THE UNIVERSITY OF
MELBOURNE

STRATEGIC PUBLIC INTEREST LITIGATION FOR TRANSPARENCY AND ACCOUNTABILITY OF HARMFUL DIGITAL MARKETING: A RESEARCHER-REGULATOR-COMMUNITY DIALOGUE

Co-hosted by:

ADM
+S

Melbourne Law School

Centre for AI and Digital Ethics

Health Law and Ethics Network

Funded by:

ACADEMY OF
THE SOCIAL SCIENCES
IN AUSTRALIA

ACKNOWLEDGEMENT OF COUNTRY

The University of Melbourne acknowledges the Traditional Owners of the unceded land on which we work, learn and live: the Wurundjeri Woi-wurrung and Bunurong peoples (Burnley, Fishermans Bend, Parkville, Southbank and Werribee campuses), the Yorta Yorta Nation (Dookie and Shepparton campuses), and the Dja Dja Wurrung people (Creswick campus).

The University also acknowledges and is grateful to the Traditional Owners, Elders and Knowledge Holders of all Indigenous nations and clans who have been instrumental in our reconciliation journey.

We recognise the unique place held by Aboriginal and Torres Strait Islander peoples as the original owners and custodians of the lands and waterways across the Australian continent, with histories of continuous connection dating back more than 60,000 years. We also acknowledge their enduring cultural practices of caring for Country.

We pay respect to Elders past, present and future, and acknowledge the importance of Indigenous knowledge in the Academy. As a community of researchers, teachers, professional staff and students we are privileged to work and learn every day with Indigenous colleagues and partners.

EVENT INFORMATION

LOCATION

WORKSHOP
Room 628, Level 6,
Melbourne Law School
185 Pelham street, Carlton
Map

Notes about the Venue:

The Melbourne Law School is located at 185 Pelham St, Carlton. It is not on the main part of the Parkville campus. It is on the South Side of University Square, closer to the city than the main campus and a couple of blocks north of Queen Victoria Markets. When you enter the building, please use the lifts to come up to the 6th floor and then walk right out of the lifts.

Connecting to Wi-Fi:

Username: assaworkshop   Password: 2pcA!1

Joining online:

Please note, not all session is available online. Please contact your panel chair if you need to attend online. Link for both days: https://unimelb.zoom.us/j/81673284540?pwd=bm5ZVW41ZkxXWnVrL244cFNIWnQ2dz09
Meeting ID: 816 7328 4540   Passcode: 991962

DINNER, 25 SEPTEMBER

The Woodward
Level 10
Melbourne Law School
185 Pelham street, Carlton
Map

TRAVEL

If you are travelling to the event, please consider your own safety and consider wearing an N95/P2 mask at airports and during airplane travel and in shared spaces such as lifts, vehicles, taxis, buses and other ground travel. You may wish to request in advance that windows be at least partly open on both sides of vehicles prior to arrival, the driver be in a mask, and vehicle air-conditioning set to fresh air intake.

If you are feeling unwell, please do not attend this event in-person – instead, stay home, seek medical advice and consider getting a COVID-19 test. COVID-19 symptoms are listed on the Victorian Government website.

KEY CONTACTS
Emergencies Ring 000

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EXPLANATION OF PURPOSE AND FORMAT OF WORKSHOP

Closed workshop - invitation only and conducted under Chatham House Rules.

Convenors:
Prof Christine Parker, Assoc Professor Paula O'Brien, Prof Jeannie Paterson (Melbourne Law School) and Prof Kim Weatherall (the University of Sydney Law School).
Logistic convenor:
Astari Kusumawardani (Melbourne Law School).

Online marketing strategies enabled by digital platforms can be used by harmful industries such as alcohol, unhealthy food, and gambling to manipulate consumers, misrepresent their products, and engage in predatory conduct targeting vulnerable groups in society: but these practices are difficult to investigate, and scholars, activists and regulators working on different kinds of industries rarely have a chance to discuss their common challenges. This workshop brings together key social science and socio legal researchers working on these issues across a range of harmful industries to reflect on the regulatory and policy implications of harmful digital marketing, and engage in dialogue with regulators, lawyers and community groups about the potential benefits, challenges, and pitfalls of strategic public interest litigation (whether class actions by consumers or enforcement action by regulators) to address these harms.

Public interest litigation 'is intended to achieve change to law and policy that will benefit individuals and communities beyond those directly involved in the campaign' (Durbach et al 2013). It can provide affected communities with opportunities to drive change through the courts and acknowledge wrongdoing in a public declaratory manner, as well as mobilising public support for law reform and social change.

The workshop will be organised with short presentations by academics researching harmful online marketing in order to prompt dialogue with regulators, community organisations and experts in public interest litigation. The workshop will investigate the role of litigation in pursuing public interest goals in a digital age and in responding to online harms. We will encourage participants to reflect on the purposes of public interest litigation in drawing attention to widespread or systematic harmful conduct, developing case law, allowing compensation, acting as general and specific deterrence, and driving legislative change. We will also reflect on the costs of such strategies as compared to other options such as lobbying for legislative change, new regulatory strategies or public awareness/education campaigns.

Participating lawyers and regulators will gain an understanding of the state of the evidence about harmful marketing (the forms of marketing, the technologies used, how these technologies work to drive consumption and harm, the consumption patterns and resulting harms) and the cutting-edge methodologies being developed for investigating digital marketing activities; social sciences researchers and community advocates will gain a better understanding of the legal and regulatory frameworks and requirements for litigation, and where there are evidentiary gaps that may be filled through further research activity.

After the workshop, the convenors will write up a report summarising themes and learnings from the workshop. However, the dialogue at the workshop will be subject to Chatham House Rules, meaning that reflections and experiences of individual participants will not be recorded and reported. Academic contributions will of course be appropriately referenced and acknowledged.

REFERENCE

Andrea Durbach, Luke McNamara, Simon Rice, & Mark Rix, 'Public Interest Litigation: Making the Case in Australia' (2013) 38 Alternative Law Journal 219–23. https://doi.org/10.1177/1037969X1303800404

FURTHER READING ON PUBLIC INTEREST LITIGATION AGAINST BIG TECH

Liam Harding, Jeannie Paterson & Elise Bant, 'ACCC v Big Tech: Round 10 and Counting', Pursuit (online, 24 March 2022). https://pursuit.unimelb.edu.au/articles/accc-vs-big-tech-round-10-and-counting.

Jeannie Marie Paterson, Shanton Chang, Marc Cheong, Chris Culnane, Suelette Dreyfus, and Dana McKay, 'The Hidden Harms of Targeted Advertising by Algorithms and Interventions from the Consumer Protection Toolkit' (2021) 9 *International Journal of Consumer Law and Practice* 1. SSRN: https://ssrn.com/abstract=3993496 or http://dx.doi.org/10.2139/ssrn.3993496

INSTRUCTIONS FOR PRESENTERS

If you would like to use slides for your presentation, please share them to OneDrive Harmful Digital Marketing Workshop - Presentations, or alternatively email them to christine.parker@unimelb.edu.au and your panel chair before the workshop.

You are also welcome to share a short previously published paper or report with conference attendees before which will be uploaded to a shared drive.

WORKSHOP PROGRAM

9:00am	**Coffee and refreshments available**	
9:30am	**Introductions; Framing the dialogue for this workshop: Why Public Interest Litigation?** The convenors will introduce the purpose of the workshop and the key questions to be addressed: Why litigate? Or more specifically, what are the goals of public interest litigation, and when, how and with whom can it be used to promote social change? How do regulators understand their role in public interest litigation, and what justifications do they require? How and when can class actions achieve public interest ends? What do we know from multi-disciplinary regulatory studies about the various social, cultural, political and economic impacts - both productive and counter-productive - of public interest litigation? What are the conceptual and evidentiary challenges in thinking about public interest litigation as a response to digital advertising, and digital advertising of harmful products? What are the lessons from reform efforts around comparable issues? We invite our presenters and participants to engage in a dialogue about the possibility for public interest litigation in making digital marketing transparent and accountable, and in prompting further regulatory and policy action.	Jeannie Paterson + Paula O'Brien, Christine Parker, Kim Weatherall
10:30am	**Tea break (approx. 30 minutes)**	

Harmful digital advertising and potential for public interest litigation: presentations and dialogue

The next 4 sessions (for the remainder of Day 1) will take the following form:
1. The presenters for each session are invited to do the following [total of 10 minutes per presenter]:
    a. Briefly introduce your empirical research on harmful online advertising ie topic and methods;
    b. Respond to the provocation for this workshop on the potential for academic research to contribute to public interest litigation by summarising: (a) what evidence of harms (ie, to rights or interests, to physical or mental wellbeing, or to property or financial circumstances) is your research providing? (b) what evidence of wrong-doing (civil, criminal or moral) is your research providing?
    c. How would opponents likely argue against your account of the harms and/or wrongs associated with online advertising? What do you see as the weaknesses in the evidence that research can provide?
2. The respondent will respond to the presentation reflecting on the potential for public interest litigation given the state of the evidence [5 minutes]
3. The panel chair will coordinate a dialogue with all participants in the workshop on the presentation: representatives of relevant community organisations/regulators/policy bodies will be invited to comment

DAY 1: MONDAY, 25 SEPTEMBER

11:00am	**Presentation 1: The Australian Ad Observatory + gambling advertising** (ADM+S, QUT, Monash): Introduction to Australian Ad Observatory (Dan); collecting ads from Facebook (Abdul) and focus on gambling advertising (Cesar and Robbie)	**Chair:** Kimberlee Weatherall **Presenters:** Dan Angus (QUT, ADM+S) Abdul Obeid (QUT, ADM+S) Cesar Albarran-Torres (Swinburne, ADM+S) & Robbie Fordyce (Monash, ADM+S) **Respondent:** Carol Bennett (Alliance for Gambling Reform)
12:15pm	**Lunch (approx. 60 minutes)**	
1:15pm	**Presentation 2: Young Australians and the promotion of alcohol on social media (ARC Linkage with FARE) and Australian Ad Observatory alcohol advertising** (UQ Digital Cultures and Societies, ADM+S)	**Chair:** Paula O'Brien **Presenters:** Nic Carah & Lauren Hayden (UQ, ADM+S) **Respondent:** Lucy Westerman (Australian Chronic Disease Prevention Alliance)
2:15pm	**Tea break (approx. 15 minutes)**	
2:30pm	**Presentation 3: Building an Artificial Intelligence System (SCANNER) for monitoring unhealthy (food, tobacco and alcohol) advertising to children** (Deakin Global Centre for Preventive Health and Nutrition)	**Chair:** Christine Parker **Presenter:** Navoda Liyanapathirana (also on behalf of Kathryn Backholer) (Deakin) **Respondents:** Tanita Northcott (Deakin, ADM+S), Jane Martin (Cancer Council Vic, Food for Health Alliance)
3:30pm	**Short break (approx. 30 minutes)**	

4:00pm	**Presentation 4: Alcohol exposure online: why it matters and how it can be monitored** (La Trobe Centre for Alcohol Policy Research)	**Chair:** Jeannie Paterson **Presenters:** Emmanuel Kuntsche (La Trobe) Ben Riordan (La Trobe) **Respondent:** Robin Room (La Trobe)
5:00pm	**Wrap Up for the Day**	
5:30pm	**Drinks and Dinner @the Woodward, Level 10, Melbourne Law School building** **5:30pm - drinks** **6:00pm - dinner**	

WORKSHOP PROGRAM

DAY 2: TUESDAY, 26 SEPTEMBER

9:30am	**How does public interest litigation work?** The purpose of this session is to identify how public interest litigation works in practice from a legal perspective. Henry Fraser and Zahra Stardust will present their research on public interest litigation for accountability of automated decision making; Lizzie O'Shea, class action lawyer, human rights activist, founder and CEO of Digital Rights Watch and will present on her experience running public interest litigation.	**Chair:** Kimberlee Weatherall **Presenters:** Henry Fraser (and also on behalf of Zahra Stardust) (QUT, ADM+S) Lizzie O'Shea (Maurice Blackburn, Digital Rights Watch, Alliance for Gambling Reform) **Respondent:** Genevieve Wilkinson (UTS)
10:30am	**Tea break (approx. 30 minutes)**	
11:00am	**Matters of evidence and the challenge of litigation** This session will focus on the practical and technical challenges of bringing public interest litigation - particularly against powerful companies. We will discuss challenges specific to litigation against Big Tech, as well as challenges common to much public interest litigation, such as attempts to undermine the evidence and the experts who provide it. The UWA Tech Policy Lab researchers will discuss some of the challenges in bringing actions against BigTech (Julia Powles) and the issues in interrogating the algorithm (Hannah Smith). Charles Livingstone will discuss the challenges to researchers' evidence in respect of gambling harms. Jonathan Liberman will discuss the experience of tobacco litigation.	**Chair:** Jeannie Paterson **Presenters:** Julia Powles and Hannah Smith (UWA) Charles Livingstone (Monash) Jonathan Liberman (MLS) **Respondent:** Dennis Nelthorpe
12:15pm	**Lunch (approx. 60 minutes)**	

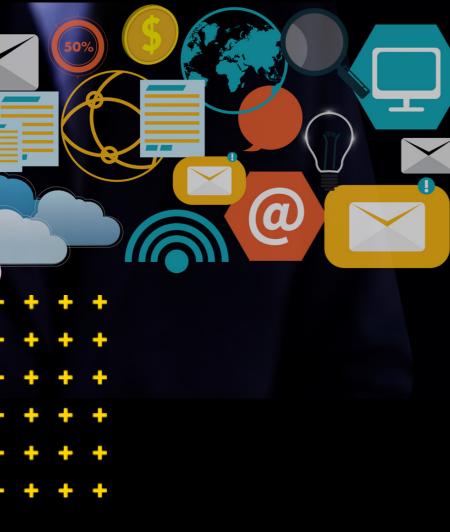|		
1:15pm	**Propelling the case forward** In this panel we will draw on our community organisation representatives to address: How do we gain sufficient critical attention to start public interest litigation? And once litigation is running or complete how can it be used to promote change? This panel will involve a presentation from CHOICE as to the lessons they have learned around making the case for law reform and policy action in relation to digital technology and digital marketing, followed by a structured conversation chaired by Paula O'Brien working with EMCR, Dan Anderson-Luxford with the community organisations present at the workshop about their insights about how to support and maximise the impacts of litigation and avoid the pitfalls.	**Chair:** Paula O'Brien (with Dan Anderson-Luxford) **Presentation** by Kate Bower (CHOICE) **Responses** by panel of community organisation representatives: [5 mins each] - Chandni Gupta (Consumer Policy Research Centre), - Carol Bennett (Alliance for Gambling Reform), - Jane Martin (Cancer Council Victoria, Food for Health Alliance).
2:45pm	**Tea break (approx. 15 minutes)**	
3:00pm	**Wrap Up: Establishing a case** What would it take to establish a case legally to run public interest litigation? In this session we will reflect on and summarise our discussions over the workshop by imagining a series of 'perfect cases' given what we have learned about what the implications might be for online industries, for consumers, for regulators, for researchers, society and culture. This process of ideating 'perfect cases' will also serve to highlight gaps in existing social science research, as well as the types of law reform that might be needed to address harmful industry marketing.	**Chair:** Christine Parker **Discussion:** Everyone - with prompts from Christine Parker, Kim Weatherall, Paula O'Brien, Jeannie Paterson
4:00pm	**Close**	

CONFIRMED PARTICIPANTS

Dr Cesar Albaran-Torres	Swinburne University, ARC Centre of Excellence for Automated Decision Making and Society (ADM+S)
Daniel Anderson-Luxford (PhD Candidate)	La Trobe University, Centre for Alcohol Policy Research
Prof Daniel Angus	QUT, Digital Media Research Centre & ADM+S
Carol Bennett	CEO, Alliance for Gambling Reform
Dr Kate Bower	Choice, Consumer Data Advocate
A/Prof Nicholas Carah	UQ, Digital Cultures and Societies, ADM+S
Jeremy Fenton	Acting General Manager, Consumer Division, Australian Communications and Media Authority
Dr Robbie Fordyce	Monash University, ADM+S
Dr Henry Fraser	QUT, Law, ADM+S
Dr Jake Goldenfein	Melbourne Law School, ADM+S
Chandni Gupta	Deputy CEO, Consumer Policy Research Centre
Lauren Hayden (PhD candidate)	UQ, Digital Culture and Societies, ADM+S
Holly Jones	Melbourne Law School and Centre for AI and Digital Ethics (CAIDE), University of Melbourne
Whitny Kapa	Legal Policy Advisor, McCabe Centre for Law & Cancer
Prof Emmanuel Kuntsche	La Trobe University, Centre for Alcohol Policy Research
Ms Astari Kusumawardani	Research Centre Administrator, ADM+S, University of Melbourne
Dr Kelly Lewis	Monash University, ADM+S
A/Prof Jonathan Liberman	Melbourne Law School, Law and Global Health
A/Prof Charles Livingstone	Monash University, Public Health and Preventive Medicine
Dr Navoda Liyanapathirana	Deakin University, Deakin Global Centre for Preventive Health and Nutrition
Jane Martin	Cancer Council Victoria, Executive Manager of Food for Health Alliance (FHA), and Alcohol and Obesity Programs
Bonnie Matheson	VicHealth, Manager, Commercial Determinants of Health
Dr Fabio Mattioli	University of Melbourne, Social and Political Sciences
Dennis Nelthorpe	Consumer law and not for profit consultant; formerly West Justice
Tanita Northcott (PhD candidate)	Deakin University and Melbourne Law School, ADM+S
Dr Abdul Obeid	QUT, Digital Media Research Centre & ADM+S
A/Prof Paula O'Brien	Melbourne Law School, Health Ethics and Law Network
Lizzie O'Shea	Maurice Blackburn, Digital Rights Watch, Alliance for Gambling Reform
Prof Christine Parker	Melbourne Law School, ADM+S

CONFIRMED PARTICIPANTS

Prof Jeannie Paterson	Melbourne Law School and Centre for AI and Digital Ethics (CAIDE), University of Melbourne
A/Prof Julia Powles	UWA Law, UWA Tech and Policy Lab
Dr Ben Riordan	La Trobe University, Centre for Alcohol Policy Research
Prof Robin Room	La Trobe University, Centre for Alcohol Policy Research
Carly Rooney-Ewen	Lead, Commercial Determinants of Health, VicHealth
Dr Hannah Smith	UWA Law, UWA Tech and Policy Lab
Prof Kim Weatherall	University of Sydney, Law, ADM+S
Lucy Westerman	Executive Officer, Australian Chronic Disease Prevention Alliance (ACDPA)
Dr Genevieve Wilkinson	UTS, Law

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