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CENTRE FOR MEDIA TRANSITION

Digital Platforms Inquiry – Preliminary Report

Submission to
Australian Competition and Consumer Commission

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About the Centre for Media Transition

The Centre for Media Transition is an interdisciplinary research centre established jointly by the Faculty of Law and the Faculty of Arts and Social Sciences at the University of Technology Sydney.

We investigate key areas of media evolution and transition, including: journalism and industry best practice; new business models; and regulatory adaptation. We work with industry, public and private institutions to explore the ongoing movements and pressures wrought by disruption. Emphasising the impact and promise of new technologies, we aim to understand how digital transition can be harnessed to develop local media and to enhance the role of journalism in democratic, civil society.

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Introduction

Thank you for the opportunity to contribute to this review.

In making this submission, the Centre for Media Transition wishes to acknowledge the considerable amount of work done by the ACCC in the preparation of its preliminary report and the clear-eyed and forthright qualities of its analysis. As has been noted in other jurisdictions, most recently the Cairncross Review in the UK, the ACCC's work has touched directly on concerns felt across the world about the role of digital platforms and the sustainable future of journalism.

Without wishing to prejudge the end result of this review or parallel events in, say, the UK, there is a clear desire on behalf of government and their regulators for better understanding the impact of Facebook, Google and other digital platforms on the news ecosystem and the delivery of information. On the flipside, there is now a widespread articulation of the public good of journalism in multiple forums, including at government level.

Both these trends are overdue and to be welcomed.

Before we concentrate on key recommendations and offer suggestions on proposed areas for further work, the CMT also wishes it to be noted that the news media industry will continue to face digital disruption and the need to shape and reshape its business model irrespective of what regulations or restrictions are imposed on digital platforms.

The migration of advertising revenues from traditional media was in full swing long before the full realisation of Facebook and Google (assuming we may have seen the full flowering of either). While this fact may appear immaterial to the impact the platforms are now having on revenues and competition, we mention it to serve as a reminder that the news media industry will be required to keep innovating, keep finding new avenues to fund its operation and keep discovering closer ways to form lasting relations with its audiences. Many of these areas are covered in the preliminary report's proposed areas for further analysis. We would like to address several of those areas here.

We address the Commission's findings and preliminary recommendations under three themes:

1. Promoting news and journalism
2. Regulatory imbalance
3. Data privacy

In this submission we draw in part on our research report for the ACCC, prepared as an input to this Inquiry, *The Impact of Digital Platforms on News and Journalistic Content* (CMT 2018a).

1. Promoting news and journalism

This section of the submission addresses the following recommendations and areas for further work:

- Preliminary recommendation 4: advertising and related business oversight;
  Preliminary recommendation 5: news and digital platform regulatory oversight; and
  Area for further work 4: digital platform ombudsman
- Area for further work 1: supporting choice and quality of news and journalism
- Area for further work 2: improving news literacy online
- Area for further work 3: improving the ability of news and media businesses to fund the production of news and journalism

Preliminary recommendation 4: advertising and related business oversight; Preliminary recommendation 5: news and digital platform regulatory oversight; Area for further work 4: digital platform ombudsman

The CMT supports these proposals in principle.

On **Preliminary recommendation 4**, we appreciate the continuing importance of advertising revenue to news media. We note the difficulties faced by advertisers and news media in understanding the impact and value of digital advertising arranged by platforms and we acknowledge the risk of digital platforms favouring their own businesses. We acknowledge that the ACCC's proposal for regulatory oversight without any direct regulation of these activities is a pragmatic response to these problems. On the question of which regulator should perform this function, see our comments on news oversight below.

On **Preliminary recommendation 5**, we agree with, and do not need to repeat here, the ACCC's findings about the role of platforms in the algorithmic delivery of news to consumers; the comments about the public benefit of news and journalism; and the comments on how risks as to their continued viability support the case for some regulatory oversight.

In our report for the ACCC we noted the desirability of *explanations*, without necessarily exposing platforms to requirements for algorithmic 'transparency'. We noted the practical difficulties involved in ensuring transparency of constantly changing algorithms (CMT 2018a, 62). The objectives of any reporting and oversight requirement might be to understand how certain elements work together to produce (for example) different search results. This is not so much what the algorithms are, as how they produce certain results that might, or might not, be in the public interest. As Doshi-Velez et al (2017) put it, 'explanation' refers to *how* and *whether* certain input factors affect final decisions, outcomes, or recommendations. We note that the *New York Times* has provided an explanation for its hybrid recommender system, which uses a combination of different algorithmic techniques (see CMT 2018a, 53-55).

Accordingly, we support the proposal for regulatory oversight on the ranking and referral of news content. We accept the ACCC's point that this function could be performed by the same new regulator which would also (under Preliminary recommendation 4) oversee ranking and display of advertising. We do note, however, that there would be advantages in the ACCC having insight into the advertising aspects and the ACMA having insight into the news aspects – provided they are adequately tasked and resourced for this work. And should further regulation become necessary, these two regulators may be better placed to exercise enforcement powers.

On the **proposal for a digital platform ombudsman** who would deal with actual disputes between publishers and platforms on these ranking and referral issues, we agree that assistance in securing timely outcomes is, in principle, a worthwhile initiative, and we are keen to hear the responses of both publishers and platforms of the practical operation of such a scheme.

Area for further work 1: supporting choice and quality of news and journalism

The ACCC's suggestions for further work in this area (pages 296-98 of the Preliminary Report) point to reforms in the way digital platforms signal quality. We note that the platforms are taking steps to improve these areas in various ways. Facebook, for instance, wishes to fund fact-checkers in the coming Federal election to help reduce the amount of 'fake news' on its platform; Google, mainly via its Google News Initiative, is supporting research efforts into improving trust in news media. We would point the Commission to the work of the US-based Trust Project (https://thetrustproject.org) and its Trust Tick, a digital signifier that certain journalistic standards have been met in the preparation and publishing of an article. We note that some publishers in Australia are considering implementing the tick. In a similar vein, the International Fact-Checking Network sets out a set of standards for any news media operator wishing to be part of its network (https://ifcncodeofprinciples.poynter.org).

We note that all these initiatives are voluntary. In contrast, the ACCC's proposal for a 'platforms code' would depend on voluntary participation by publishers and mandatory participation by platforms. (Our summary of how this arrangement would work, which does include some assumptions, is set out in the box below.) There are, however, consequences of not participating and these are different for platforms and publishers. For platforms, non-participation at the outset is likely to take the form of failure to submit a code of practice to the ACMA; this in turn is likely to lead to a mandatory, ACMA designed industry standard. In any event, once registered (presumably under a new part of the *Broadcasting Services Act 1992* that resembles Part 9, rather than under an amended Part 6 of the *Telecommunications Act 1997*), the code would be applicable to all services providers in the 'digital platform' category and would be enforceable by the ACMA.

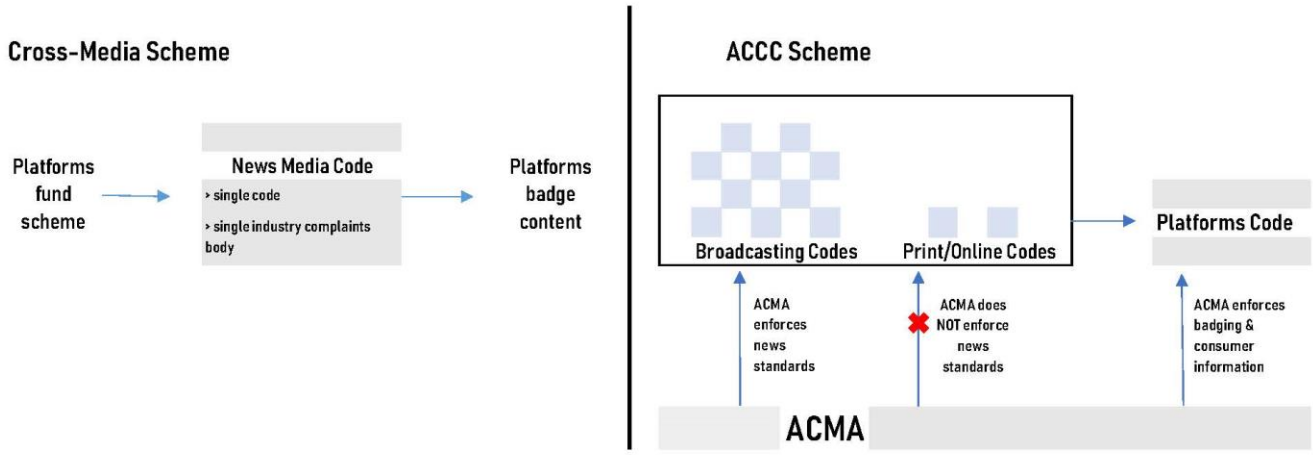
For publishers, there is no obligation to belong to a scheme registered with the ACMA, but failure to do so means their content would not necessarily receive the badge of authority added by platforms. (There would presumably be some code provision stopping platforms from adding the badge to other content, however worthy, otherwise membership of one of these schemes would lose its advantage.)

The ACCC's Platform Code Proposal

1. Platforms would sign up to a code that, in effect, promotes news content produced under the journalistic standards schemes used by news media.
2. The code could be developed on behalf of digital platforms by an industry group such as Digi. It would be registered with and enforced by the ACMA (presumably under new provisions in the Broadcasting Services Act).
3. Under the platforms code, digital platforms would be required to: badge content that is produced by news media under a journalistic standards scheme; inform consumers about this activity; inform consumers about the ways in which platforms curate and present news to them.
4. In contrast, the journalistic standards schemes applying to news media would require: content rules concerning accuracy, fairness, transparency etc; a complaints handling scheme; a mechanism to ensure continued compliance; a means of de-registration for non-compliant entities; reporting to ACMA on complaint statistics and outcomes.
5. The journalistic standards schemes developed by news media might include the existing broadcasting codes and print/online schemes.

These arrangements would, for the first time, see the print and online standards scheme administered by the Australian Press Council have a statutory element. We do not agree with the observation that this would represent a 'return to 2013' in the sense that it is said to reflect elements of the scheme proposed in the News Media (Self-regulation) Bill 2013. The ACCC's proposal appears to be one for recognition, not regulation, of publishers by the ACMA. It is designed principally to impose a regulatory obligation on platforms, not publishers, and would confer a benefit on those who participate. That benefit would be provided by platforms, not by government, designed to correct an imbalance that has arisen over the past decade. There is an obligation placed upon publishers to report to the ACMA on statistics and outcomes, but none of these aspects threatens the independence of print and online media from government.

The one aspect in which there would potentially be greater government involvement is in the 'mechanisms … to ensure … continued compliance, and a means of de-registration for non-compliant entities' (see page 297). We think this element is out of place in the scheme proposed, being suited to a more comprehensive regulatory model. This is one reason why we suggest the ACCC's model could be adapted. We would prefer that both publishers and digital platforms see the value in implementing their own scheme for the promotion of news created by professional journalists, rather than having it imposed upon them. In the figure below we attempt to represent the ACCC proposal alongside our preferred 'cross-media model'.



We prefer the cross-media model for these reasons:

1. It recognises that the current fragmentary system of codes and principles is serving no one. In our report for the ACCC (CMT 2018a, 88), we noted fourteen sets of standards about aspects such as 'accuracy'. A common code could still have opt-in elements for those who seek to (or are required to) provide an additional level of accountability, but it would establish base-line standards that would help provide confidence in reliable newsgathering.
2. It recognises the reality of how businesses are now structured, across platforms. The removal of Australia's cross-media rules may well have been a necessary reform in the face of global competition; their replacement with content rules that apply the same rule about accuracy wherever the content appears is a logical and necessary next step.
3. It provides a single destination for consumer complaints.
4. It recognises that platforms are now firmly established in the news ecosystem, and also that they have some responsibility for the way in which news and journalism, as public goods, are treated. To ignore their new position would be the equivalent of suggesting Uber has not dramatically affected how consumers pay for transport. However, it does not treat platforms as publishers; it simply recognises the revenue shift from publishers to platforms and uses funding of an expanded standards and complaints scheme as the mechanism for industry support.
5. It does not involve a statutory element; in fact, it could involve the removal of broadcasters from the current ACMA-administered system under Part 9 of the Broadcasting Services Act, with enforcement based on the APC model of mediated outcomes and prominent publication of adjudications – rather than ineffective licence conditions, enforceable undertakings and promises to do better.

Some other points are worth noting:

- There are other options for addressing these issues, some of which (for example, the use of trust indicators) may well be compatible with a cross-media code. A more comprehensive regulatory model could involve the establishment of an ombudsman (with elements similar to the Telecommunications Industry Ombudsman).
- In adopting a cross-media model, it would be important not to accept the least rigorous journalistic standards found in current codes and standards. In our view, the principles developed by the Australian Press Council are superior to those in most of the broadcasting codes of practice which have been amended over many years of operation in the period following the introduction of the Broadcasting Services Act in 1992. While this is not the place to provide an analysis of these codes, there are many provisions that we would consider inadequate. One example is the failure of the Commercial Television code

to cover the newsgathering practices of the *60 Minutes* team involved in the Sally Faulkner Beirut story.

In conclusion, we recognise there are some risks in removing the current broadcasting codes from the ACMA domain and moving the obligations to an industry-funded and administered scheme, but we think they are outweighed by the benefits in establishing a single set of news reporting standards, a single destination for consumer complaints, and a system where outcomes are based on publicising both lapses in journalistic standards and those cases where careful consideration comes down on the side of the public interest in fair, accurate and open reporting.

Area for further work 2: improving news literacy online

We fully support moves to better educate Australians about news literacy and how journalism is curated and displayed on social media and other digital platforms. To this we would add, briefly, two thoughts.

i. Of utmost concern in this area is the generation of digital natives who have little or no memory of traditional news and how it was delivered and differentiated. Any media literacy campaign would need to be mindful of precisely how younger Australians receive and think about news. The ACCC report and the Cairncross Review both indicate that digital platforms exploit the desire/need to 'snack' across content types via mobile phone delivery and that many younger consumers make little distinction between news and other content. It is all content. We would very much urge any campaign to be informed by the professions of child psychology and information design as well as educationalists, policy makers and creatives.

ii. A key word in this debate is trust. Our own work on trust (CMT 2018b) in news media indicates that Australian news consumers are increasingly discerning about news content and information gathering. For instance, in our work, when asked where they go to check out certain rumours, their first instinct was to a direct source (a council website or the Bureau of Meteorology) rather than a news media intermediary. Understanding how and what consumers trust — and how they use the digital environment to be informed — goes to the heart of any attempt to boost media literacy. If consumers know where to find evidence-based information, might we also assume that they know what they are reading is of lower quality but that is easy to receive it and enjoyable to experience. Our point is that, to boost news/media literacy we should not characterise accessing good quality journalism as the mental equivalent of eating your greens.

Area for further work 3: improving the ability of news and media businesses to fund the production of news and journalism

Of particular concern is the immediate future of the regional and local news services, especially those owned by smaller and/or independent operators. The CMT supports the move to review the impact of the recent Regional and Small Publishers' Jobs and Innovation Package (RSPJIP) and would suggest any assessment should consider the following:

1. The eligibility criteria for the fund. Are there legitimate news media start-ups or independent operators currently and unfairly excluded?
2. The capacity of small and regional publishers to understand what is innovation and enact it.
3. The capacity of small and regional publishers to understand how to meet the criteria of the fund, especially given most are very busy trying to make ends meet.
4. The restrictions placed in the current fund on using the money to actually pay journalists or editors. Labour and skill shortages in regional areas often mean there is insufficient capacity to expand in areas such as IT.

5. Consider ways to assist publishers, editors and news media operators to better understand what their audiences most require from them. There is often a gap in what publishers think they need and what their audiences actually want.

In addition to the changes to the innovation package, the CMT would urge the ACCC to consider a more far-reaching idea: to recommend that **the ABC** make available its expertise to assist independent regional publishers (as defined by enabling legislation of the RSPIJ) — and potentially work in journalistic collaboration with such publishers to ensure the sustainability of the regional news ecosystem. If we as a society accept there is a public good in ensuring the diversity of news providers, then the case can be made that the taxpayers funds that support the ABC should also provide some benefit to other local providers. The ABC, as noted by the Cairncross Review in the UK of the BBC, has acquired considerable know-how and talent. It is not unreasonable to suggest it shares that expertise, though we appreciate exactly how this sharing would take place would require more work and goodwill on all sides.

The CMT notes the ACCC's preliminary report floated two areas of direct government assistance to the news media industry, namely: **the introduction of tax offsets** for journalism considered high public benefit journalism or in danger of underproduction; and **making personal subscriptions tax deductible,** providing the news media business meets certain ACMA-established criteria.

We note there has been some media commentary about the potential of this latter idea to impose government standards and obligations on the news media industry. For the reasons outlined above, we are less concerned by this, but if a self-regulatory model for platform promotion of journalism is adopted, it may be that qualifying criteria for tax concessions would need to be outlined in tax law, rather than media regulation.

In any event, we do see the need to fully understand the implications and financial cost of tax concessions before they are enacted. There does, for instance, need to be a far greater understanding of what Australian news consumers would be prepared to pay for and what they actually want in terms of content and delivery. Despite the loss of jobs in journalism and obvious and painful adjustments for the industry, it is not always true that what ails the industry can simply be fixed by producing more journalism per se. Rather, to our mind, journalism's future will be better serviced by understanding the demand side for journalism as well as, if not more so, than the supply. Doing so might give rise to new news media companies and approaches to journalism that would enhance diversity and plurality and better serve audiences. Furthermore, and with the need to better understand demand, we would urge any move to making subscriptions tax deductible be front ended by a comprehensive study into the information needs of Australians and modelling of the cost of tax deductibility and back ended by a sunset clause ending the subsidy at some fixed time, say, after ten years. The answer to sustainability is not, in our opinion, open-ended subsidy; the answer is supporting the industry where it is unable to support itself — and making the playing field level — and for the industry to create products that audiences need. We understand the news media industry will continue to exist within a mixture of business models, from not-for-profit and taxpayer funded to full-profit, but do not accept that despite its high cost, public interest journalism can only exist within a framework of ongoing handouts. That said, and being mindful of the ACCC's view that any such scheme might be open to fraud, we do support further exploration of introducing a more generous form of tax offset to support public good journalism and boost areas of under production. Clearly considerably more work will need to be done in the design of any such scheme. As indicated, we would urge that any moves in this area be subject to regular review; the news media landscape has changed rapidly over the past ten years and there is no reason to expect that the pace of change will be any slower in the next decade — if anything, it is likely to quicken.

2. Regulatory imbalance

This section of the submission addresses the following recommendation:

- Preliminary recommendation 6: review of media regulatory frameworks

Preliminary recommendation 6: review of media regulatory frameworks

We acknowledge the important work of the ACCC in documenting the sources of industry-specific law and regulation applying to platforms and to media and communications providers in Australia.

We agree with the proposition that the regulatory arrangements are out-dated. This has been recognised on numerous occasions, including in the ACMA's work on 'broken concepts' (ACMA 2011); in the report of the Convergence Review (DBCDE 2012); and in the Department's review of the ACMA (DOCA 2016). Most recently, the Chair of the ACMA reflected on the desirability of a converged Communications Act to address the problem that much current legislation is irrelevant and new areas have opened up (see Day 2018).

An example of the disjointed approach to communications regulation is even found in the ACCC's own analysis: requiring platforms to implement more effective take-down procedures for copyright-infringing material (as proposed in Preliminary recommendation 7) would involve new regulation under the Telecommunications Act, whereas requiring platforms to label news content produced under existing standards schemes (as envisaged in Area for further work 1) could involve new regulation under the Broadcasting Services Act.

Accordingly, we support the recent observations of the Chair of the ACMA on the need for change. We think that any regulatory review (which we agree is needed) should be conducted in an environment designed to do just that: the development of a converged Communications Act. This would include statutory recognition of digital platforms.

In terms of the 'imbalance', while we would like to see a Communications Act include recognition of digital platforms, we do not think that 'balance' is to be achieved by imposing matching obligations on media companies and platforms. In a parallel policy debate, government is considering how to achieve public policy objectives around Australian content and children's content. As that debate has shown, the result is unlikely to be wholesale application of existing rules on newer entrants, but it also does not mean the current, lopsided obligations should continue.

In an area such as defamation law, we think there is a need to scale back the cause of action, or at least improve the public interest defences. Reform will not involve subjecting platforms to publisher liabilities. Similarly, a more contemporary understanding of media diversity would not seek to apply ownership limits to platforms, but would recognise the ways in which consumers obtain and consume news and journalism. It would look at sources of news and comment but would also consider the ways in which recommender systems might limit or promote the exposure of consumers to different content. It would not simply attribute 'points' to commercial radio licences, commercial television licences and newspapers associated to their licence areas. We explored this in Chapter 4 of our report to the ACCC.

In that report, we suggest the new, 'hybrid' role of digital platforms means they have new responsibilities and that one of those is an obligation not to harm the public benefit involved in the production of news and journalism (CMT 2018a, 150). Once digital platforms are recognised in a Communications Act as a kind of service provider, they can be held to a general obligation (not necessarily limited to them) not to harm news and journalism – just as they could, in principle, be required to provide a regulator with sufficient information on the operation of their algorithms (see above). This would be a reasonable regulatory response that would not seek to equate platforms with content creators, but would see them as participants in an industry regulated so as to protect public and consumer interest.

3. Data privacy

This section of the submission addresses the following recommendations and areas for further work:

- Preliminary recommendation 8: use and collection of personal information
- Preliminary recommendation 9: OAIC Code of Practice for digital platforms
- Preliminary recommendation 11: unfair contract terms
- Area for further work 9: prohibition against unfair practices.

These matters are addressed below, following some preliminary comments.

Privacy *is* linked to competition

We wish to make some preliminary remarks to respond to comments that the ACCC's role in competition and consumer law should not extend to data privacy.

Whether arguments in support of privacy are based on the value of personal autonomy, on the importance of human relationships, or on the practices that mark out democracy from totalitarianism, privacy matters, and the digital platform environment creates new ways in which consumer privacy can be compromised. For instance, what happens when Google combines data obtained via Google Search with data obtained on Gmail, and then with data obtained on YouTube? And what happens when Facebook obtains data about people who don't use Facebook? Extensive research has shown that digital platforms are able to build detailed profiles of non-users (Garcia 2017; Sarigol, Garcia & Schweitzer 2014). Further, platforms have admitted to collecting data on non-users (Baig 2018; Marshall 2016). Meanwhile, in the background, a number of data broking companies such as Quantium, Experian and Acxiom generate significant revenues by trading in personal data (Molitorisz 2018).

The ACCC's preliminary report shows how these issues of digital privacy can be closely related to a participant's market power, with both Google and Facebook having 'substantial market power' (ACCC 2018, p. 4). We submit that the dominance of digital platforms is, in many cases, only achievable due to the amount of data they collect. The business model of digital platforms is often predicated on the gathering of personal data. It is this personal data that enables digital platforms to attract advertisers, which generate the bulk of their revenue: in 2017, Google's parent company Alphabet earned US$32 billion from advertising, accounting for 84 per cent of its revenue (Shaban 2018); meanwhile, Facebook generates 98 per cent of its global revenue from advertising (Statista 2019).

Digital platforms do not exclusively control data. However, significant barriers to entry can be established in specific market sectors through data collection efforts. For example, consumers can use Bing or DuckDuckGo instead of Google search. However, these alternatives arguably provide a lesser service because they do not have access to the same amount of data as Google, data which can then inform service provision, pricing and customer experience. Google's data is not just obtained through Google search, but also through Gmail, Google Maps, Google Street View, and every other Google service. In short, the more data Google has and the bigger it gets, the less likely it is that a competitor can become viable. This has been described as the network effect (ACCC 2018, pp. 24-7, 35-65), which recent scholars have sought to disentangle into various specific "network effects" (Barwise & Watkins 2018, pp. 26-8).

This lack of competition can affect consumer privacy by creating an inequality of bargaining power between platforms and users, which in turn renders consent to the use of data deeply problematic. In a case reported on February 7, Germany's Federal Cartel Office (FCO, or Bundeskartellamt) found that market dominance significantly affected the question of consent. The office found that Facebook could no longer merge a person's data from their Instagram, Facebook and WhatsApp accounts, without their explicit consent. As antitrust expert Lina Khan said in response to the decision: 'The FCO's theory is that Facebook's dominance is what allows it to impose on users contractual terms that require them to allow Facebook to track them all over. When there is a lack

of competition, users accepting terms of service are often not truly consenting. The consent is a fiction' (Dreyfuss 2019).

We encourage the ACCC to continue to engage with data privacy concerns in its inquiry and to continue to recognise the links between data privacy and competition.

Preliminary recommendation 8: use and collection of personal information
Preliminary recommendation 9: OAIC Code of Practice for digital platforms
Preliminary recommendation 11: unfair contract terms
Area for further work 9: prohibition against unfair practices.

We agree with the ACCC's finding that 'the current regulatory framework, including privacy laws, does not effectively deter certain data practices that exploit the information asymmetries and the bargaining power imbalances that exist between digital platforms and consumers.' Further, we contend that the privacy of Australians is inadequately protected by law. Privacy in Australia is protected by a 'patchwork of specific legislation' (Greenleaf 2010, 148) and is disjointed and confusing as a result. Australia's privacy protections were not regarded as 'adequate' by the European Union for the purposes of the Data Protection Directive adopted in 1995; and the gap between European and Australian privacy law has only grown wider since the EU's adoption of the General Data Protection Regulation, or GDPR, in 2018 (Greenleaf 2014, 2018). Privacy law in Australia would benefit from increased protections, greater clarity and a more streamlined approach. In its preliminary report, the ACCC recommends a series of measures that aim to provide consumers with more control of their personal information and greater transparency around how it is used.

As an overarching point, we regard the *scope* of the proposed reforms as vital. First, while we largely agree with the aim and import of these preliminary recommendations, we are concerned that any ensuing reforms would be undermined if an unduly narrow approach were taken to the scope of the data falling within the reform proposals. Second, we are concerned with the use of the terms 'personal information/data'. Particularly following the decision in *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4, Australia has a much narrower approach to the scope of personal information/data than other jurisdictions. Third, we are concerned about the advent of new technologies, such as data matching and re-identification technologies. On our view, the scope of data covered under any proposed reforms ought to be considerably expanded from formulations based upon the current definition of 'personal information' in the *Privacy Act*.

With this in mind, one of the ACCC's major recommended reforms involves substantially amending and enhancing the Privacy Act (**Preliminary Recommendation 8**). We strongly support such reforms. However, for reasons we have outlined, we regard 'personal information' as too narrow a phrase to capture much of the data that is relevant for current purposes, which often includes data that is not 'about' an individual. This has been recognised by the Productivity Commission and the Treasury, during the rollout of the Consumer Data Right, or CDR (see Productivity Commission, 2017; Consumer Data Right, 2018). In response, these bodies have devised a new formulation that allows people to access data that is either about them, or relates to them.

The risk of introducing reforms based on the current definition of 'personal information' contained in the Privacy Act is that:

- Notification and erasure rights (**parts (a) and (d) of Preliminary Recommendation 8**) will only be applicable to a relatively small amount of data ('personal information'), which may not significantly reduce the harms identified in the preliminary report.
- A two-tier system of data rights could emerge in Australia, with individuals having different rights in relation to different sets of data through the proposed Privacy Act reforms and the Consumer Data Right.

We suggest that the ACCC consider the possibility of aligning its recommended reforms with the Consumer Data Right and proposing a broader definition of personal data that can operate comfortably across multiple legal instruments. The CDR aims to capture a larger amount of data, and we suggest the inquiry work with the definition contained in the CDR bill. This would be logical, considering that the inquiry's proposal is essentially an extension of the market-based rights proposed in the CDR, but with a focus on consumer harms. Barring this concern, we agree with the substance of both the notification and erasure reforms. They are significant and potentially far-reaching.

In our view, the independent third-party certification scheme (**part (b) of Preliminary Recommendation 8**) would provide a valuable way for more privacy assessments to be conducted. While our preference would be for the Office of the Australian Information Commissioner (OAIC) to conduct the audits, they are constrained by resourcing, as noted elsewhere in the report. We question whether the audits will change business practices considering that the personal information of consumers only represents a limited amount of consumer data available to companies. The scheme may motivate companies to differentiate their services on data protection and privacy; however, the scope of the audits might also mean that some companies are provided with seals while still engaging in questionable practices due to the limited scope of the Privacy Act.

We strongly support the notion that consent ought to be express and opt-in (**part (c) of Preliminary Recommendation 8**). Consent is a crucial (if imperfect) mechanism for ensuring that data practices are fair. This preliminary recommendation would go far to ensure that consent obtained online is satisfactory and ethical, rather than inauthentic and illusory, due to the power imbalance.

Further, we strongly support the notion that penalties for breaches need to be significantly increased and that the OAIC ought to be better resourced for enforcement (**parts (e) and (g) of Preliminary Recommendation 8**). The General Data Protection Regulation, which came into effect in Europe in May 2018, imposes substantial maximum penalties for breaches, including penalties of up to €20 million, or 4 per cent of a company's annual global turnover (Johnston, 2018). In Australia, as the ACCC notes, currently the OAIC can only request that the courts set fines of up to '$420 000 for individuals and $2.1 million for organisations' (ACCC 2018, p. 231). Australian protections have been described as inadequate (Greenleaf 2018).

Under the Privacy Act, individuals can make complaints to the OAIC. However, they have no direct right of action. The ACCC proposes introducing such a direct right of action (**part (f) of Preliminary Recommendation 8**), a proposal we support.

The ACCC's preliminary recommendations on privacy extend beyond reforms to the Privacy Act. More tentatively, we support the OAIC Code of Practice (**Preliminary Recommendation 9**). It could be useful tool, allowing legislative requirements to be formalised in a workable model for the sector. However, as the preliminary report notes, 'some digital platforms may already meet the obligations of the proposed Privacy Code' (p. 234). We suggest that like the certification scheme, the ACCC seriously consider the likelihood of identifying practices in breach of the proposed code, before introducing new regulatory measures.

Finally, we strongly endorse the proposals in relation to unfair contract terms and unfair practices (**Preliminary Recommendation 11, Proposed Area for Further Analysis 9**). This ought to be enshrined as a fundamental principle of the way digital platforms are legally bound to interact with users. We also emphasise that significant consideration needs to be given to vulnerable communities. We are pleased that the inquiry has continually referred to the need to ensure that information needs to be delivered in 'easy and accessible' ways (ACCC 2018, p. 230). We note that this will be particularly pertinent for children, as acknowledged in **part (f) of Preliminary Recommendation 8**. We also encourage the ACCC to recognise other demographics (such as the elderly) who may struggle with understanding how their data is being used. In particular, we note the findings from the 2018 Australian digital inclusion index, which found that 'Australians […] struggle to keep up with new technologies, and relatively few users engage in more advanced

activities' (Thomas et al. 2018, p. 12). As a result, we encourage the ACCC to consider that digital media literacy may also involve improving the population's general understanding around how personal data is used, in addition to the issues surrounding news literacy noted in the preliminary report.

On the topic of data privacy, we note the Centre for Media Transition is conducting ongoing research and acknowledges that the preliminary recommendations of the ACCC are a bold and significant step in the right direction.

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