Standard form notices and contracts are uniformly used online as detailed information must be communicated to consumers, with some of this in fact mandated by data privacy legislation. There have however, been repeated examples of how such texts have been used to disadvantage or even deceive consumers and these raise questions regarding the boundaries of consent and the role of consumer protection, contract law and data privacy law more generally. In its recent Digital Platforms Inquiry – Final Report, the Australian Competition and Consumer Commission (ACCC) recommended the reform of the Privacy Act and the Australian Consumer Law in response to the significant challenges to consumer privacy brought about by our use and reliance on technology. These recommendations reflect the desire to empower consumers and provide them with some control over their personal information but also the increasing role played by the ACCC in assessing the legitimacy of the practices used to obtain consent. More specifically, in its report the ACCC made recommendations for the reform of the Privacy Act to provide strengthened consent mechanisms to solidify the principle-based Act and to the Australian Consumer Law to bolster the protection for consumers.

However, there is arguably a need to add nuance to the ACCC’s recommendations and in particular, their call for a consent-based approach to understand where the lines should be drawn regarding the legitimacy of business practices vis-à-vis the role and qualitative standard of consumer consent. Indeed, it is important to note that the use of deceptive tactics to collect personal information is only part of the picture and that there is a need inter alia to:

1. Gain a more detailed understanding of what commercial purposes should require the consent of the individual due to their privacy-invasive nature keeping in mind the increasingly blurred boundaries between seemingly innocuous data and derived sensitive inferences,

2. Investigate the kinds of purposes that cannot be or rather should not be legitimised even with individual consent, keeping in mind the effects of market power on individual consumer decision-making; and finally,

3. Explore the role of privacy by design as a methodological approach and its capacity to require ‘fair’ user experience and user interface design choices and thus facilitate consent that is more meaningful.
### 1.0 Consent Traps and Private parts - Chaired by Dr Vanessa Teague

<table>
<thead>
<tr>
<th>Time</th>
<th>Session</th>
</tr>
</thead>
</table>
| 14:00 – 14:05 | Welcome & Introductions  
*Dr Damian Clifford* |
| 14:05 – 14:25 | 'Consent is a trap': Australians reflect on consent, privacy and smartphones  
*Dr Sacha Molitorisz and Dr James Meese*  
In July 2020, Sacha Molitorisz (UTS Centre for Media Transition) and James Meese (RMIT) conducted six virtual focus groups in Sydney and Coffs Harbour into consent, privacy and smartphones. Unsurprisingly, the 26 participants expressed major concerns about how consent currently operates, but also said they want consent to work, offering a range of suggestions about how to improve it. |
| 14:25 – 14:45 | Greater than the Sum of Our Private parts: Does Australia Need A New Way to Define and Protect Private Information?  
*Dr Kobi Leins and Prof Lars Kulik*  
Protection of privacy is both a legal as well as a technical question. Small amounts of data that are collected and shared over time can lead to an immense amount of information and inferences about an individual or community. The law does not effectively govern the current capacity of computing. Solutions to data protection need to be both legal and technical. In our presentation we will explore the technical capabilities and the need for ‘sociotechnical imaginaries’ (Sheila Jasanoff) to provide greater protection for the collection, access, process and use of our information, as recommended by the Australian Law Reform Commission in 2008. |
<table>
<thead>
<tr>
<th>Time</th>
<th>Session</th>
</tr>
</thead>
</table>
| 14:45 – 15:05 | **Young people’s consent to data processing – suggestions for reform of the Australian Privacy Act 1988**  
**A/Prof Normann Witzleb and Prof Moira Patersons** |

This paper discusses how the data protection framework under the Privacy Act 1988 (Cth) as it applies to children and young people could be enhanced. With particular emphasis on the rules of consent, the paper evaluates the law reform proposals made by the Australian Competition and Consumer Commission in its Digital Platforms Inquiry. Adopting a comparative approach with references to the law of the EU and the US, the paper advocates protections that have particular regard to the developing ability of children to make valid privacy choices.

| 15:05 – 15:25 | **Fairness, Consent and the Convention on the Rights of the Child**  
**Dr Valerie Verdoodt** |

This paper explores the role of the fairness principle in the General Data Protection Regulation (GDPR) and more specifically, how the need to ‘fairly balance’ competing rights and interests may provide an avenue to consider the impact of children’s rights when personal data are processed. The analysis will explore this potential role for the Children’s Rights Convention through the lens of the parental consent provisions contained in Article 8 of the EU Regulation.

| Break 15.25 - 15.40 |
### 2.0 Manipulation and ‘Fair’ Substantive Limits - Chaired by A/Prof Stacey Steele

**15:40 – 16:00 Digital consumer manipulation and alternatives to consent**

*Dr Kayleen Manwaring*

The ACCC in its Digital Platforms Inquiry made a number of recommendations relevant to addressing problems of digital consumer manipulation. However, I propose that the ACCC’s acceptances of disclosure and consent as primary mechanisms limits the potential appropriate reform in this area. A reliance on consent in the context of digital consumer manipulation can be particularly problematic, as the nature of behavioural advertising tactics is such that they ‘may not be able to be defused by raising users’ awareness or knowledge of how they operate.’ (Nadler & McGuigan). Alternatives addressing appropriate limitations on conduct should be considered in order to appropriately protect against such harms. This is particularly important in the context of vulnerable and disadvantaged groups.

**16:00 – 16:20 Protecting Privacy in India: The Roles of Consent and Fairness in Data Protection**

*Prof Jeannie Paterson and A/Prof Mark Taylor*

This paper discusses consent and the notion of fairness in the Indian Data Protection Bill and more specifically, the proposed introduction of the concept of data fiduciaries. The paper uses these developments to reflect on the requirement for ‘fair’ data processing in the English regime of data protection. Such safeguards are not included in the ACCCs proposals, which places more emphasis on consent. The paper reflects on the place for substantive limits on data processing under reform to the ACL.

### 3.0 Delineating (ii)legitimate interests and dark patterns - Chaired by Dr Will Bateman

**16:20 – 16:40 Legitimate Interest and the boundaries of legitimate consent**

*Dr Lorenzo Dalla Corte and Dr Damian Clifford*

In its Digital Platforms report the Australian Competition and Consumer Commission recommended the adoption of a consent-based approach in the reform of the Privacy Act 1988. In doing so, the ACCC expressly recommended the exclusion of a legitimate interest balancing condition similar to that contained in Article 6(1)(f) of the EU General Data Protection Regulation given its malleability therefore, the potential for it to undermine proposed moves towards the empowerment of consumers. However, the failure to include a catch-all all balancing condition may arguably result in the stretching of consent and the exceptions recommended by the ACCC. This paper will explore the legitimate role for legitimate interests in data privacy legislation in order to shed light on the implications of the ACCC’s recommendation.

**16:40 – 17:00 How dark patterns cloud consent**
Legislative attempts at regulating consumer consent are fraught with challenges, as has been seen with the EU’s ePrivacy Directive. Such legislative action is applied in an adversarial context, with platforms looking to maintain the current status quo in terms of data collection. One such example is the usage of dark patterns, a form of deceptive or leading user interface that aims to manipulate, or nudge, the user into a particular action. In this presentation we will examine some examples of such dark patterns, and consider how such practices could be mitigated, and consider how technology and law could be better used to deliver user consent.
SPEAKER LIST

Dr Will Bateman – Senior Lecturer, ANU College of Law
Dr Damian Clifford – Postdoctoral Research Fellow, ANU College of Law
Dr Chris Culnane – Honorary Fellow in the School of Computing and Information Systems at the University Melbourne
Dr Lorenzo Dalla Corte – Honorary Lecturer, ANU College of Law
Prof Lars Kulik – School of Computing and Information Systems at University of Melbourne
Prof Seth Lazar – ANU, School of Philosophy, College Arts & Social Sciences
Dr Kobi Leins – Senior Research Fellow in Digital Ethics, School of Computing and Information Systems at University of Melbourne
Dr Kayleen Manwaaring – Senior Lecturer, School of Taxation & Business Law, UNSW
Dr James Meese – Senior Lecturer, School of Media and Communication, RMIT
Dr Sacha Molitorisz – Postdoctoral Research Fellow, Centre for Media Transition, University of Technology Sydney
Prof Jeannie Paterson – Melbourne Law School, University of Melbourne
Prof Moira Paterson – Law School, Monash University
Prof Megan Richardson – Melbourne Law School, University of Melbourne
A/Prof Stacey Steele – Melbourne Law School, University of Melbourne
A/Prof Mark Taylor – Melbourne Law School, University of Melbourne
A/Prof Vanessa Teague – Honorary A/Prof, ANU College of Engineering & Computer Science
Dr Valerie Verdoordt – LSE Fellow, Department of Law, London School of Economics
A/Prof Normann Witzleb – Law School, Monash University