

28 November 2023

**Consultation on Protecting consumers from unfair trading practices; Australian Government: The Treasury**

**Submission of written evidence by Martin Brenncke**

1. My name is Dr. Martin Brenncke, and I am a Senior Lecturer in Law at Aston University, Birmingham, United Kingdom. I am a legal expert in consumer law and behavioural regulation (e.g. regulating dark patterns) in consumer markets. My expertise is evidenced by academic publications and conference presentations.

**Introduction**

2. I submit that reform is warranted for Australian consumer law (ACL) in order to address harmful commercial practices not currently captured by existing protections in ACL (unfair trading practices). I agree with policy Option 4. My submission addresses the key focus questions Q1, Q2, and Q8.

**Consultation Objective 1: Identify the policy problem**

3. This Part addresses the key focus question Q1.
4. Page 9 of the Consultation document seeks further evidence for the extent of harms caused by unfair trading practices not currently captured by ACL. I would like to add that trading practices such as **dark patterns** in choice architectures, which typically exploit consumer behavioural biases,<sup>1</sup> also **harm consumer autonomy**. This perspective on consumer harm is significant because one of the aims of consumer law is to enable consumers to make informed decisions. Consumers' ability to make informed decisions implies consumers' ability to make autonomous decisions.<sup>2</sup> Consumers' ability to make informed, autonomous decisions is violated if unfair trading practices such as dark patterns exploit consumer behavioural biases. I explain this in detail in two recent journal articles, "Regulating Dark Patterns"<sup>3</sup> and "A Theory

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<sup>1</sup> Martin Brenncke, *Regulating Dark Patterns*, 14(1) NOTRE DAME JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (forthcoming) (manuscript Part I.A.), full text available at <https://papers.ssrn.com/abstract=4588652>.

<sup>2</sup> As explained in Brenncke, *supra* note 1, manuscript Part II.B.

<sup>3</sup> Brenncke, *supra* note 1, manuscript Part III.B.

of Exploitation for Consumer Law”.<sup>4</sup> In short: The wrongness of choice architectures that exploit consumer behavioural biases can be conceptualised as a subset of consumer harm. This clarifies that regulating these exploitative practices is concerned with preventing harm to consumers.<sup>5</sup>

5. In my journal article “Regulating Dark Patterns”,<sup>6</sup> I develop six **categories of autonomy violations** (see next paragraph) which are specifically tailored for the assessment and regulation of dark patterns that exploit consumer behavioural biases. These categories are instances of consumer harm that are particularly prevalent in online choice architectures in the context of business-to-consumer transactions and interactions. I explain why specific dark pattern practices like subscription traps, hiding information about fees, pre-selecting options by default, nagging, and the dripping of mandatory fees during the purchasing process fall under these categories and violate consumer autonomy.
6. Dark patterns in online choice architectures violate consumer autonomy if they:<sup>7</sup>
  - a. Influence consumers’ decision-making in such a way that consumers ignore or misunderstand mandated information;
  - b. Cause consumers to hold false beliefs that form the foundation of consumers’ decision-making;
  - c. Cause consumers to enter into a specific contractual agreement with a business without reflection about its substance and content;
  - d. Create unreasonable time, decision effort, or emotional costs for pursuing or adhering to a particular decision;
  - e. Present choice options in a non-neutral manner when asking consumers to select between different choice options or
  - f. Manipulate consumers.
7. These categories of autonomy violations are able to specify why the majority of the examples of unfair trading practices that are mentioned on page 9 of the Consultation paper are harmful practices that violate consumer autonomy. Due to the harm to consumer autonomy caused by these practices, there is at least a *prima facie* **case for regulating them**. For example, the Consultation paper mentions “interface design strategies to undermine consumer autonomy”, “exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the choice architecture of products or services (digital or otherwise)”, “dark patterns”, and “difficulty opting out or cancelling goods or services”. A choice architecture that makes it

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<sup>4</sup> Martin Brenncke, *A Theory of Exploitation for Consumer Law: Online Choice Architectures, Dark Patterns, and Autonomy Violations*, JOURNAL OF CONSUMER POLICY (forthcoming) (manuscript Part IV.4, “The Autonomy Theory of Exploitation”), full text forthcoming at <https://doi.org/10.1007/s10603-023-09554-7>.

<sup>5</sup> Brenncke, *supra* note 4, manuscript Part II.2, “Exploitation and Consumer Harm”.

<sup>6</sup> In detail Brenncke, *supra* note 1, manuscript Part III.B.

<sup>7</sup> In detail Brenncke, *supra* note 1, manuscript Part III.B.

difficult for consumers to cancel a service (subscription trap) violates consumer autonomy if consumers face unreasonable decision-making costs when cancelling a subscription online, which effectively deters consumers from pursuing their decision to cancel the subscription.<sup>8</sup>

8. In my journal article “A Theory of Exploitation for Consumer Law”, I explain in detail what it means to *exploit* the behavioural vulnerabilities of consumers with the design of the choice architecture. I identify the necessary and sufficient conditions for an exploitation claim in consumer law and show that exploitative choice architectures are harmful for consumers because they violate consumer autonomy.<sup>9</sup> Due to the harm to consumer autonomy, there is at least a *prima facie* **case for regulating exploitative business practices** such as dark patterns.<sup>10</sup>

### **Consultation Objective 2: Explore policy options**

9. This Part addresses the key focus question Q8.
10. I agree with policy Option 4. Regulating only specific instances of unfair trading practices carries the risk that designers of products, services, and choice architectures can circumvent specific lists of regulated practices by inventing new cases of harmful practices. A general clause on its own is too vague and is unlikely to contain sufficient guidance for courts. A general clause on its own also carries the risk that the clause may be applied with different levels of intensity in practice.<sup>11</sup> In other words, a general clause on its own does not sufficiently limit executive or judicial discretion in applying the general clause. A combined approach can avoid these shortcomings. A combined approach has also proven effective (and more effective than rules or principles on their own) in the field of bank prudential and conduct of business regulation, for example.
11. Over time, judicial practice is likely to develop categories that (i) abstract from detailed rules targeting specific cases of unfair trading practices and (ii) offer more guidance for interpreting the general clause. Such categories provide a middle layer of granularity between specific rules and a vague general clause. The six categories of violations of consumer autonomy mentioned in paragraph 6 above are examples of such a middle layer.

### **Consultation Objective 3: Align Australia with other jurisdictions**

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<sup>8</sup> Brenncke, *supra* note 1, manuscript Part III.B.4.

<sup>9</sup> Brenncke, *supra* note 4, manuscript Part II (“Criteria of an Exploitation Claim in Consumer Law”) and Part IV.4 (“The Autonomy Theory of Exploitation”).

<sup>10</sup> See Brenncke, *supra* note 4, manuscript Part II.4 (“Legal Intervention in Exploitation”).

<sup>11</sup> See Luke Herrine, *Consumer Protection after Consumer Sovereignty*, University of Alabama Legal Studies Research Paper No. 4530307, full text available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4530307](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4530307) (discussing how the Federal Trade Commission in the US has applied its power to ban “unfair or deceptive acts or practices”, and how the FTC’s approach to policing unfair trading practices has evolved over time).

12. This Part addresses the key focus questions Q2 and Q8.
13. The Consultation document discusses the European Union's (EU) response to unfair trading practices, focusing exclusively on the EU's Unfair Commercial Practices Directive (UCPD). This is too coarse. Whether the EU's UCPD is capable of effectively protecting consumers from some of the potentially unfair trading practices mentioned on page 9 of the Consultation document is uncertain. The relevant practices are "interface design strategies to undermine consumer autonomy", "exploiting or ignoring the behavioural vulnerabilities of consumers that are present in the choice architecture of products or services (digital or otherwise)", "dark patterns", and "difficulty opting out or cancelling goods or services".
14. When assessing the fairness of a commercial practice under the EU's UCPD, the effect of the practice on consumer behaviour is assessed from the perspective of the "average consumer".<sup>12</sup> The average consumer is said to be a rational economic actor, and a rational economic actor is not biased.<sup>13</sup> Hence, Rosca concludes that "[t]he average consumer . . . is not biased or susceptible to the exploitation of their cognitive biases."<sup>14</sup> This view severely limits the ability of the UCPD to capture commercial practices exploiting consumer behavioural biases such as dark patterns. Even if one rejects this view, the question of whether the average consumer benchmark is sufficiently porous to incorporate behavioural findings about consumer heuristics (rules of thumb) and biases is an ongoing debate in EU consumer law scholarship. The controversies surrounding this issue are one reason for the UCPD's limited effectiveness to curb dark patterns. As a consequence, the EU has decided to expressly regulate dark patterns in online choice architectures on online platforms with the Digital Services Act.<sup>15</sup> **One lesson for ACL from the EU's experience** with regulating unfair trading practices is not to adopt the benchmark of the average consumer or rational economic actor.
15. Significant legislation in EU consumer law addressing dark patterns, interface design strategies that undermine consumer autonomy, and trading practices that exploit consumer behavioural vulnerabilities can be found in sectoral and cross-sectoral legislation outside the UCPD. While some of this legislation regulates only specific trading practices, other legislation adopts a general clause. I discuss this legislation in detail in two recent journal articles.<sup>16</sup> The most prominent example is **Article 25 of the Digital Services Act**, which prohibits providers of online platforms such as social media and content-sharing websites (e.g., Twitter, Facebook, LinkedIn, Instagram, TikTok, Youtube) and online marketplaces (e.g., Amazon Store) to design, organize or operate their online interfaces "in a way that deceives or manipulates the

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<sup>12</sup> See Recital 18 UCPD.

<sup>13</sup> For discussion, see Brenncke, *supra* note 1, manuscript Part I.B.

<sup>14</sup> Constanta Rosca, *Destination 'Dark Patterns': On the EU (Digital) Legislative Train and Line-drawing* (Apr. 13, 2023), <https://www.maastrichtuniversity.nl/blog/2023/04/destination-%E2%80%98dark-patterns%E2%80%99-eu-digital-legislative-train-and-line-drawing>.

<sup>15</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), art. 25, 2022 O.J. (L 277) 1.

<sup>16</sup> Brenncke, *supra* note 1, manuscript Part I; Brenncke, *supra* note 4, manuscript Part III ("The Regulation of Behavioural Exploitation in EU Consumer Law").

recipients of their service or in a way that otherwise materially distorts or impairs the ability of the recipients of their service to make free and informed decisions.”. This provision explicitly targets dark patterns, as Recital 67 of the Digital Services Act makes clear. Compared to the UCPD, Article 25 Digital Services Act and other provisions expressly addressing dark patterns and choice architectures exploiting consumer behavioural biases do not adopt the benchmark of the average consumer. They protect biased consumers, whose behaviour deviates from rational choice theory.<sup>17</sup> Biased consumers require protection from having their biases exploited by commercial practices.

16. The categories of violations of consumer autonomy mentioned in paragraph 6 above are not derived from the EU’s UCPD but from EU consumer law regulating dark patterns and choice architectures exploiting consumer behavioural biases. They are suitable to assess the unfairness of the trading practices mentioned on page 9 of the Consultation document.

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<sup>17</sup> Brennncke, *supra* note 1, manuscript Part I; Brennncke, *supra* note 4, manuscript Part III.5 (“The Biased Consumer Image”).