Unfair trading practices

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Commissioner for Children & Young People

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Re: Unfair trading practices – Consultation Regulation Impact Statement

Thank you for the opportunity to provide feedback on potential reforms to Australia's unfair trading practices in the Consultation Regulation Impact Statement. It is commendable that the government intends to update the legislation to protect consumers from the increasing number of harmful trading practices, especially those occurring online. It is overdue and an opportunity for Australia to realign with many international jurisdictions.

This submission advocates for **Option 4 – Introducing a combination of general and specific prohibitions on unfair trading practices**. This is because advanced technology risks are bringing new risks that are likely to significantly impact children's lives unless they are properly addressed with a new legislative framework that has the flexibility to respond to evolving risks.

As South Australia's Commissioner for Children and Young People my mandate is to promote and advocate for the rights, interests and wellbeing of all children and young people in South Australia at a systemic level.

It is also my role to ensure the State, at all levels of government, satisfies its international obligations under the United Nations Convention on the Rights of the Child (UNCRC). This includes children's and young people's interactions with the commercial world, which is increasingly happening online. This must include our youngest citizens' rights to enjoy the benefits of online products and services which respect their right to privacy, protection from exploitation, and rights to access information (Article 13 of the UNCRC), to freedom of expression and participation (Article 12) and to access education (Articles 28 and 29).

Currently, consumers, including children and young people, are not adequately protected against significant risks from 'unfair' practices as the unconscionable conduct protection

has a much higher bar. Recent data breaches, for example, resulting from business practices resulted in personal information about consumers being leaked and shared without their knowledge or consent (e.g. Optus, Super SA, Sony and Latitude). Other examples include unfair practices such as Qantas selling seats on flights that did not exist, online dating apps locking people into long term contracts and the monetarisation of children's data shared which is being shared via apps, Edtech, games and other online media. It would be naïve to believe that business will only make decisions that are ethical and in the best interests of their customers without proper regulation. The only way to protect consumer rights is to implement laws so all businesses operate on a level playing field and in line with customer rights.

Since 2017, I have spoken with thousands of children and young people across South Australia about what is important to them. They have consistently told me that the online world is just another place where they live their lives. Where they learn, play, connect with others and with services, make and create, relax, and share and receive information. This means that it is vital that their rights are protected online just as they are in the physical world.

In my direct engagement with children and young people, one of their biggest concerns for them when they are online is 'feeling that they can trust the sites they visit to not try to take advantage of them'. They want to be able to trust adults, institutions and technology companies, service providers and websites to not take advantage of them and their personal information.

They have consistently told me that they want appropriate protection and tools to feel empowered to navigate the digital world confidently and creatively without being 'manipulated' to use services or purchase products or have their privacy unknowingly breached. They identify trust as fundamental to strong communities as well as their own wellbeing, safety and privacy.

Unfortunately, we know that children and young people are subject to a range of risks as online users of media and apps, and as consumers of products and services:

- Content risks – such as being exposed to harmful content such as pornography or misinformation.
- Contact risks – whereby they may be contacted as a result of their personal information being shared, or privacy being insufficiently protected, by apps and used by others for malicious purposes such as grooming or sextortion.
- Consumer risks - including harmful advertising about gambling, fast food, alcohol and vapes, being misled to sign up to apps or services for the long term that are difficult to cancel, having their personal information or money stolen due to inadequate protections being in place.

Marketing risks

Children and young people are regularly exposed to adverts for unhealthy food, gambling, and alcohol. An Australian 2021 study found that children aged 13-17 years of age saw a median of 17.4 food promotions each hour on the internet, 99% of which would not be permitted on television based on nutrient profiling criteria.[i] The promotion of unhealthy products is known to increase consumption of particular categories, and brands, of foods.[ii]

Alcohol advertising in Australian is "self-regulatory and voluntary" which means that children and young people are regularly exposed to alcohol advertising. According to the Alcohol and Drug Foundation, nearly 90 per cent of Australian teenagers see regular online adverts for alcohol which include easy access to buy alcohol online for delivery through a "shop now" button without age checks.[iii]

Gambling is also being promoted to children and young people online both directly and as in-game or in-video content. Evidence from various countries suggests that between 40% and 80% of youth have gambled in the past year, with 0.2–12.3 % of youth experiencing gambling-related problems.[iv] Adolescent gambling has been associated with a range of harms, including missing or dropping out of school; family disruptions; and substance use.[v]

In addition to explicit advertising, the most common marketing strategies that apply to children and young people are:[vi]

- Native or in-stream advertising, which mimics the tone and format of the platform in which it appears and can be hard to identify as separate to the video or game;
- Influencer marketing – advertising that is integrated into user-generated content on social media, where they use, wear, test or feature specific products, music, and experiences. As they tend to be viewed as role models their messages are very powerful.
- Prize winning opportunities, through which children are offered to gain gaming advantages, skins and other benefits or "loot" by clicking on marketing options.
- Advergames – games that feature advertisements or commercial messages.

We know that children and younger people have fewer cognitive skills for recognising advertising and to be able to critically interpret marketing messages. At the same time, advertisers are using memes, GIFs and videos to attract increasingly younger audiences.[vii]

Commercial profiling risks

Commercial profiling risks arise when advertisers use data they have gathered on children and young people without informed consent and/or in violation of consumer or data protection laws. Many children, and adults, do not have sufficient digital literacy skills to understand the disclosures they encounter in the digital environment, especially in respect of their personal data. While there is global recognition that this is a problem, there are no commonly accepted approaches to regulate the commercial profiling of children.[viii]

Security risks

Consumer risks also include security risks, such as when free games, ring tones, or other downloads contain malware that give the app's developers impermissible access to personal information which could facilitate identify theft or tracking. While protections are in place to protect children from real life consumer risks, there are few protections online, particularly where the tech company behind the issue is not in the same country as the victim.

A number of recent data breaches involving Optus, Medibank Private, and MyDeal involved private information each company held about customers which was stolen and used by

criminals. These data breaches may have direct and long-lasting impacts on those affected, including financial harm through identity theft or fraud, psychological harm and reputational harm.[ix]

While we may think of young people as more tech savvy than older Australians, scams are increasingly targeted towards younger people with scammers using Instagram, Snapchat and TikTok. While many scams relate to online purchases, which are more common amongst adults, scammers also use sextortion or online video game bribes to lure their victims.

The dangers of EdTech

In addition to the dangers faced by children and young people in their private lives, they are also exposed to risks at school and via the devices and educational apps they use for their education.

Children are increasingly having their data mined by commercial and malicious interests that are potentially or actually exploitative. EdTech is no exception – companies profit from access to children's personal data gained in real time throughout the school day and beyond.

A 2022 report by Human Rights Watch confirmed that children are exploited globally through seemingly innocuous educational technologies. The technologies Human Rights Watch reviewed were widely used internationally across schools and colleges. The majority of these learning platforms were found to put children's rights at risk, and to undermine or actively violate their rights by monitoring students without consent and knowledge, by harvesting the data on what they do, who they are, where they live or study, and who their family and friends are. Most of the learning platforms reviewed shared this data with advertising technology companies in order to inform their algorithms for marketing purposes.

Students, parents and staff are at risk of cyber-attacks if EdTech does not adequately secure the data it collects and saves. A 2021 study found that the education and research sector globally had an average of 1,739 cyber-attacks per organisation weekly, with

Australia suffering 3,934 weekly, including an attack on the NSW Department for Education that forced it to shut down many of its online learning platforms.[x] Another cyber-attack in Victoria targeted school student health information including demographics, developmental and behavioural issues, and family alcohol and drug problems.[xi]

The protection of children's and young people's rights in the digital world must be appropriately balanced with their rights to participate online as consumers to use learning tools, to find information, to be creative, to play and to socialise. From what children and young people have told me I would suggest that there needs to be an integrated system-wide approach to ensure that children are able to participate in the benefits of being online, but are protected from practices that could take advantage of their vulnerabilities.

I recommend that any new legislation should have general and specific provisions to prohibit practices that disproportionally affect children and young people – now and in the future – including:

- Legislating for a wider definition of unfair trading practices so that consumers, at a general level, are protected from exploitation, clickwrap consents and data collection, and any dark practices.
- Providing specific provisions that protect children and young people, considering their developmental stages and their capacity to understand commercial contracts, opaque advertising and practices that can trap children into contracts and subscriptions.
- Provisions that ensure advertising agencies have processes in place to prevent delivery of inappropriate marketing to children.
- Ensuring a positive duty of care for business to provide information which clearly discloses paid advertising (in relation to influence) and harmful industries (e.g. alcohol, gambling and cigarettes) and to not advertise harmful products to children, including through influencers.
- Any new legislation should be accompanied by an awareness raising campaign to clarify any changes. This should include child and young person friendly material.

If you have any queries about topics raised in this submission please do not hesitate to contact me.

Yours sincerely,

Helen Connolly
Commissioner for Children and Young People

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