

Submission to Australian Consumer Law Review Interim Report

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We welcome this opportunity to provide input into this review of the Australian Consumer Law. Our submission mostly relates to section 4 of the Interim Report on Emerging Consumer Policy Issues. Our submission comprises the following points:

1. We reiterate our view expressed in our submission to the Issues Paper that an evidence-based approach to consumer harm should guide all regulatory action under the *Australian Consumer Law* ('ACL'). In particular, independently-conducted and rigorous empirical research on the conduct and knowledge-base of Australian consumers should guide this action. This evidence-based approach should also be used by regulatory bodies such as the ACCC or fair trading agencies in deciding whether or not to initiate legal proceedings.
2. We reiterate our view expressed in our previous submission that the broad provisions of the ACL are sufficiently flexible to adapt to emerging issues in e-commerce, especially the prohibition on misleading and deceptive conduct in section 18 of the ACL.
3. We reiterate our view that, based on the empirical research we carried out on Australian consumers' understanding of Google's search results (detailed in our previous submission), including for comparison shopping services, we urge regulatory bodies to re-consider the extent to which Australian consumers are confused, or even misled and deceived, by the way information is presented to them by search engine services such as Google.
4. We reiterate our view that in order to determine whether consumers are indeed misled or confused as to the origin and nature of the search results generated by online search services, we recommend that further thorough independent research is carried out on Australian consumers' understanding of search engine results, but especially Google search results (as the most popular search engine in Australia) and other comparison shopping services.
5. We encourage regulatory agencies to consider introducing 'best-practice' guidelines for online search providers and comparison shopping services in relation to the use

of labelling and disclaimers to clearly identify source and affiliation, in order to minimise consumer confusion.

6. We welcome the Interim Report's acknowledgement of emerging consumer policy issues such as the Internet of Things. However, we view that 3D printing is another emerging technology which should be monitored by consumer agencies, particularly given its potential implications for product safety, such as the possibility of individuals printing and selling items made with a 3D printer which do not conform to product safety standards.¹ Another area of consumer concern involving 3D printing is that of passing off, i.e. that objects may be created using 3D printers which are misrepresented as coming from a particular source or associated with a particular brand when in fact that is not the case.² While we do not believe there is widespread cause for concern regarding 3D printing at the moment due to the current state of the technology, we believe 3D printing ought to be recognised as an emerging consumer policy issue, as these problems are likely to amplify with improvements in 3D print technology and better consumer accessibility to cheap 3D printers.
7. We also welcome the Interim Report's acknowledgement of the consumer concerns posed by 'smart' products requiring software upgrades which may render the hardware unusable. We recognise that this is a growing problem and urge that the Review takes account of two issues in this area for guiding future policy:
 - a. The use of technical protection measures (TPMs) and/or digital rights management (DRM) techniques to limit what consumers can do with the hardware they have purchased, especially given the threat of copyright infringement that 'breaking' these techniques may entail. This has been recognised in intellectual property literature and practice as problematic, but has not had much recognition in the context of consumer policy.
 - b. The EU's Circular Economy Strategy is aimed at "closing the loop" of product lifecycles through greater recycling and re-use, and bring benefits for both the environment and the economy",³ and includes cognisance of the problems posed to the Circular Economy of planned obsolescence in consumer goods.⁴ Indeed, EU Member State France has introduced measures to make planned obsolescence an offence. Sustainability should also be recognised as an important value for guiding consumer policy in Australia, similar to this approach in the EU.

¹ See: Angela Daly, *Socio-Legal Aspects of the 3D Printing Revolution* (Palgrave Macmillan 2016) Chapter 3 'Replicating Ruin: Printing Dangerous Objects'; Angela Daly, 'Don't Believe the Hype? Recent 3D Printing Developments for Law and Society' (2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2800955>

² See Amanda Scardamaglia, 'Flashpoints in 3D Printing and Trade Mark Law' (2015) 23(2) *Journal of Law, Information & Science* 31

³ European Commission, 'Circular Economy Strategy' <http://ec.europa.eu/environment/circular-economy/index_en.htm>

⁴ European Parliament Think Tank, 'Planned obsolescence: Exploring the issue' 2 May 2016 <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI%282016%29581_999>

8. When it comes to considering policy or regulatory interventions in new and emerging areas, we believe the seemingly 'zero-sum' game of not regulating to permit innovation should be called into question. Regulators and other public bodies should recognise that forbearance or omission is actually a form of regulation which does have consequences for the economy and society more generally, some of which may be negative. Instead, these actors should consider what *kinds* of innovation would be desirable and act accordingly in order to facilitate this innovation, which may include taking regulatory measures. For example, if sustainable innovation is considered to be socially and economically important, regulators and other actors should not shy away from incentivising or otherwise promoting this. A deregulatory situation may be advantageous for certain stakeholders but not necessarily for society as a whole, and this is where public bodies can have a role in promoting the societal good.