Outline

• Call tipping point for underlying systemic developments:
• “Surveillance capitalism” – new infrastructure
• Effect on individual rights
• Effect on States’ abilities to regulate
• Individual jurisdictional responses and effect
• Solutions ought to look to historical precedents
Tipping point?

- Christchurch March 15 and livestreaming
- Sri Lanka April 21 – fake news and platform exclusion
  - Image credits: stuff.co.nz & The New York Times
Surveillance Capitalism

• Shoshana Zuboff *The Age of Surveillance Capitalism* 2019

• New information architecture enables:
  • Appropriation of behavioural surplus
  • Behaviour modification

• Internet Corporations platforms allow:
  • Unprecedented global social interaction at scale
  • Uncontrolled data flows
Attributes

- Permanence of data
- Geostationary earth satellites
- Smart devices
- Data at scale e.g. Google, FB
- IoT / RFID / wearables
- People / Places / Things
Examples

• apps, personalised advertising, messaging and newsfeeds

• Example:
  • “One Year Into GDPR, Most Apps Still Harvest Data Without Permission”
  • https://adexchanger.com/privacy/one-year-into-gdpr-most-apps-still-harvest-data-without-permission/?mkt_tok=eyJpIjoiT1dJM1pHVm1Zall5TkdVeiIsInQiOiJ1dVR2cDiSaStFSzBtd3VTQkZVQTZyd3A1K3EwdUs3dUIUZ2U3bmh0RmJxdkZZaXpLODVTZkiiMDVoQ0tncU51OGtCUzBO T0tSTGxjcTIZT2tIYVVwcTRZdIAzR2tuK1Z6dG96OHZhcnZ3WTdXOE9jTW1WRG5vV2tEcDg4eUw3TCJ9
What is personal data?

- Metadata more important than content
- Connections, duration, patterns, likes etc
- These allow **derived data**, “shadow self”
- Individual scores, rating increasingly common
Regulatory implications?

- Existing categories outflanked
- E.g. anti-trust/competition, advertising, electoral laws
- E.g. manipulating newsfeeds concerning fake news about rival business?
- Identified violations of existing laws tip of iceberg
- What forms of behaviour modification are legitimate?
  - Facebook and bogus medical cures group newsfeeds
  - Social engineering but where will this end?
More implications

- Techniques for valuing data especially personal data outdated?
- Privacy: focus on identification too narrow
  - Has enabled commercial exploitation
  - What forms of exploitation are unconscionable?
  - Information asymmetry enables rent-seeking behaviour
- Internet platforms provide key infrastructure & services
  - E.g. Google analytics, Facebook Groups & advertising, WhatsApp...
- Acting as State actors
  - E.g. Facebook’s’ Libra currency unlike other crypto-currencies
  - E.g. Facebook’s “independent” appeal panel
Past regulatory responses

- LICRA v Yahoo (2000)
- Google Spain v AEPD and Gonzales (2014)
- Issues remain same or do they?
- Goldsmith and Wu *Who Controls the Internet* (2006)
  - Suggest gatekeeper role for platforms
  - BUT has this led to gatekeepers becoming rulers?
Germany’s “Facebook” law

• Network Enforcement Act 2018
• 24-hour timeline for removal of unlawful content
  • Standards contained in Criminal Code – hate speech, defamation
• Fines up to 50 m euros
• Definition of social network provider:
  • Platforms enabling users to share with others/public
• Exceptions:
  • Journalistic/editorial content
  • Individual communication/dissemination e.g. LinkedIn, customer review pages etc; rating websites unclear
• Major issue: few reported complaints suggesting self-censorship
Problems with responses

- *Ex post* rather than *ex ante* intervention
- Leaves platforms as judge, jury and enforcer (mostly)
- Not just content that is harmful:
- Leaves controls of structures, linkages & directional flows to companies
  - E.g. who sees newsfeeds
  - Ranking of search results
  - Tailoring services and advertising to companies and individuals
  - Whose interests are promoted?
Recent study


• Critically investigates Instagram’s “black box” decision-making
  • Finds arbitrary removal of images of women’s bodies
  • Bias in decision-making privileging certain body types
  • Inconsistent moderation (up to 22% false positives violating own policies)
  • Examined like images: underweight, mid-range & overweight
  • Instagram's’ “complete discretion”, lack of review & lack of transparency inconsistent with legality
  • Argues for empirical, digital legal analysis of outcomes
Corporate responses

• Zuckerberg Op-ed
https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html?utm_term=.6a2c764094f9
  • Independent appeal body
  • Embedding officials (France) within company incl. travel
  • Data Transfer Project – data portability? Collaboration with Google, Microsoft etc
• First and third problematic – Facebook setting standards
• Corporate involvement unavoidable e.g. data portability?
Australian Consumer Right

- Treasury Laws Amendment (Consumer Data Right) 2018 Bill
- Covers competition & consumer issues (ACCC & OAIC regulators)
  - Envisages whole new data ecosystems, mutual rights & obligations underpinned by statute
  - New data driven services
  - Derived data included
- Data standards body
- CDR rights extend to legal persons
  - Only requirement identifiable & in course of supply of goods/services to them
- Banking, energy & telecom sectors
- Access to individuals & accredited TPs of transactions etc
Historical echoes?
Solutions?

• Reversal of private control of standards & adjudication
• E.g. social media platform’s internal adjudication
• Amenable to review by public authorities
• Public process to decide standards themselves
• Historical precedents – Government of India Act 1858