not have to resolve whether the AdSense contract is a 'consumer contract'. It may or may not be.

318 *ACL* (n 24) s 24(2)(b).

319 Ibid s 24(2)(a).

320 Australian Competition and Consumer Commission, *Unfair Contract Terms: Industry Review Outcomes* (Report, March 2013) 6–7.

321 Ibid 7.

YouTube is that it is a *multinational* corporation, and the Variation Term arises in a Californian contract.[322]

YouTube's Variation Term is probably unfair. First, it is likely[323] that an unfettered UVC in a consumer or small business contract results in a significant imbalance.[324] UVCs have been held to be unfair in several cases.[325] One example of a term that *may* be unfair,[326] as per s 25(d) of the *ACL*, is 'a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract'.[327] Section 25(d) supports the conclusion that the Variation Term is unfair. A UVC with a limited scope might be acceptable. A blanket, open-ended UVC is problematic. It effectively says that a meeting of the minds is not required.[328] Instead, the contract is a piece of clay that YouTube can mould as it sees fit. YouTubers do not have an equivalent UVC that they can exercise.[329] In theory, YouTube could use the Variation Term to incrementally increase its share of the advertising revenue to 90%. The example demonstrates the inherent unfairness of such clauses. On 1 June 2021, YouTube introduced what it calls a 'right to monetise' term:

> You grant to YouTube the right to monetize your Content on the Service (and such monetization may include displaying ads on or within Content or charging users a fee for access). *This Agreement does not entitle you to any payments*.[330]

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322 Many multinational platforms now make use of UVCs. See, eg: 'Uber BV Terms and Conditions: Australia', *Uber* (Web Page) cl 1 <https://www.uber.com/legal/en/document/?country=australia&lang=en-au&name=general-terms-of-use>; 'Terms of Service', *Airbnb* (Web Page) cl 3 <https://www.airbnb.com.au/terms#sec201910_3>; 'Terms of Use', *Tinder* (Web Page) cl 1 <https://policies.tinder.com/terms/intl/en>; 'Terms and Conditions', *Airtasker* (Web Page) cl 15 <https://www.airtasker.com/terms/>.

323 Jeannie Marie Paterson and Rhonda L Smith, 'Why Unilateral Variation Clauses in Consumer Contracts are Unfair' (2016) 23(3) *Competition and Consumer Law Journal* 201, 206.

324 The concept of causing a significant imbalance has issues: see Hugh Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1997) 231, 242–5. There is also a distinction between two commercial parties' considered allocation of risk by means of a UVC and a consumer or small business contract where it is artificial to describe the UVC as a considered term agreed upon by both parties: see ibid 206–7.

325 For a list of cases in which a UVC has been held to be unfair see Paterson and Smith (n 323) 206 n 22.

326 Ibid 206.

327 *ACL* (n 24) s 25(d).

328 Greig and Davis (n 205) 21–2.

329 *ACL* (n 24) s 25(d). See also *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092, [126]–[149] (Judge Harbison).

330 'YouTube Terms of Service' (n 78) (emphasis added).

The right to monetise may be part of an incremental, or creeping, strategy by which YouTube increases its share of revenue. YouTube first demonetised small-time YouTubers for being below the minimum threshold of views. It has now reserved for itself the right to monetise the content.

Second, under s 24(4) there is a presumption that the Variation Term is not reasonably necessary unless YouTube proves otherwise. YouTube does have a legitimate interest to protect: it needs a degree of contractual and policy flexibility in order to regulate inappropriate content. Regulating content goes to YouTube's standing in the community, ability to respond to evolving circumstances, market conditions, its relationship with advertisers, earning advertising revenue, and costs of monitoring content.[331]

As a blanket UVC, the Variation Term goes beyond what is reasonably necessary to protect YouTube's legitimate interest. It is not limited to managing inappropriate content. Regulators in Australia[332] and the United Kingdom[333] have stated that delineating exactly when a UVC will be exercised may rescue it from being declared void. For example, a term providing that '[m]anagement reserves the right to alter the opening times as it sees fit' was susceptible to being held unfair.[334] It was rescued by changing the term to '[m]anagement reserve the right to adjust the hours for the purpose of cleaning, decorating, repairs or special functions and holidays'.[335] Further, YouTube has not established a direct correlation between the number of views and inappropriate content. In other words, the exercise of the Variation Term by YouTube so far, arguably, has gone beyond its legitimate interest.

Third, as per s 24(1)(c) of the *ACL*, the application of demonetisation 'would cause detriment' to YouTubers. The detriment is loss of advertising income, sometimes livelihood, reputation, and the ability to sell the YouTube content as an asset.[336]

Fourth, looking at the contract as a whole under s 24(2), either party can terminate the contract at any time. A YouTuber that is unhappy with a unilateral change to

331 Paterson and Smith (n 323) 209.

332 Commonwealth of Australia, *Unfair Contract Terms: A Guide for Businesses and Legal Practitioners* (Guide, March 2016) <https://consumer.gov.au/sites/consumer/files/2016/05/0553FT_ACL-guides_ContractTerms_web.pdf>.

333 Office of Fair Trading, *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* (Guide, September 2008) 52–3 [10.3]–[10.6] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284426/oft311.pdf>.

334 Office of Fair Trading, *Historic Annex A to Unfair Contract Terms Guidance* (Guide, September 2008) 58 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450467/Unfair_terms_guidance_Annex_A.pdf>.

335 Ibid.

336 Goggin and Tenbarge (n 15). In *Sweet*, the allegedly wrongful demonetisation adversely affected the plaintiffs' ability to sell the content: *Sweet* (n 17).

policy, and so the AdSense Terms, is free to leave YouTube.[337] Hence, YouTube could argue that a YouTuber is choosing to agree to the new terms rather than it being a unilateral change. However:

- YouTube is a de facto monopoly. YouTubers have nowhere to go;
- Behavioural economics suggests that consumers will not leave.[338] Platforms know this;
- Even if it were possible for a YouTuber to move elsewhere, they might be confronted by another UVC.[339] This speaks to the general need to regulate UVCs in platform-consumer contracts;
- Having built a brand, a YouTuber would incur a cost if they moved; and
- In short, a YouTuber does not have a true freedom in the circumstances.

Fifth, regarding transparency, the AdSense Terms are not found in one document, but in a series of interlinking online contracts and policies.[340] The Variation and Display Terms are, of themselves, transparent. Their operation in coordination with content policies is not transparent. Navigating interlinking documents makes it hard for YouTubers to understand the terms. The lack of understanding is something that the court can take into account under s 24(2) of the *ACL*.

So, under ss 23 and 24, the Variation Term is likely void. If the Variation Term is void, then changes made to the terms purportedly pursuant to the Variation Term, such as demonetisation, lack legal foundation.

B *Display Term*

Another option for YouTube is to argue, as per *Sweet*, that demonetisation was introduced under the Display Term. There are two problems with YouTube relying on the Display Term:

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337 'AdSense Terms' (n 76) cl 6. See also 'YouTube Terms of Service' (n 78); Office of Fair Trading, *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* (n 333) 52–3 [10.3].

338 Paterson and Smith (n 323) 214.

339 Ibid 215.

340 The interlinking character is brought out by 'AdSense Terms' (n 76) cl 1:

> By using our Services, you agree to (1) these Terms of Service, (2) the AdSense Program Policies, which include but are not limited to the Content Policies, the Webmaster Quality Guidelines, the Ad Implementation Policies, and the EU User Consent policy (collectively, the 'AdSense Policies'), and (3) the Google Branding Guidelines (collectively, the 'AdSense Terms').

- Like the Variation Term, it too might be void under s 23; and
- If not void, because the Display Term must be exercised in good faith, then YouTube has probably breached the good faith obligation.

1 *Whether Void under s 23*

In *Sweet*, Chen J held that the Display Term was not a UVC but a contractual 'discretion'.[341] His Honour then rejected the plaintiffs' argument that there was an implied covenant that the discretionary power be exercised in good faith. The ability to imply such a covenant in the face of express terms was 'narrowly circumscribed' under US law.[342]

The approach under s 23 in Australia is different. Under s 23, there does not appear to be a sharp distinction between UVCs and contractual discretions. In stating 'the effect of' permitting one party to vary the contract, s 25(d) is not limited by the formal description of a term, for example as a UVC or a discretion, but considers its substantive effect. As per the AdSense Terms, demonetisation is a change to both policy and terms.

That being so, under ss 23 and 24 the Display Term might be void. Most of the reasons above regarding the Variation Term being void, also apply to the Display Term, albeit not with the same intensity. Unlike the Variation Term, the Display Term has a specific scope, ie, a necessary discretion regarding displaying advertisements. Having said that, the Display Term is unlike UVCs rescued by regulators in that it does not specify the purpose of the discretion or provide guidelines as to its application.[343] For example, the Display Term could be used for an illegitimate purpose, such as YouTube favouring a YouTuber. Section 25(g) supports the Display Term being unfair. The s 25(g) example of a term that might be unfair is one that permits 'one party unilaterally to vary the characteristics of the goods or services to be supplied'. It is arguable that the character of a positive monetisation service has been changed, especially for small to midsize YouTubers. Hence, YouTube may struggle to prove that the Display Term, as it stands, is reasonably necessary under s 24(4).

Alternatively, the requirement that the contract as a whole should be considered at s 24(2)(b) has led some commentators to suggest that s 24 imposes a good faith obligation.[344] That is, the Display Term is subject to an obligation of good faith, and not void for this reason. If so, then the issue becomes whether YouTube is in breach of the good faith obligation.

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341 *Sweet* (n 17) [5]–[9].

342 Ibid [6]. Such a covenant could only contradict an express 'discretion when necessary to protect an agreement that otherwise would be rendered illusory and unenforceable': applying *Third Story Music Inc v Waits*, 48 Cal Rptr 2d 747, 806 (Ct App, 1995).

343 Office of Fair Trading, *Historic Annex A to Unfair Contract Terms Guidance* (n 334) 58.

344 Corones et al (n 163) 6 [2.5].

2 *Whether Breach of Good Faith*

The AdSense Terms is a Californian contract, and *Sweet* held that the Display Term was not subject to an implied covenant that it be exercised in good faith.[345] In Australia, it is likely that the Display Term is subject to a good faith obligation. Good faith may arise by virtue of s 24. A stronger foundation for it to arise is the statutory *Franchising Code of Conduct* ('*Franchising Code*').[346] Where there is a franchising agreement under reg 5, both parties owe a non-excludable obligation of good faith to each other under reg 6.[347]

First, there is a good argument that the *Franchising Code* applies to an Australian YouTuber–YouTube relationship. Under reg 5, an Australian YouTuber is probably in a 'franchising agreement'[348] with YouTube provided they are carrying on a business.[349] Under reg 5(1)(b), an Australian YouTuber is distributing services[350] *in Australia*; and operating 'under a system or marketing plan substantially determined, controlled or suggested'[351] by YouTube. YouTube provides the platform, lays down the content guidelines, and organises the advertising. Under reg 5(1)(c), 'YouTubers' are associated with the YouTube brand.

Second, at common law, the meaning of good faith has not been settled in Australia.[352] Without limiting its common law meaning, reg 6 states that good faith may involve whether the party acted honestly and not arbitrarily; and whether the party cooperated to achieve the purposes of the agreement.[353]

345 *Sweet* (n 17).

346 *Competition and Consumer (Industry Codes: Franchising) Regulation 2014* (Cth) ('*Franchising Code*').

347 That being so, other reasons why a good faith obligation may arise are not considered.

348 *Franchising Code* (n 346) reg 5(1)(b)–(c) defines a franchising agreement as an agreement

> in which a person (*the franchisor*) grants to another person (*the franchisee*) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor … [and] under which the operation of the business will be substantially or materially associated with a trade mark, advertising or a commercial symbol.

349 The *Franchising Code* (n 346) will not apply to a purely amateur YouTuber.

350 The definition of services in the *CCA* includes entertainment: 'the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction': *CCA* (n 97) s 4 (definition of 'services' para (a)(ii)).

351 See *Australian Competition and Consumer Commission v Kyloe Pty Ltd* [2007] FCA 1522, [40] for a non-exhaustive list of factors to consider in determining whether this requirement is met.

352 See generally Jessica Viven-Wilksch, 'Good Faith in Contracts: Australia at the Crossroads' (2019) 1(1) *Journal of Commonwealth Law* 273.

353 *Franchising Code* (n 346) regs 6(3)(a)–(b).

Common law cases have emphasised that good faith applies where the contract involves a relationship, for example, employment.[354] Good faith may arise to redress a power imbalance or particular vulnerability in the relationship.[355] One reason that a non-excludable good faith obligation was introduced was asymmetric power:

> There is an inherent and necessary imbalance of power in franchise agreements in favour of the franchisor, but abuse of this power can lead to opportunistic practices including encroachment … termination at will, and unreasonable unilateral variations to the agreement.[356]

There is foreign authority that a contractual discretion might be subject to an obligation of good faith.[357] The Supreme Court of Canada recently held that exercising a contractual discretion in a way that is unconnected to, or outside the compass, of its purpose is arbitrary.[358] As for 'cooperating', it has been held that the parties must act with fidelity to, and not undermine, the bargain.[359] To be clear, a party subject to a good faith obligation can still act selfishly or in their own interest.

Third, it is submitted that YouTube's unilateral introduction of demonetisation has not been in good faith. It is 'arbitrary'. YouTube has not established a direct correlation between the number of views and inappropriate content. Moreover, the Variation

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354 See, eg, *Bartlett v Australia & New Zealand Banking Group Ltd* (2016) 92 NSWLR 639.

355 See, eg: *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 258 (Priestley JA) ('*Renard Constructions*'); *Mineralogy v Sino Iron Pty Ltd [No 6]* (2015) 329 ALR 1, 161 [1010] (Edelman J) ('*Mineralogy*'). See also Viven-Wilksch (n 352) 280.

356 Parliamentary Joint Committee on Corporation and Financial Services, *Opportunity Not Opportunism: Improving Conduct in Australian Franchising* (Report, December 2008) 101 [8.3].

357 See *Renard Constructions* (n 355)*; Mineralogy* (n 355).

358 *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District* [2021] 454 DLR (4th) 1, [63]–[72].

359 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 321 ALR 584, 650 [288]. See also Sir Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 (January) *Law Quarterly Review* 66, 69:

> [Good faith] embraces no less than three related notions: (1) an obligation on the parties to co-operate in achieving the contractual objects (loyalty to the promise itself); (2) compliance with honest standards of conduct; and (3) compliance with standards of conduct which are reasonable having regard to the interests of the parties.

This passage was applied by Bathurst CJ in *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184: at 59–60 [145]. Justice Edelman has also expressed the view that good faith requires that a contractual discretion be exercised reasonably: see *Mineralogy* (n 355) 161 [1010]. For the purposes of this article, we do not need to enter the debate as to whether good faith requires reasonableness.

Term seems to be the proper mechanism for changes to terms and content policy. The Display Term's purposes are probably to maximise advertising revenue for both parties, execute YouTube's content policy, and manage YouTube's own business and costs. Hence, using the Display Term to change policy is, arguably, outside the compass of its purpose.

It is not 'co-operative'. Unilaterally changing the monetisation policy, when a purpose of the AdSense Terms is a 'partnership' to generate revenue for both YouTubers and YouTube, is hardly cooperative. This is especially so given YouTube's subsequent assertion that it reserves the right to monetise the content itself. Unilateral demonetisation undermines the bargain. For many small-time YouTubers, the decision has ended a long-term relationship with YouTube. At the very least, it appears that the interest of small-time YouTubers has not been given due consideration.

C *YouTube in Breach of Contract*

In summary, the unilateral introduction of demonetisation lacks legal foundation. Both the Variation and Display Terms might be void under s 23 of the *ACL*. If they are void, YouTube lacks the contractual basis to change the policy and terms. Alternatively, the Display Term is not void because it is subject to an obligation of good faith. But then YouTube breached the good faith obligation when it unilaterally introduced demonetisation. In theory, YouTubers who have had their content demonetised, without there being a proper contractual foundation for doing so, may be able to sue for unpaid advertising revenue.

Recognising that YouTube has a legitimate interest, a more penetrating inquiry might be to ask how the parties' interests can be balanced? YouTube has a vested interest in more even-handed clauses, which are not void, and allow it to make policy changes. The Variation Term could specify the circumstances when it will be exercised. YouTube could cooperate by consulting with a YouTube representative body, such as FairTube, before making significant policy changes. Facebook is moving in this direction. The Display Term could explicitly state that the discretion is to be exercised in good faith. It could state the purpose of the discretion is to maximise advertising revenue for both parties and manage YouTube's profitability.

VII Conclusion

This article submits that, first, despite the proper law of contract and exclusive jurisdiction clauses, the *ACL* applies to a demonetisation claim by an Australian YouTuber and will be heard by Australian courts. Second, there are practical challenges to proving a claim for wrongful demonetisation under the consumer guarantees. Third, YouTube's lack of transparency regarding demonetisation contravenes s 21 of the *ACL*. Transparency is a critical issue for YouTubers. Fourth, YouTube's unilateral introduction of demonetisation is in breach of contract. As the use of UVCs by multinational platforms is becoming ubiquitous, it is good that the *ACL* appears able to withstand such clauses.

Something should be said about reform:

- Proper law of contract and exclusive jurisdiction clauses are disenfranchising Australian consumers and debasing Australian market norms. It would be better if the consumer guarantees under ch 2 of the *ACL* were expressly made mandatory laws. Judges have been left to do the heavy lifting;

- Alternatively, proper law of contract and exclusive jurisdiction clauses can be added to the list of s 25 terms that might be unfair. That way, judges have a discretion to disapply them. To use the language of s 24(1): what legitimate interest drives the use proper law of contract or exclusive jurisdiction clauses? The larger the Australian operations and volume of Australian customers, the harder it is to justify their use. Such reform would be consistent with developments in Canada and the European Union. In Canada, it is recognised that a consumer needs to be protected from an exclusive jurisdiction clause.[360] The European Union provides the strongest protection: a consumer can only be sued in their own domicile [361] The consumer has the option of suing in their own domicile or that of the other party;

- The *ACL* may need to do more to redress information asymmetry. Statutory unconscionability is a limited and exceptional remedy. The right to be informed was one of four original rights in Kennedy's Consumer Bill of Rights in the early 1960s.[362] The problem of information asymmetry has become acute in the 21st century. It is, therefore, odd that information asymmetry is not explicitly tackled by the *ACL*; and

- A battleground in the 21st century is likely to be algorithm negligence, something that may be difficult to prove. The *ACL* should consider how it can facilitate proof. It could, for example, introduce a reverse-onus provision.

Organisations like FairTube are thoughtful and conciliatory about demonetisation. YouTubers want to maintain a long-term relationship with YouTube. They accept that YouTube needs to police content and make a profit. Their complaints are about transparency and fairness. We should acknowledge the modesty of such concerns. YouTubers ask no more than what we would expect of a public utility or large corporation. Perhaps the fundamental issue is that YouTube is essentially unregulated.

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360 *Douez* (n 203).

361 *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* [2012] OJ L 351/1, art 4(1).

362 The original four rights were the right to safety, the *right to be informed*, the right to choose, and the right to be heard: Kennedy (n 291).