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"Please Watch this Ad ... Or Else": Could Advertisements Requiring User Focus or Response be "Coercive" under the Australian Consumer Law?

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Mark A Giancaspro[*]

From posters in shop windows and on light posts to pop-ups and banner ads on computers and smartphones, advertising has evolved dramatically over the past century. In recent times, emergent technologies have seen advertising take another quantum leap forward. Some major corporations are now employing what this article terms 'compulsive advertising technologies' ('CATs') to market to consumers. CATs require consumers to actively engage with the advertisement shown in order to terminate. Some ads track eye movements, read facial profiles, and even demand verbal responses to cues. This article is the first to consider whether the use of CATs could amount to 'coercive' conduct, proscribed by s 50 of the Australian Consumer Law ('ACL'), by using compulsion to negate the consumer's choice or freedom to act in circumstances that are unreasonable or unjustifiable. Through a doctrinal analysis, it is argued that existing case law interpreting ACL s 50 supports this view. The article concludes by suggesting amendment to the consumer law to provide clarity as to the sorts of non-physical conduct that can amount to coercion.

I INTRODUCTION

In August 2012, the Sony Group's gaming and network services subsidiary, Sony Computer Entertainment,[1] was granted a patent over technology which can imbed interactive television commercials into various media including films and video games.[2] One of the potential applications of the technology, described in the patent, was an advertisement which would only terminate when the name of the company being advertised was uttered by the user.[3] The example provided was McDonald's. An ad for the famous fast-food chain would appear onscreen alongside an instruction that the user exclaim 'McDonald's' in order to end the commercial. At that point, the client device – equipped with 'a microphone that captures the user's words and voice recognition'- would determine if the user had responded as required and proceed to skip the rest of the commercial once they had done so.[4] Not long after the patent was granted, the technology was described by some media outlets as both 'hilarious' and 'terrifying'.[5]

More recently, American subscription-based movie ticketing service MoviePass announced it would be launching a Web3-based application program ('app') in which users earn credits redeemable for cinema tickets and other products by watching advertisements.[6] The more alarming feature of the app is that it will use facial recognition and eye-tracking technology to ensure the user is genuinely watching the ads being shown.[7] If the user does not keep their eyes focussed on the screen, the ad will

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[1] Now 'Sony Interactive Entertainment'.

[2] Gary M Zalewski, U.S. Patent No. 8,246,454 B2 (21 August 2012). Zalewski was the inventor, however Sony Computer Entertainment America LLC is listed as the assignee. This is the common arrangement when company employees produce patentable technologies for their employer.

[3] Ibid p 26.

[4] Ibid.

[5] Matt Vella, 'Sony Patent is Hilarious, Terrifying', *Fortune* (online, 1 May 2013) <https://fortune.com/2013/04/30/sony-patent-is-hilarious-terrifying/>.

[6] Danka Delić, 'MoviePass' Eye-Tracking Software Pauses Ads if You Look Away', *ProPrivacy* (online, 18 February 2022) <https://proprivacy.com/privacy-news/moviepass-eye-tracking-software-pauses-ads-if-you-look-away>.

[7] Ibid.

pause and not resume until it has secured the user's gaze. Again, the response from the media was less than favourable, with some commentators[8] branding the MoviePass strategy as 'brutal' and something reminiscent of Anthony Burgess' famously dark dystopian tome, *A Clockwork Orange*.[9]

As a growing volume of consumer advertising migrates online, and smart devices become more prevalent in common households and social settings, technologies such as Sony Group's voice-response commercials and MoviePass' eye-tracking app may become more common. The need to gain an advantage in the increasingly competitive online media market will undoubtedly continue persuading content creators to be audaciously innovative when marketing their products and services. This is especially so given most digital advertisements permit the consumer to ignore them while they play out, or otherwise to 'skip' them from a certain point, to access the content they desire. These 'compulsive advertising technologies' ('CATs'), as I refer to them, remove the capacity for consumers to passively heed (or ignore) advertising and go one step further in forcing them to absorb and even respond to it. Though this makes sense from a marketing perspective, it raises a number of concerns from the consumer perspective.

It is the thesis of this article that *compelling* a consumer to watch and respond to an advertisement can be construed as 'coercive' conduct, as proscribed by s 50 of the *Australian Consumer Law* ('*ACL*').[10] It is argued that the case law interpreting this provision and the established canons of statutory construction support this view. Part II briefly discusses the contemporary trend of online advertising, identifying some of the common methods by which purveyors advertise to consumers through computers and smart devices. It then considers the emerging class of CATs, encompassing Sony Group's voice-response commercials and MoviePass' eye-tracking app, rationalising their use from a marketing perspective. Part III then introduces *ACL* s 50, tracing its history within the Australian consumer protection framework. It elucidates the provision's apparent meaning and scope by reference to a variety of relevant sources from parliamentary materials to court judgments. Against this backdrop, Part IV makes the case that the use of CATs could indeed amount to coercion and, therefore, give rise to pecuniary and criminal penalties under the *ACL*. It is explained how the term 'coercion' has not been fully nor extensively expounded by the Federal Parliament or the courts but that the available interpretative guidance suggests that it is broad enough to capture the use of CATs.

Part V succinctly suggests a minor amendment to s 50 of the *ACL*, namely the insertion of a non-exhaustive definition of both 'undue harassment' and 'coercion' to provide clearer guidance as to the kinds of behaviour that may be caught by the provision. Doing so provides clarity while sparing the courts the task of blindly ascertaining the meaning of these terms. Finally, Part VI concludes with a plea to the legislature to ensure the *ACL* maintains pace with rapid technological developments. It is submitted this is critical to ensuring consumers are adequately protected during the relentless march of the Fourth Industrial Revolution.

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[8] See for example, Dan Robitzski, 'Brutal Startup is Using Eye Tracking to Force You to Watch Ads', *Futurism* (online, 23 March 2019) <https://futurism.com/moviepass-eye-tracking-ads>.

[9] Anthony Burgess, *A Clockwork Orange* (William Heinemann, 1962). The book was popularised further by Stanley Kubrick's 1971 eponymous film adaptation.

[10] The *Australian Consumer Law* is contained in sch 2 of the *Competition and Consumer Act 2010* (Cth). It should be noted that there is a complementary provision to *ACL* s 50 in s 12DJ of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'). This provision applies in respect of 'financial services', which includes financial products: *ASIC Act*, s 12BAB(1AA). Given that most retail advertisements will be for consumer goods and services, the *ACL* provision is the focus of this article.

II THE MODERN AGE OF ONLINE ADVERTISING

With a few notable exceptions, such as Lamborghini and Tupperware,[11] all businesses advertise in some manner. For the majority, it is an essential part of their marketing strategy. Advertising not only serves an important competitive purpose by vying for the attention and investment of consumers, it is also the primary means by which businesses can communicate the nature, quality, price, and locations of their goods and services.[12] This has been recognised by purveyors for thousands of years.[13] The advent of the movable-type printing press by German goldsmith Johannes Gutenberg in the 1400s revolutionised the production of text,[14] and its commercialisation in the 19th century helped democratise information on an unprecedented scale.[15] Advertising was now more efficient and effective than ever, capable of reaching audiences far and wide. Until the radio and television entered the market, static billboards, signs, flyers, newspapers, and catalogues were the primary means of advertising goods and services.[16] These electronic mediums signalled a new sensory dimension in advertising, allowing consumers to hear and see live advertisements.

Things changed dramatically, of course, when computers and the internet arrived in the late 20th century. These technologies further broadened the reach and speed of advertising. Indeed, in the decade from 1994 (when online advertising began), measured online ad spending outstripped outdoor and radio advertising.[17] Since then, the exponential growth of internet speed and infrastructure, coupled with the advent of portable internet-equipped smartphones and related smart devices such as tablets, has again changed the way consumers shop and, subsequently, the way businesses market to them. The sheer ubiquity of the internet and devices connected to it has dramatically impacted corporate marketing strategies. Even print advertisements are waning as more eyes look to phone and computer screens than to newspapers, shop windows, television screens and billboards. As McStay explains, 'digitality has embedded itself into the communicating strategies of virtually all companies interested in advertising'.[18] This technological revolution has seen a great deal of advertising shift online to websites and smart device apps. Some very recent estimates claim that 55 percent of all marketing is now digital.[19]

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[11] Niharika Kalyankar, '6 Brands that Do Not Advertise and Probably Never Will', *Startup Talky* (15 March 2022) <https://startuptalky.com/brands-that-dont-advertise/>.

[12] Gerard J Tellis, *Effective Advertising: Understanding When, How, and Why Advertising Works* (Sage, 2004) 4.

[13] The earliest forms of advertising can be traced back to 3000 BCE, with clay tables inscribed with merchant names being unearthed in an area near the former city of Babylon in ancient Mesopotamia (located in modern-day Iraq). The Ancient Egyptians and Romans used papyrus and stone tablets respectively to advertise their wares, and the Ancient Greeks were known to use town criers to advertise goods arriving by ship. See Norman J Medoff and Barbara K Kaye, *Electronic Media: Then, Now, and Later* (Routledge, 3rd ed, 2017) 156. Tungate notes: '[I]t's safe to say that advertising has been around for as long as there have been goods to sell and a medium to talk them up – from the crier in the street to the handbill tacked to a tree': Mark Tungate, *Adland: A Global History of Advertising* (Kogan Page, 2nd ed, 2013) 7.

[14] Avery Elizabeth Hurt, *How the Printing Press Changed the World* (Cavendish Square, 2019) ch 1.

[15] Jukka Kortti, *Media in History: An Introduction to the Meanings and Transformations of Communication Over Time* (Bloomsbury, 2019) 57.

[16] The earliest known printed advertisement appeared in Germany around 1525 and promoted a book on medicine: Medoff and Kaye, n 13, 156.

[17] Charles R Taylor, 'The Six Principles of Digital Advertising' (2009) 28(3) *International Journal of Advertising* 411, 411-12. Only advertising through television, magazines and newspapers comprised a great proportion of overall advertising spending.

[18] Andrew McStay, *Digital Advertising* (Bloomsbury, 2nd ed, 2016) 3.

[19] Susie Marino, '165 Strategy-Changing Digital Marketing Statistics for 2023', *WordStream* (18 January 2023) <https://www.wordstream.com/blog/ws/2022/04/19/digital-marketing-statistics>.

Online advertisements on smart devices typically take the form of tappable 'banners', videos, and pop-ups.[20] These will generally appear on your device screen prior to or during viewing of digital content (such as videos, games, and text articles). The usual practice is for the advertisements to commence at the outset and either: (a) allow the user to close or 'skip' the advertisement immediately, or after a minimum predetermined period of time[21] or (b) preclude premature termination and conclude only once it has run its course. It is well-known anecdotally, and verified by empirical studies,[22] that consumers tend to ignore these advertisements and, where possible, skip them as soon as they can. When consumers feel that an advertisement is intrusive and is being forced upon them, there is typically a distinctly negative emotional response, known as 'ad abandonment'.[23] Their impatience and irritation manifests as avoidance, such that they purposely ignore both the advertisement and what it is promoting.[24] Some consumers even utilise 'ad blockers' to try and inhibit online advertisements, or simply concede and switch to other content.[25] The general discontent with advertising content has also translated to higher uptake of 'premium' ad-free versions of popular online platforms. For example, YouTube's Music and Premium subscription service, which launched in 2018 and offers content free of advertisements, enticed 30 million new subscribers in 2022 – to add to the existing 50 million subscribers boasted by parent company Google.[26] Similarly, music streaming site Spotify has an impressive 195 million subscribers to its premium version, representing a 930 percent increase on the number it attracted following the version's launch in 2015.[27]

What this reveals is a great irony in that, despite the majority of advertising now occurring online, it is largely being avoided by consumers. This is despite contemporary efforts to use algorithms to track consumer preferences and expose them to customised and ideally more appealing advertisements.[28] Inefficiency in the traditional design of digital advertisements, most of which are ignored, is encouraging businesses to generate increasingly sophisticated ways to encourage consumers to engage with their advertisements.[29] Speaking of MoviePass' plans to use facial recognition and eye-tracking technology in its app, company co-founder Stacy Spikes was defiant and vigorously defended the move:

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[20] Daniel Rowles, *Mobile Marketing: How Mobile Technology is Revolutionizing Marketing, Communications and Advertising* (Kogan Page, 2014) 186-7. See also ACCC, *Digital Advertising Services Inquiry: Final Report* (August 2021) 26 [1.1.1].

[21] These are known as 'pre-roll' advertisements and are commonly seen on popular digital content websites such as YouTube, whose videos on its regular non-premium platform often have pre-roll advertisements before and during close to all of its videos. Generally, the duration of the forced segment of the advertisements is 5-10 seconds.

[22] See, eg, Colin Campbell et al, 'Understanding Why Consumers Don't Skip Pre-Roll Video Ads' (2017) 46(3) *Journal of Advertising* 411.

[23] Kendall, Goodrich, Shu Z Schiller and Dennis Galletta, 'Consumer Reactions to Intrusiveness of Online-Video Advertisements' (2015) 55(1) *Journal of Advertising Research* 37.

[24] Ibid 41.

[25] Tim Hughes, Adam Gray and Hugo Whicher, *Smarketing: How to Achieve Competitive Advantage through Blended Sales and Marketing* (Kogan Page, 2019) 26.

[26] Jem Aswad, 'YouTube Music and Premium Soar to 80 Million-Plus Paid Subscribers', *Variety Magazine* (online, 9 November 2022) <https://variety.com/2022/music/news/youtube-music-premium-80-million-paying-subscribers-1235427016/>.

[27] Josep Ferrer, 'The Secret Recipe Behind Spotify's Success', *UX Collective* (online, 8 December 2022) <https://uxdesign.cc/the-secret-recipe-behind-spotifys-success-f78f8eda68ee>.

[28] Julian Thomas, 'Programming, Filtering, Adblocking: Advertising and Media Automation' (2018) 166(1) *Media International Australia* 34.

[29] Stepahine Flosi, Gian Fulgoni, and Andrea Vollman, 'If an Advertisement Runs Online and No One Sees It, Is It Still an Ad? Empirical Generalizations in Digital Advertising' (2013) 53(2) *Journal of Advertising Research* 192.

> We had an early version of [the MoviePass app] where you know what happened. People put the phone down and left and didn't pay any attention to it. Right now, 70 percent of video advertising is unseen. This is a way that advertisers get the impact they're looking for but you're also getting the impact yourself.[30]

Spikes' language suggests that consumers benefit from being compelled to watch the advertisements through the MoviePass app. Businesses certainly benefit from consumers being forced to watch their advertisements, but there is scarcely a case for reciprocal benefits. The same can be said for advertisements such as those proposed by Sony Group, which will terminate only when the user says the name of the company being advertised. Though Sony's patent suggests that users could be rewarded for doing so in the way of points of coupons from the company advertised,[31] the method still seems excessive. Clearly, the objective is to leave a psychological imprint on the user, such that they both consciously and subconsciously contemplate the products or services being advertised and, ideally, feel compelled to purchase the same. Even if one accepts the underlying psychology behind advertising, this still seems a bridge too far. The whole idea of advertising is to passively expose consumers to different goods and services and allow consumers to make informed decisions about what they buy. Digital advertisements have never before required consumers to be looking at, listening to, or engaging with them in order for them to progress and terminate. The use of CATs is therefore an extraordinary and unprecedented step which arguably raises questions as to whether this use of compulsion goes beyond mere marketing and becomes coercive under the unique proscription contained within the consumer law. Part III turns now to discussing this proscription.

III STATUTORY PROSCRIPTIONS AGAINST HARASSMENT AND COERCION

The earliest statutory frameworks governing competition and consumer law in Australia contained no provisions addressing harassment or coercion of consumers. Indeed, they contained close to no provisions directly concerned with consumer protection. Instead, they were largely geared towards the preservation of competition and therefore primarily addressed the conduct of corporations. The first comprehensive Australian trade practices legislation, the *Trade Practices Act 1965* (Cth), exemplified this focus, addressing a variety of anticompetitive behaviours with only occasional reference to the interests of consumers.[32] The High Court in *Strickland v Rocla Concrete Pipes Ltd*[33] determined that the Act was constitutionally defective and invalidated it, prompting the Commonwealth to introduce the *Restrictive Trade Practices Act 1971* (Cth) in its place. The new Act essentially replicated the old though addressed the latter's deficiencies to ensure its validity.[34] Again, no proscription against harassment or coercion of consumers featured in this legislation.

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[30] Adam Smith, 'MoviePass Will Track People's Eyes Through Their Phone's Cameras to Make Sure they Don't Look Away from Ads', *The Independent* (online, 12 February 2022) <https://finance.yahoo.com/news/moviepass-track-people-eyes-phone-164124974.html>.

[31] 'In one embodiment, the user gets rewarded with some points or a coupon from the sponsor. The rewards can be collected by the user in a variety of ways, such as receiving a coupon on the mail or via email, getting a text message in a mobile phone with the coupon, collecting points toward collecting prices in a web site, etc': Gary M Zalewski, U.S. Patent No. 8,246,454 B2 (21 August 2012) 10,

[32] See, for example, s 50, which mandated reference to 'the needs and interests of consumers' in evaluating whether a restriction or other practice (other than a practice of monopolisation) was contrary to the public interest.

[33] (1971) 124 CLR 468.

[34] So much is clear from the Explanatory Memorandum to the Restrictive Trade Practices Bill 1971 (Cth). It stated: 'The purpose of the Bill is to overcome the constitutional defects that have been found by the High Court to exist in the Trade Practices Act 1965-1971. The Bill provides for the repeal of the existing Act and for the re-enactment

The *Trade Practices Act 1974* (Cth) ('*TPA*') heralded a new era in consumer protection. This Act repealed and replaced the *Restrictive Trade Practices Act 1971* (Cth) while also making express provision for the protection of consumers from a variety of unfair practices.[35] It was, in fact, later amended to expressly stipulate as its object the enhancement of the welfare of Australians 'through the promotion of competition and fair trading and provision for consumer protection'.[36] Section 60 of the *TPA*, entitled 'harassment and coercion', stated thus:

> A corporation shall not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

The Explanatory Memorandum to the Trade Practices Bill 1974 (Cth) stated that s 60 was designed to prohibit 'coercive conduct by salesmen or debt collectors at a person's place of residence'.[37] This reference is curious given the eventual provision was not restricted in its application to supplies or payments occurring in residential homes. It was, however, restricted specifically to *consumers*.

Finally, the *TPA* was replaced by the *Competition and Consumer Act 2010* (Cth) ('*CCA*').[38] The *CCA* was designed to address the shortcomings of Australia's existing consumer policy framework, as identified by the Productivity Commission.[39] It also remedied the critical gaps in the *TPA*'s scope and coverage while consolidating the numerous other consumer protection regimes that previously operated across Australian jurisdictions. The *CCA* states as its object the enhancement of the welfare of Australians 'through the promotion of competition and fair trading and provision for consumer protection'.[40] Section 50 of the *ACL*—recall from Part I that the *ACL* is contained in sch 2 to the *CCA*—retained but modified the *TPA*'s proscription against harassment or coercion. The current s 50(1) provides:

> (1) A person must not use physical force, or undue harassment or coercion, in connection with:
> (a) the supply or possible supply of goods or services; or
> (b) the payment for goods or services; or
> (c) the sale or grant, or the possible sale or grant, of an interest in land; or
> (d) the payment for an interest in land.[41]

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of similar provisions on a different constitutional basis': Explanatory Memorandum, Restrictive Trade Practices Bill 1971 (Cth) [1]-[2].

[35] See Explanatory Memorandum, Trade Practices Bill 1974 (Cth) [1].

[36] *Trade Practices Act 1974* (Cth), s 2.

[37] Explanatory Memorandum, Trade Practices Bill 1974 (Cth) 16.

[38] The *CCA* applies uniformly across all Australian states and territories: *Fair Trading (Australian Consumer Law) Act 1992* (ACT) s 7; *Fair Trading Act 1987* (NSW) s 32; *Consumer Affairs and Fair Trading Act 1990* (NT) s 27; *Fair Trading Act 1989* (Qld) s 16; *Fair Trading Act 1987* (SA) s 14; *Australian Consumer Law (Tasmania) Act 2010* (Tas) s 6; *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 8; *Fair Trading Act 2010* (WA) s 19.

[39] Productivity Commission, Parliament of Australia, *Review of Australia's Consumer Policy Framework* (Final Report, 30 April 2008) vol 1, 2-3. The Commission's view was that Australia's consumer policy framework was inconsistent, inefficient, costly to administer, and incapable of adaptation to rapidly changing consumer markets. It was also said to provide inadequate redress mechanisms for consumers.

[40] *CCA*, s 2.

[41] It should be noted that s 50(1) of the *Fair Trading Act 2010* (WA) is equivalent to *ACL* s 50(1). Additionally, s 45 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) prohibits a number of 'debt collection practices', one of which is 'using physical force or undue harassment or coercion' (s 45(2)(a)). It is also acknowledged that s 168 of the *ACL* renders the use of undue harassment or coercion an offence subject to the penalties stipulated in that provision.

The noteworthy amendments to this new iteration of the provision are threefold. First, where the former *TPA* s 60 referred to physical force or undue harassment or coercion towards *consumers*, *ACL* s 50 is not so confined.[42] The subject of such conduct is not referred to at all; the emphasis is upon the wrongdoer. Second, and related to the first point of difference, *ACL* s 50 applies to 'persons' who physical force or undue harassment or coercion. This contrasts with *TPA* s 60, which applied to corporations in most cases.[43] The current reference to persons could conceivably apply to natural persons as well as other business entities other than corporations.[44] Finally, *ACL* s 50 is broader than *TPA* s 60 in that it applies to the actual or possible sale or grant of an interest in land (or a payment for such an interest).

At this juncture, it is important to explain the meanings of the relevant types of misconduct referred to in *ACL* s 50(1). For the purposes of this article, only *coercion* will be considered. The reason for this is that the use of CATs across digital media clearly involves neither 'physical force' nor 'undue harassment'. The former requires contact with or directed towards the user, which is obviously impossible in the context of incorporeal, visual advertisements. It envisages physical contact in the ordinary sense of the term.[45] The latter is a different concept which is concerned with repeated, unwelcomed, and unjustified pressure calculated to intimidate, demoralise, or exhaust the subject.[46] CATs, while perhaps annoying and arbitrary in operation, do not unduly harass users. As will be discussed shortly, CATs are far more likely to be deemed 'coercive' given the way they operate.

'Coercion' is not defined in *ACL* s 50. It was not defined in the previous *TPA* either.[47] It has accordingly been left to the courts to extrapolate the meaning of this term. Some cases offer helpful guidance as to the sorts of conduct that can be classified as 'coercive' in the sense used in the consumer law. It should first be clarified that the adjective 'undue' applies only to harassment and not to coercion. Ample authority supports this view.[48] As to what coercion means, a handful of cases offer insight. One of the earliest cases to consider the predecessor to *ACL* s 50 (*TPA* s 60) was *Australian Competition and Consumer Commission v McCaskey*.[49] That case centred largely upon the issue of undue harassment, but French J did make some practical observations. His Honour made reference to the dictionary meaning of 'coercion', describing the concept as encompassing compulsion or constraint.[50] He added that the word 'coercion' and all others in the statutory provision should 'be given their

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[42] It should be noted, however, that s 53A of the *TPA* prohibited generally the 'use of physical force or undue harassment or coercion in connection with the sale or grant, or the possible sale or grant, of an interest in land or the payment for an interest in land'. There was no limitation to consumers.

[43] Sections 5 and 6 of the *TPA* did, however, extend the application of Part V of the Act to bodies corporate (including entities other than corporations), Australian citizens, and persons ordinarily resident within Australia.

[44] See Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), [3.9]; *Acts Interpretation Act 1901* (Cth) s 2C.

[45] See *Australian Competition & Consumer Commission v Davis* [2003] FCA 1227.

[46] *Australian Competition and Consumer Commission v McCaskey* (2000) 104 FCR 8, 27 [48] (French J).

[47] 'There is no definition of "undue harassment or coercion" or any of those words individually in the TPA': *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2013] FCA 350.

[48] *Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 472, 485 [59]; *Australian Securities and Investments Commission v Accounts Control Management Services Pty Ltd* [2012] FCA 1164, [15]; *Australian Competition and Consumer Commission v ACM Group Limited (No 2)* [2018] FCA 1115, [184], [266]; *Australian Securities and Investments Commission v Select AFSL Pty Ltd (No 2)* [2022] FCA 786, [286]. It is noted that French J in *Australian Competition and Consumer Commission v McCaskey* (2000) 104 FCR 8 at 27 [49] appeared to suggest that the adjective 'undue' governed both harassment and coercion. The subsequent authorities listed here, however, clearly regard this suggestion as erroneous and proceeded on the basis that 'undue' related only to harassment. The correctness of this approach is also reinforced by commentary in the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), which at para [6.394] speaks separately of 'undue harassment' and 'coercion', with 'undue' only being discussed in the context of harassment.

[49] (2000) 104 FCR 8 ('*McCaskey*').

[50] Ibid 27 [50].

ordinary meanings as relevant to the context in which they appear'.[51] An important aspect of his Honour's analysis was that the legitimacy of the conduct in question is important to evaluating whether it is coercive. If the conduct is serving legitimate purposes or is otherwise justifiable, it is less likely to amount to coercion.[52]

A more definite explication was provided by Hill J in *Australian Competition and Consumer Commission v Maritime Union of Australia*.[53] Coercion was said to carry with it 'the connotation of force or compulsion or threats of force or *compulsion negating choice or freedom to act*'.[54] This emphasised portion of Hill J's remarks makes clear that there is no need either for physical force or for a threat of the same to establish coercion; the mere application of compulsion and negation of free choice is sufficient. This will be pertinent in Part IV when the case for CATs being instruments of coercion is made, as will the views of Peterson J in *Hodges v Webb*,[55] which Hill J cited in his judgment. In that case, Peterson J, synthesising his Honour's expression of the test for coercion at common law, stated:

> The test may be equivalent to an inquiry whether the [plaintiff] would have acted in a particular way if the particular motive or inducement had been absent. But the fact that he would have acted differently if the circumstances had been different does not show that in adopting the course in question he was acting under coercion or compulsion.[56]

His Honour added that a plaintiff 'cannot properly be said to be coerced if, having two alternative courses presented to him, he follows that course which he considers conducive to his own interests'.[57]

Most of the later cases examining the concept of coercion have involved threats of unpleasantness falling short of physical force.[58] Various examples abound, many involving debt collectors vis-à-vis debtors. The collector in *Australian Securities and Investments Commission v Accounts Control Management Services Pty Ltd*[59] was deemed to have coerced a debtor by calling her neighbour and friend and asking them to pass on a message to the debtor's husband (instead of her). This was branded a 'distinctly unsavoury tactic' which carried with it the implicit suggestion that such embarrassing exposures might be expected in the future.[60] The collector's additional intimation to the debtor that court officers would be sent to her house to serve legal documents in marked cars were also deemed a form of coercion.[61] The case of *Australian Competition and Consumer Commission v ACM Group Limited (No 2)*[62] is analogous. ACM Group, a debt collector representing various creditors, contacted the debtor, a Centrelink recipient, and told her that one of her creditors was preparing legal documentation (including a summons) for litigation against her, and that if a default was recorded

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[51] Ibid 26 [47].
[52] Ibid 27-8 [51].
[53] (2001) 114 FCR 472 ('*Maritime Union*').
[54] Ibid 485 [61] (emphasis added). Approved in *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2006] FCA 1427 at [74]; *Australian Securities and Investments Commission v Accounts Control Management Services Pty Ltd* [2012] FCA 1164 at [16].
[55] [1920] 2 Ch 70.
[56] Ibid 86.
[57] Ibid 87.
[58] In some cases, these threats can rise to the level of harassment, which is arguably more serious in nature: see, for example, *Australian Competition and Consumer Commission v Panthera Finance Pty Ltd* [2020] FCA 340 (debt collector unduly harassed three consumers by repeatedly insisting they disprove liability for debts for which they were not liable, and continuing to pursue the alleged debts despite them having been challenged by the consumers in question).
[59] [2012] FCA 1164 ('*ACM Services*').
[60] Ibid [89].
[61] Ibid [124]-[125].
[62] [2018] FCA 1115 ('*ACM Group*').

against her credit file, she would not be able to obtain credit for up to seven years.[63] The debtor felt 'stunned', 'threatened' and 'flustered', ultimately agreeing to pay $1,000 to halt any court proceedings.[64] 'This amount represented the total of her pay and Centrelink benefits for a fortnight and, if [she] made this payment, she knew she would not have enough to cover rent for that fortnight'.[65]

Justice Griffiths, sitting alone in the Federal Court, deemed this conduct to be coercive. ACM Group was aware of the debtor's dire financial and personal circumstances and was dismissive of her genuine offers to make repayments on a negotiated schedule.[66] They also knew that the creditor they represented was not immediately prepared to commence litigation and had not prepared the requisite legal documentation.[67] The court felt the debtor had been 'pinned to the wall' and 'railroaded', and that the totality of the circumstances supported the view that ACM Group had acted coercively under *ACL* s 50.[68] Justice Griffiths stressed that establishing whether or not particular conduct constitutes coercion 'depends on an overall impression or evaluative judgment'.[69] Clearly, then, this process has a normative dimension and is chiefly fact-dependent.

The coercive conduct in *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd*[70] was more sinister. The defendant, a telecommunications provider, created a fictitious debt collector and agency, 'Jerry Hastings', to pursue debtors and induce them to pay the debts alleged. Jerry Hastings contacted debtors and told them that

> if they did not agree to pay a sum in satisfaction of the alleged debt, they would be taken to court and have judgment entered against them which would require them to pay an additional charge equal to 20% of the alleged debt and be subject to an order for repossession of their assets in satisfaction of the debt.[71]

This was held to be coercive under *TPA* s 60.[72] Justice Mansfield added that conduct meeting this threshold must be in the nature of 'something significantly beyond legitimate and reasonable demands'.[73] This echoes French J's suggestion in *McCaskey* that conduct occurring in the pursuit of legitimate objectives or which is otherwise defensible is less likely to be deemed coercive. Put differently, there would seem to be a proportionate relationship between the objectionability of commercial conduct which seeks to influence a consumer's choice and the likelihood of that conduct being deemed coercive.[74]

Perhaps the most recent case examining the coercion provisions of the consumer law and providing guidance as to their scope is *ASIC v Select AFSL Pty Ltd (No 2)*.[75] Fourteen vulnerable consumers (10 of whom were Indigenous and living in remote Australian communities) were pressured

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[63] Ibid [21].
[64] Ibid [22].
[65] Ibid.
[66] Ibid [267].
[67] Ibid [268]-[271].
[68] Ibid [272]. ACM Group was penalised $750,000 for this and various other breaches of the *ACL*: *Australian Competition and Consumer Commission v ACM Group Limited (No 3)* [2018] FCA 2059.
[69] Ibid [266].
[70] [2013] FCA 350 ('*Excite Mobile*').
[71] Ibid [207].
[72] Ibid [208].
[73] Ibid [209].
[74] Cf *ASIC v Select AFSL Pty Ltd (No 2)* [2022] FCA 786, [475] ('…simply because conduct may be improper or illegitimate does not mean it necessarily falls within the concept of coercion').
[75] [2022] FCA 786 ('*Select AFSL*'). This case concerned s 12DJ of the *ASIC Act* but, as mentioned earlier in this article and as stated in the case itself, this provision is 'the statutory analogue of s 50 of the *ACL*': *Select AFSL* at [283].

into entering into various life, funeral, and accidental injury insurance agreements. The majority of these consumers did not speak English as a first language and had little understanding of and were misled in respect to the products being sold to them. They were also rushed through sales discussions and contracts. Shockingly, their questions in sales calls often went unanswered, and their requests for time to consider their options were ignored. The defendants alleged that 'coercion' in the context of s 12DJ of the *ASIC Act* (*ACL* s 50) 'requires that there be threatening conduct or intimidation'.[76]

This submission was rejected. Justice Abraham correctly observed that the language of s 12DJ did not confine the concept in the manner contended for and that the case law confirmed that it was a concept of wider import.[77] Her Honour cited and approved Hill J's statement in *Maritime Union* that coercion extended not only to force but also to compulsion which negated free choice. Citing Farrell J in *Australian Competition and Consumer Commission v Safety Compliance Pty Ltd*,[78] she also noted that the term 'generally imports some form of compulsion, whether by threat of force or otherwise'.[79] Her Honour continued with words that are instructive for the purposes of this article: 'The issue is what is encompassed in the concept of "otherwise", there referred to. That is, the element of compulsion is the necessary ingredient for a coercion claim, but compulsion can be brought about by conduct *other than by threat or force*'.[80] Clearly, then, the bar for coercion is not so high as to screen out conduct which does not involves threats or force. It may conceivably capture conduct which merely negates choice in circumstances where such conduct is not wholly reasonable or justifiable.

Justice Abraham went further in explaining how coercion might be established and the various perspectives that the courts must consider. Her Honour stated:

> [T]o determine whether coercion has been established, one must look at both the actions of the alleged wrongdoing party and the effect those actions had on the innocent party. The same action (e.g. a threat to do harm) may have a different impact depending on the complexion of the party to whom that action is directed, and the context in which the action is taken. ASIC's submission that the key question is whether the free action or free choice of the consumer has been negated, can be seen as nothing more than a recognition that coercion includes actions undertaken involving negation of choice or freedom to act. However, that does not turn the assessment of whether there has been coercion into a purely subjective inquiry…. Nor can it distract from the concept underpinning coercion, that of compulsion. That is, the negation of free choice must be brought about in that context. … The question of negation of choice or freedom to act cannot be considered in a vacuum and must be tethered to the concept of compulsion.[81]

Justice Abraham again stressed that there need only be '*some conduct*, which is capable of compelling a person or applying pressure to act in a particular way'.[82] Such conduct need not be in the nature of threats or force,[83] and it must in any event be read in the context of the innocent party's circumstances

[76] Ibid [362].
[77] Ibid.
[78] [2015] FCA 211 at [147].
[79] *Select AFSL*, [362].
[80] Ibid (emphasis added).
[81] Ibid, [363].
[82] Ibid, [365] (emphasis added).
[83] Ibid, [367]: '[T]he authorities recognise that compulsion can occur in circumstances absent a threat or intimidation … Coercion can take many forms'. See also ACCC and ASIC, 'Debt Collection Guideline: For Collectors and Creditors' (April 2021) 44: 'It is important to note that coercion may be exhibited in many forms, and is not limited to using or threatening physical force. A person may be considered to be coerced by another person either to do something or refrain from doing something'.

and how they were made to feel.[84] '[C]oercion can be established by a combination of circumstances. The assessment of whether or not particular conduct is coercive will *depend on an overall impression or evaluative judgment*, considered in light of the surrounding circumstances'.[85] It is for this reason, Abraham J cautioned, that each case must turn on its own facts[86] and that 'considerations relevant in one case cannot simply be taken at a level of generality (and out of context) as being illustrative of coercion in another factual circumstance'.[87]

In this case, the consumers were compelled by the defendants' conduct to sign up to insurance policies; they did not willingly consent to the course of action that they embarked upon but were pressured to do so.[88] As will be explained in Part IV, analogies can be drawn to situations where business employ CATs to compel consumers to watch advertisements in order to access content they will in almost all cases have paid for. Those consumers are clearly in a weaker – or, more accurately, helpless – bargaining position to exercise their choice to watch the advertisements shown to them. Such imbalance in bargaining strength is relevant to an evaluation of conduct alleged to be coercive.[89] Justice Abraham ultimately determined that the defendants had indeed coerced a number of the consumers involved and had therefore violated *ASIC Act* s 12DJ.[90]

In rarer cases, the allegedly coercive conduct involves threatened, and even *actual*, physical force. In *Australian Competition and Consumer Commission v Davis*,[91] for example, the complainant, a consumer, was pinned to the ground as his vehicle was lawfully repossessed from the complainant's premises by the respondents. The complainant had defaulted several times on his loan which financed the vehicle, and he was in significant arrears at the time, at which point the lender contracted the respondents to repossess his vehicle. Notwithstanding their contractual right to reclaim the vehicle, and threats of assault from the complainant, the respondents' actions were deemed by the Federal Court to amount to coercion in contravention of s 23 of the *Fair Trading Act 1987* (WA)[92] (near equivalent in wording to *TPA* s 60). Neither their authority to seize nor their right to reasonably defend themselves affected this determination.[93]

Of course, as mentioned earlier, instances of businesses utilising CATs to market to consumers do not involve physical force. Rather, they compel the consumer to actively engage with the relevant advertisements. The foregoing case law provides a sufficient agglomerate of principles to consider more intently in the forthcoming Part whether the use of CATs could amount to coercion under *ACL* s 50.

IV WHETHER CATS ARE COERCIVE

As discussed in Part II, CATs are an emerging marketing tool which harness advanced smart device technologies to ensure consumer captivation. Whereas with traditional advertising forms consumers could consciously choose not to pay them heed, CATs remove this choice by refusing to terminate (or to permit premature termination) unless the consumer is watching or otherwise engaging with the advertisement. In the context of digital media, the consumer can no longer opt to ignore or prematurely 'skip' an advertisement preceding the content they wish to access. Whether or not such functionality is

[84] Ibid, [364]-[366].
[85] Ibid, [366] (emphasis added).
[86] Ibid.
[87] Ibid [370].
[88] Ibid [374].
[89] Ibid [379] citing *McCaskey* at 27-8 [51]; *ACM Group* at [276]
[90] Ibid [478], [554], [767], [955].
[91] [2003] FCA 1227 ('*Davis*').
[92] Ibid [20]-[22] (Lee J).
[93] Ibid.

commensurate with coercion of the consumer depends upon a careful application of the relevant principles synthesised in Part III.

It is logical to begin with French J's remark in *McCaskey* that the term 'coercion' as it appears in the consumer law framework should be given its ordinary meaning within the context it appears.[94] This suggestion is consistent with a long line of authorities.[95] As explained in Part III, however, the term is not defined in the *ACL*. The Federal Court in both *McCaskey*[96] and *Select AFSL*[97] referred to a dictionary definition of 'coercion' to obtain assistance. This is a sensible point of reference when seeking to determine the ordinary meaning of any word contained in a statute.[98] Perusal of definitions across a variety of leading dictionaries considered by the common law courts are largely commensurate with one another, as indicated in Table 1:

Dictionary	**Definition of 'coerce'**	**Definition of 'coercion'**
Oxford English Dictionary[99]	'To shut in, restrain, confine'.	'Constraint, restraint, compulsion; the application of force to control the action of a voluntary agent'.
Macquarie Dictionary[100]	'To restrain or constrain by force, law, or authority; force or compel, as to do something'.	'The act or power of coercing; forcible constraint'.
Collins English Dictionary[101]	'To compel or restrain by force or authority without regard to individual wishes or desires'.	'The act or power of coercing'.
Black's Law Dictionary[102]	'To compel by force or threat'.	

Table 1: Definitions of 'Coerce' and 'Coercion'

The consistent theme in these definitions is restraint upon the subject, with an apparent supposition that force was utilised. Whether defined in either of its verbal forms (i.e., 'coerce' or 'coercion'), however, there is reference to *compulsion* untethered to any notions of force. This is most prominent in the *Collins English Dictionary* definition, which goes a step further and refers not only to the subject being compelled to act in a particular manner but to this compulsion occurring without regard to the subject's 'wishes or desires'. CATs, by their very nature, compel the subject (consumer) to watch and engage with the advertisements displayed to them. They go beyond the orthodox method of merely presenting the advertisements for a stipulated duration, which would preserve the consumer's rightful choice to ignore or skip the advertisement. They instead go a considerable step further by removing this fundamental choice and compelling the consumer to watch the advertisement. Such compulsion

[94] *McCaskey*, 26 [47].

[95] See, eg, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920)28 CLR 129, 148-9, 161-2; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 305, 320-21; *Mills v Meeking* (1990) 169 CLR 214, 233; *Marshall v Director-General of Department of Transport (Qld)* (2001) 205 CLR 603, 623; *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2010) 240 CLR 409, 421.

[96] (2000) 104 FCR 8, 27 [50].

[97] [2022] FCA 786, [284]. The court was citing French J's definition from the Shorter Oxford English Dictionary in *McCaskey*.

[98] See, eg, *R v Peters* (1886) 16 QBD 636; *Australian Gas Light Co v Valuer-General (NSW)* (1940) 40 SR (NSW) 126; *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329.

[99] *Oxford English Dictionary* (Clarendon Press, 1989) vol III, 435.

[100] *Macquarie Dictionary* (Pan Macmillan, 5th ed, 2009) 335.

[101] *Collins English Dictionary* (Collins, 2nd ed, 1986) 307.

[102] *Black's Law Dictionary* (West, 9th ed, 2009) 294.

seemingly transforms advertising to a far more aggressive form of guerrilla marketing. By definition, therefore, CATs can be seen as coercive.

Of course, reference to definitions alone is not a sufficient means of properly evaluating impugned conduct. We must consider the principles drawn from the relevant case law. These authorities, rather than precisely spelling out what coercion means in the context of the consumer law framework, suggest that any conduct and combination of circumstances can potentially be coercive.[103] Each case must turn on its own facts,[104] and factors relevant to a finding of coercion in one scenario will not necessarily be relevant in another.[105] The process of examining the facts and circumstances of a given case must be an evaluative one.[106] We must therefore be careful not to be overly demure in our assessment of CATs and the impacts they have upon consumers. Put simply, these technologies entirely remove a consumer's choice to ignore or skip a digital advertisement presented to them through various smart devices. This may at first glance seem like a mere inconvenience; a frivolous triviality. It is clearly not as serious as physically pinning a consumer to the ground,[107] emotionally blackmailing them,[108] or exploiting their latent vulnerabilities.[109] However, just because a consumer is not physically or emotionally goaded, it does not mean they have not been coerced. The essence of coercion, as *Maritime Union*[110] and *Select AFSL*[111] tell us, is the negation of free choice. That negation must occur in circumstances which are indefensible, such as where they do not involve either the pursuit of legitimate objectives or otherwise justifiable conduct on the defendant's part.[112]

Businesses which employ CATs are doing more than imposing a negative obligation on the consumer (i.e. making them wait for the advertisement to terminate or otherwise to permit them to terminate it prematurely after a certain period of time). They are also imposing a *positive* obligation on the consumer to actively engage with the advertisement, whether by requiring them to maintain eye contact or to issue a verbal response of the business' choice. The contractual terms of use for both Sony Group's and MoviePass' devices and apps respectively will undoubtedly authorise those businesses to impose this positive obligation upon the consumers. That is, Sony Group will stipulate that a precondition of the use of its services is that consumers periodically verbally respond to advertisements in order to terminate them and resume watching their desired content. In MoviePass' cases, the precondition will be that consumers maintain ocular focus upon the advertisements being shown on their device screen in order for them to run in full and terminate.

Contracting parties are free to impose whatever terms they wish upon one another, provided those terms are lawful.[113] However, cases such as *Davis* tell us that having a contractual right to act in a particular manner towards a person does not itself mean that you cannot be said to have coerced the latter.[114] Indeed, in *Davis*, the Federal Court did not accept that a contractual authority to repossess a vehicle and a general right to defend one's self permitted the respondents to use coercive measures against the complainant in the enforcement of that authority. The question of whether an act is authorised by contract is separate from the question of whether the conduct is coercive within the

[103] See, eg, *Select AFSL*, [366].
[104] Ibid.
[105] Ibid [370].
[106] Ibid [366]; *ACM Group*, [266].
[107] As in *Davis*.
[108] As in *ACM Services*, *ACM Group*, and *Excite Mobile*.
[109] As in *Select AFSL*.
[110] *Maritime Union*, 485 [61].
[111] *Select AFSL*, [285].
[112] *McCaskey*, 27-8 [51]; *Excite Mobile*, [209].
[113] *Prime Sight Ltd v Lavarello* [2014] AC 436, 450 [47] (Lord Toulson). See also Nadelle Grossman and Eric A Zacks, *Contracts in Context: From Transaction to Litigation* (Aspen Publishing, 2019) ch 1.
[114] *Davis*, [20]-[22]. See also *Nathan v Capital Finance Australia Ltd* [2008] FCA 459 at [16].

meaning of the consumer law.[115] And so, even if a business had, through its contractual terms with a consumer, the right to force the consumer to engage with its advertisements through the use of CATs, this does not preclude a finding that the business has in doing so coerced the consumer.

The evaluative analysis required to establish coercion under *ACL* s 50 also entails consideration of the consumer's perceptions. As Abraham J observed in *Select AFST*, determining whether coercion has been established requires analysis of the actions of both the alleged wrongdoer and the innocent party.[116] In particular, the impacts of the wrongdoer's conduct upon the innocent party, including by reference to the latter's attributes and emotional responses, are 'relevant to the assessment of whether the conduct undertaken amounted to coercion'.[117] This aligns with the dictionary definitions perused above, some of which expressly emphasise reference to the subject's perceptions and desires. Considering CATs from a consumer's perspective, it is clear to see that they compel the consumer to do something they otherwise almost certainly would not choose to do. A study undertaken by HubSpot Research in 2016 and updated in 2020 revealed that 91 percent of respondents considered advertisements to be more intrusive than they were the three years prior, and 73 percent held strongly negative opinions about advertisements appearing on websites and mobile phones.[118] Nearly two-thirds (64 percent) of respondents regarded online ads as 'annoying and intrusive'.[119] This means that, overwhelmingly, most people would not consciously opt to watch advertisements and instead consider them an inconvenience.

Whereas traditionally that inconvenience can be ameliorated by the consumer's choice not to watch or engage with the advertisement, CATs now threaten to nullify that choice completely and lean upon the consumer's contractual agreement to do so. The case law tells us that exploitation of an imbalance in bargaining strength to exercise choice is relevant to evaluating the coercive nature of conduct.[120] As French J confirmed in *McCaskey*, the 'manner or circumstances of a … communication', including the language and tactics used to convey that communication, may go beyond the legitimate purposes of drawing the subject's attention to the information being communicated.[121] Consumers exposed to CATs have no realistic choice;[122] due to having agreed to terms in standard form and drafted to favour the businesses they deal with, they have unwillingly submitted to being exposed to advertisements which go beyond display and require engagement. The suggestion that the consumer can simply not utilise the relevant product or service embedded with CATs is unreasonable. If all businesses utilised CATs, consumers would be left with no choice at all, or at best a Hobson's choice. CATs are invasive, oppressive, and frankly unnerving. Remembering that especially unsavoury or unfair conduct is more likely to be seen as coercive,[123] there is a credible case for the idea that the use of CATs could be coercive and contrary to the consumer law.

It remains to consider a strong counterargument. Precedent holds that conduct meeting the threshold of coercion must be in the nature of 'something *significantly beyond* legitimate and reasonable

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[115] Ibid [21].
[116] *Select AFSL*, [363].
[117] Ibid [364]-[366].
[118] Mimi An, 'Why People Block Ads (and What It Means for Marketers and Advertisers), HubSpot Research (13 July 2016; updated 14 January 2020) <https://blog.hubspot.com/marketing/why-people-block-ads-and-what-it-means-for-marketers-and-advertisers?utm_campaign=SOI%202016&utm_source=Partner>.
[119] Ibid.
[120] *McCaskey* at 27-8 [51]; *ACM Group*, [276]; *Select AFSL*, [379].
[121] *McCaskey*, 27-8 [51].
[122] Coercion 'carries with it the connotation of force or compulsion or threats of force or *compulsion negating choice or freedom to act*': *Maritime Union* at 485 [61] (emphasis added). See also *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2006] FCA 1427, [74]; *Australian Securities and Investments Commission v Accounts Control Management Services Pty Ltd* [2012] FCA 1164, [16].
[123] *ACM Services*, [89]. See also *McCaskey* at 27-8 [51].

demands'.[124] As such, the impugned conduct committed by the alleged coercer against the innocent party must substantially transgress acceptable boundaries of commercial interaction. It is notable that consumers will invariably agree through contract to be subjected to CATs. This does suggest an air of legitimacy. However, just because a customer has agreed to a term, it does not mean that the term is enforceable, particularly where it is one of many terms packaged in standard form.[125] This fact is reflected in the existence of the Unfair Contract Terms provisions of the *ACL* and *ASIC Act*, which empower the courts to render unfair terms void.[126]

In *Hodges v Webb*, it was said that the mere fact the innocent party would have acted differently and taken a different course of action but for the defendant's conduct does not necessarily mean that the former was coerced.[127] There is no coercion if you merely have two alternative courses presented to you and you follow the one you consider conducive to your own interests.[128] This might suggest that there is no compulsion where a business utilises CATs to advertise to consumers, because the consumer can opt to avoid the frustration associated with being compelled to watch and engage with advertisements by avoiding the technologies in which those advertisements appear. Of course, this principle must be read in the context of the others discussed in this article. Where the consumer is effectively compelled to make a choice between courses – the less preferable being not being able to access the content they desire and the most preferable being having to submit to intrusive ads that mandate engagement – this would appear to go beyond persuasion and enter coercion territory.

Above all, we should remember that coercion includes negation of free choice (in circumstances that are unreasonable and unjustifiable) whether by threat of force *or otherwise*.[129] Despite the case law generally involving some measure of force or other untoward conduct, we must not arbitrarily exclude other forms of conduct that compel the innocent party through other means. It is compulsion which is the 'necessary ingredient' in any coercion claim.[130] A consumer subjected to CATs is *made* to physically respond to advertisements through such actions as eye focus and verbal response. They *must* watch the advertisement, which is a step further than merely agreeing to *be exposed* to it. Forced responses will likely be annoying, embarrassing, and even uncomfortable for many consumers. The consumer's feelings are entirely valid and form a critical aspect of the circumstantial matrix within which allegedly coercive conduct is examined. It is submitted that, in totality and on the basis of the foregoing analysis, the use of CATs can feasibly be seen as a form of coercion.

V PROPOSED AMENDMENT TO THE ACL

Whether or not one accepts this article's fundamental thesis that the use of CATs can be construed as a form of coercion contrary to *ACL* s 50, it can be agreed that defining the terms 'undue harassment' and 'coercion' in non-exhaustive terms within this provision would add much needed clarity as to the kinds of behaviour that may be captured. It would also spare the courts the task of blindly ascertaining the meaning of these terms and giving rise to the risk of inconsistency. An additional advantage is that it would eliminate any doubt whatsoever that the adjective 'undue' applies only to harassment and not to

[124] *Excite Mobile*, [209] (emphasis added).
[125] Standard form contracts are typically presented by businesses to consumers on a 'take it or leave it' basis: *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284.
[126] See *ACL* pt 2-3; *ASIC Act* pt 2.
[127] [1920] 2 Ch 70, 86.
[128] Ibid 87.
[129] *Maritime Union*, 485 [61]; *Australian Competition and Consumer Commission v Safety Compliance Pty Ltd* [2015] FCA 211, [147]; *Select AFSL*, [362].
[130] *Select AFSL*, [362].

coercion. A suggested definition for 'coercion', drawn from the preceding analysis, might read something as follows:

> ***"coercion"***, in relation to the actual or possible supply of goods or services (or the payment for the same); or the actual or possible sale or grant of an interest in land (or the payment for the same), means the unreasonable or unjustifiable compulsion (by force or otherwise) of one person by another and which negates the latter person's choice or freedom to act.

For consistency, a complementary definition could be inserted into the equivalent provision contained in s 12DJ of the *ASIC Act*. The proposed definition harmonises the various explications of coercion expressed by Australia's appellate courts and aligns with the fundamental purpose of the competition and consumer law framework, which is to enhance the welfare of Australians through the promotion of competition and fair trading, and consumer protection.[131] It clarifies that compulsion need not result from force, and through the use of the 'unreasonable or unjustifiable' adjective permits sufficient flexibility for the courts to consider the surrounding circumstances in evaluating allegedly coercive conduct. Conduct might be technically justifiable (e.g. stem from a contractual right to act in a particular manner towards the innocent party) but nonetheless be unreasonable, as in *Davis*. In other cases, there may be no defensible justification for the impugned party's conduct, which would support, but not necessarily confirm, the view that the conduct was also unreasonable.[132]

Irrespective of the new statutory provision's form, it is submitted that a definition for 'coercion' would resolve many of the difficulties currently experienced by the courts.

VI CONCLUSION

The idea of an advertisement that reads your facial profile, tracks your eye movements, or compels you to utter verbal remarks in order to terminate seems somewhat Orwellian. Such advertisements are, however, very real and are now poised to become a feature of the marketing ecosystem. Moreover, they are not currently prohibited by Australia's various advertising standards, which focus upon the substance and timing of the advertisement rather than the method for its delivery.[133] CATs, whether patented and ready for development (as with Sony Group's voice-response commercials) or imminently commencing operation (as with MoviePass' eye-tracking app), will raise a number of important legal and ethical questions, one of which is whether these technologies go too far with their advertising and infringe consumer rights. This article has contemplated and responded to this question, ultimately concluding that the law interpreting *ACL* s 50 seemingly supports an argument that the use of CATs would amount to 'coercion' under that provision. The fact that CATs force consumers to actively engage with advertisements and entirely remove their choice not to do so to access their desired content makes them an unreasonable and unjustifiable marketing tool. Despite the absence of force, the use of CATs is, conceptually, indistinguishable from physically turning one's head to face a specified direction or demanding a verbal or physical response to receive one's reward.

At a broader level, condoning CATs arguably threatens to obfuscate the boundary between acceptable and unacceptable marketing methods, but that is a separate debate this article intentionally

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[131] *CCA*, s 2.

[132] Following authorities such as *ACM Services* and *McCaskey*.

[133] See, eg, *Broadcasting Services Act 1992* (Cth); *Broadcasting Services (Australian Content in Advertising) Standard 2018* (Cth); Australian Communications and Media Authority, *Commercial Radio Code of Practice* (March 2017); *Commercial Television Industry Code of Practice* (2015); Australian Association of National Advertisers, *Code of Ethics* (February 2021); Australian Association of National Advertisers, Interactive Advertising Bureau and Media Federation of Australia, *Australian Digital Advertising Practices* (2020).

disregards in the interests of scope. Instead, this article highlights how using CATs can be viewed as coercive when scrutinised through a legal lens. It concludes, therefore, with a simple plea to the legislature and regulatory bodies to ensure that any such technologies significantly impacting consumer choice are carefully probed and regulated. While the former must ensure that our legal framework maintains pace with rapid technological developments, the latter must be vigilant in pursuing wrongdoers in appropriate cases through enforcement actions. And if you remain unconvinced that CATs present a problem, imagine if this article only revealed its text once satisfied that your gaze was entirely focussed upon it or once you had shouted a buzzword. That unsettling deprivation of your autonomy is precisely why we need to take this issue seriously.