CENTRE FOR MEDIA TRANSITION

Digital Platform Services Inquiry

Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services, February 2022

Submission to the Australian Competition and Consumer Authority

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About the Centre for Media Transition

The Centre (CMT) was established in 2017 as an applied research unit based at the University of Technology Sydney (UTS). It is an interdisciplinary initiative of the Faculty of Arts and Social Sciences and the Faculty of Law, sitting at the intersection of media, journalism, technology, ethics, regulation and business.

Working with industry, academia, government and others, the CMT aims to understand media transition and digital disruption, with a view to recommending legal reform and other measures that promote the public interest. In addition, the CMT aims to assist news media to adapt for a digital environment, including by identifying potentially sustainable business models, develop suitable ethical and regulatory frameworks for a fast-changing digital ecosystem, foster quality journalism, and develop a diverse media environment that embraces local/regional, international and transnational issues and debate.

The CMT is also home to the APAC bureau of the global verification organisation, First Draft, that aims to combat misinformation.

This submission was prepared by:

- Dr Karen Lee, Senior Lecturer, Faculty of Law
- Professor David Lindsay, Faculty of Law
- Professor Paul Paterson, Adjunct Professor, UTS Business School
- Dr Derek Wilding, Co-Director, Centre for Media Transition

CONTACT

Centre for Media Transition
Faculty of Law, University of Technology Sydney
Building 2, Level 15
UTS City Campus, Broadway
PO Box 123, Broadway NSW 2007

cmt@uts.edu.au
+61 2 9514 9669

cmt.uts.edu.au

Introduction

Thank you for the opportunity to contribute to this consultation. We recognise the importance of the ACCC's five year Digital Services Inquiry, which builds on both the Digital Platforms Inquiry (DPI) and the Digital Advertising Services Inquiry. The Centre's contributions to the DPI mainly concerned the impact of digital platforms on news and journalistic content, but we have a longstanding interest in regulatory mechanisms used in the communications sector, particularly co-regulation, and we have since provided submissions to the review of the Privacy Act on matters raised by the ACCC in the DPI. In this submission we comment in three areas covered by the Discussion Paper:

- aspects of competition law
- the regulatory tools that might be used to implement reform
- resolving disputes.

Issue 1: Competition law

- **Consultation Question 1:** What competition and consumer harms, as well as key benefits, arise from digital platform services in Australia?

Digital platforms are characterised by features that confer entrenched and significant market power. As the UK Competition and Markets Authority (CMA) pointed out in its 2020 market study into online platforms, the factors contributing to this market power include: network effects and economies of scale; control of access to consumer data; influence over consumer decision-making, including through default settings; a lack of transparency over complex decision-making algorithms; and the interaction between elements of the complex business ecosystems controlled by platforms, such as by data sharing and matching at scale, and consumer 'lock-in'.[1]

The market power of digital platforms can undermine efficiency and innovation, and harm consumers. For example, platforms can set monopoly prices in relevant markets, such as advertising markets. Control over large data sets can deter innovation, by creating barriers to entry by potential competitors. Moreover, platforms may engage in a variety of exclusionary practices, such as preferencing their own services over those of competitors. They may use 'intermediation bias', such as in relevant algorithms, to influence consumers interactions so as to maximise profits at the expense of consumer satisfaction. Similarly, platforms can limit consumer choice, including by using 'dark patterns' to influence consumer decisions.

As explained in this submission, the factors conferring market power, and the conduct of digital platforms, pose considerable challenges to the Competition and Consumer Act (CCA) and Australian Consumer Law (ACL).

- **Consultation Question 2:** Do you consider that the CCA and ACL are sufficient to address competition and consumer harms arising from digital platform services in Australia, or do you consider regulatory reform is required?

The experiences of the ACCC (and regulators in overseas jurisdictions), as well as expert reports, suggest Australia's existing competition law is not well suited to enhancing digital platform services competition in relevant markets, and reducing harm from anti-competitive

[1] Competition and Markets Authority, *Online Platforms and Digital Advertising: Market Study Final Report*, 1 July 2020. https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study

conduct. This is largely due to the differences between the business model of digital platforms and traditional businesses. As established by a number of expert reports – including the Stigler Center Report, the Furman Report and the 2020 CMA market study report – there are conceptual and practical difficulties in applying conventional competition law to digital platforms.[2]

The essential problem is that the data and algorithm-driven, advertising-supported business model developed by the platforms does not fit neatly within the traditional competition law paradigm. This leads to difficulties in establishing that a platform has market power, establishing that conduct is anti-competitive and, given the dynamic nature of digital markets, applying ex post interventions that are sufficiently timely. Once a market has tipped in favour of one (or more) platforms, it is difficult to reverse the level of market concentration. These considerations have led the UK to favour a new approach involving ex ante pro-competitive interventions, including a code of conduct, which would more clearly define what amounts to anti-competitive conduct in digital markets. Similarly, the proposed EU Digital Markets Act would introduce new ex ante regulations that apply to platforms (or 'Gatekeepers'), including prohibitions (blacklisted actions) and specific obligations.

The current ACCC process is an opportunity to formulate recommendations for reforming Australian law taking into account these important policy developments.

Similarly, there is a case for targeted reforms of the ACL so that it more clearly addresses business practices of digital platforms that cause consumer detriment, including new forms of consumer harm. For example, the Discussion Paper identifies consumer harms that arise from the practices of digital platforms, including excessive online tracking and the use of 'dark patterns' (or 'choice architecture') to undermine consumer autonomy. Many of these concerns arise from the lack of transparency in the operations of digital platforms and a lack of consumer information about the practices of platforms, and especially their practices involving consumer data. While proposals made in the ACCC's DPI, such as the proposed introduction of a new law prohibiting unfair trading, may go some way to addressing these concerns, the current process is an opportunity to consider whether further steps may be warranted.

Reform, however, needs to take into account other current reform processes, including those addressing consumer harm such as enhanced privacy protections that would be overseen by the Office of the Australian Information Commissioner or age verification and content take-down mechanisms that will be administered by the eSafety Commissioner.

- **Consultation Question 3:** Should law reform be staged to address specific harms sequentially as they are identified and assessed, or should a broader framework be adopted to address multiple potential harms across different DP services?

The adoption of a new regulatory framework for digital platform competition law is warranted given the now solid evidence on:

- The substantial entrenched market power held by large digital platforms

[2] For the Stigler Centre report, *Stigler Committee on Digital Platforms: Final Report* (2019), see https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report. For the Furman Report, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (2019), see https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel.

- The sector-specific sources of this market power, and success of the large digital platforms in defending and boosting this market power
- The sector-specific capacity of large digital platforms for anti-competitive conduct
- The demonstrated limits of existing competition law to expeditiously address competition issues coupled with the greater likelihood of irreversible damage to competition occurring
- The key importance to Australian consumers, businesses and society of digital platform services.

Any new digital competition regulation framework should, however, have the flexibility to respond quickly to new competition challenges as the sector continues to rapidly evolve.

There is not at present a compelling case for a DP-specific consumer protection regulatory framework as:

- Existing consumer protect law has been adequate for some DP issues
- Necessary reforms can likely be accommodated within the existing framework; for example, we support the proposition that the ACL should prohibit unfair trading practices, rather than just unconscionable conduct.

Other regulatory reform initiatives are being pursued in relation to key DP consumer and society harms.

Issue 2: Regulatory tools

- **Consultation Question 4:** What are the benefits, risks, costs and other considerations (such as proportionality, flexibility, adaptability, certainty, procedural fairness, and potential impact on incentives for investment and innovation) relevant to the application of each of the following regulatory tools to competition and consumer harms from digital platform services in Australia?
    a) prohibitions and obligations contained in legislation
    b) the development of code(s) of practice
    c) the conferral of rule-making powers on a regulatory authority
    d) the introduction of pro-competition or pro-consumer measures following a finding of a competitive or consumer harm
    e) the introduction of a third-party access regime, and
    f) any other approaches not mentioned in chapter 7.

The business models and practices of digital platforms merit consideration being given to the adoption of new regulatory paradigms or measures, including those involving ex ante interventions. Each of the following categories may constitute forms of ex ante regulation.

[a] Prohibitions and obligations embodied in legislation

The EU's proposed Digital Markets Act includes a number of prohibitions (or blacklisted activities) and positive obligations that apply specifically to digital platforms (known as 'Gatekeepers').

Article 5 of the EU proposal would, in summary, prohibit Gatekeepers from:

- combining personal data from a core service with data collected from other services or from third parties;
- preventing business users from raising issues with any public authority relating to any practices of Gatekeepers; and
- bundling different core platform services offered by the Gatekeeper.

Article 5 would also impose obligations on Gatekeepers to:

- allow business users to offer the same products or services to end-users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the Gatekeeper;
- allow business users to promote offers to end users acquired via the core platform service, and to conclude contracts with these end users; and
- provide advertisers and publishers to which it supplies advertising services, upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher.

Article 6 of the proposed regulation includes a list of obligations and prohibitions that are subject to case-by-case further specification by a regulatory process. These obligations and prohibitions include:

- refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users of its core platform services;
- guarantee the possibility for end users to uninstall pre-installed applications on its core platform services;
- refrain from treating more favourably in ranking services and products offered by the Gatekeeper itself and apply fair and non-discriminatory conditions to such ranking;
- refrain from technically restricting the ability of end users to switch between and subscribe to different software applications and services to be accessed using the operating system of the Gatekeeper; and
- provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the Gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory.

The paradigm applied in the proposed Digital Markets Act, which includes prohibited practices as well as practices which are presumptively prohibited, bears some similarity to the paradigm adopted in the European Commission's proposal for regulating artificial intelligence (AI) systems, which prohibits practices and technologies that pose an unacceptable risk, while applying a higher level of regulation to systems that pose a high risk than to other AI systems.[3] For example, the proposed AI Act includes a prohibition on particular exploitative or manipulative practices, specifically those with a significant

[3] European Commission, *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts,* COM (2021) 206 final.

potential to manipulate persons through subliminal techniques or exploit vulnerable groups, such as children or people with disabilities.

Ex ante prohibitions or positive obligations are particularly strong forms of market interventions. Ill-considered prohibitions may have the effects of reducing the efficiency of platform practices (such as the efficiency of data use) or deterring beneficial innovation. Nevertheless, where practices are clearly socially detrimental, bright line rules can be an effective form of regulation, providing clarity to business and consumers alike. The Discussion Paper raises the prospect of imposing internal data separation rules, or data silos, that would limit uses or matching of data by digital platforms. And the UK government is considering data separation measures as one of a range of potential pro-competitive interventions (PCIs).

On balance, we consider that targeted and proportionate data separation rules may be one of the most effective measures to redress the entrenched market power of platforms. There may also be a role for targeted positive obligations such as information forcing rules, requiring the sharing of information about advertising and ranking practices, to increase the transparency of platform operations.

In relation to consumer protection reforms, the Discussion Paper raises the prospect of introducing regulatory measures to deter the use of 'dark patterns' to exploit and manipulate consumers, especially vulnerable consumers. In this respect, we support the introduction of a targeted and calibrated prohibition on unfair trading practices, which could provide an ex post safeguard against some of these concerning practices.[4] There is, however, a case for this to be supplemented by ex ante rules relating to the design of platform interfaces, such as prohibiting default settings that favour the services of platform operators at the expense of competitors (including the use of 'visual nudges') or are designed to unfairly lock-in consumers (such as making it difficult to cancel a service). If such prohibitions or obligations were to be introduced, care would clearly be needed in how the rules were drafted. An alternative to addressing these issues through statutory prohibitions or obligations would be to incorporate the relevant rules in codes of practice. In the UK, for example, the CMA has proposed imposing a 'fairness by design' duty in enforceable codes, which would be aimed at achieving the same objective as legislative rules directed at platform design.

[b] the development of code(s) of practice

[c] the conferral of rule-making powers on a regulatory authority

In the discussion paper (pp 75-76), the ACCC makes the following observation about codes of practice:

> In Australia, codes of practice are used in a number of sectors, including electricity, banking, dairy, food and groceries, franchising and telecommunications. The ACCC is currently responsible for administering several mandatory industry codes under Part VIB of the CCA, including the Dairy Code of Conduct and the Electricity Retail Code, and could have a role in monitoring the development and compliance with any digital platform industry codes.

[4] See, for example, J.M. Paterson and E. Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44 *Journal of Consumer Policy* 1.

Among the examples given for these various sectors and codes is the Telecommunications Consumer Protection Code (TCP Code) registered with the ACMA under Part 6 of the *Telecommunications Act 1997* (Cth).

We note that there is great variation in terms of how codes of practice are developed and enforced. Part IVB of the CCA allows for both voluntary and mandatory codes, with mandatory codes developed by the ACCC having the status of legislative instruments. The TCP Code, in contrast, is developed by industry, then registered and enforced by the ACMA, and is not a legislative instrument. The new codes to be developed for the online content scheme under the *Online Safety Act 2021* (Cth) will be more like the TCP Code than the Part IVB codes. As the ACCC also notes, the Australian Voluntary Code of Practice on Disinformation and Misinformation developed by DIGI is a voluntary code, not registered with the ACMA or the eSafety Commissioner, and for which there are no enforcement powers.

The discussion paper also suggests the ACCC or another regulator could be given rule-making powers 'to achieve overarching objectives or principles contained in the legislation' which would 'enable prohibitions and/or obligations to be detailed and potentially adaptable in their application' (77). The National Electricity Rules are provided as an example. In the communications sector, comparable rules would (presumably) be the service provider rules and standards developed by the ACMA under both the Telecommunications Act and the *Broadcasting Services Act 1992* (Cth).

In considering the use of codes of practice and regulator rule-making powers, we think it would be helpful for the ACCC to take account of the research and commentary provided as part of Part C of the Consumer Safeguards Review conducted by the (now) Department of Infrastructure, Transport, Regional Development and Communications in 2020.[5] That review should be of assistance because it explicitly considered the interaction of rules developed by industry in codes of practice and rules developed by the regulator.

The following material is adapted from the submission made by the CMT to that review. It is partly based on research into consumer and public participation in industry rule-making.[6]

1. What role should direct regulation, industry codes and guidelines play in a revised safeguards framework?

   It needs to be recognised that a significant level of investment is required to achieve responsiveness in code development – specifically, the adequate involvement of consumer and community representatives. Responsive engagement can be expensive and time consuming, and a decision by government to maintain co-regulation would also require a commitment to meet these costs or to continue to support the funding of them via charges placed on telecommunications carriers.

[5] See https://www.infrastructure.gov.au/have-your-say/consumer-safeguards-review-consultation-part-c-choice-and-fairness

[6] Lee, K. & Wilding, D. (2019), *Responsive Engagement: Involving Consumers and Citizens in Industry Rule-making*, Australian Communications Consumers Action Network, Sydney. This report was funded by a research grant from the Australian Communications Consumers Action Network. The operation of ACCAN is made possible by funding provided by the Commonwealth of Australia under section 593 of the *Telecommunications Act 1997*. This funding is recovered from charges on telecommunications carriers. See also Lee, K. & Wilding, D. (2021), 'Towards Responsiveness: Consumer and Citizen Engagement in Co-regulatory Rule-making in the Australian Communications Sector'. *Federal Law Review*, 49(2), pp. 272–302; Lee, K. & Wilding, D. (2022). 'The Case for Reviewing Broadcasting Co-Regulation'. *Media International Australia* 182(1), pp. 67-80.

While there are some shortcomings in the design and application of Part 6 of the Telecommunications Act, Part 6 (as implemented by Communications Alliance and ACMA in practice) provides the opportunity for public and consumer engagement in the shaping of rules, not just an opportunity to comment on industry plans. In short, it offers consumers a 'seat at the table' that is rarely provided, even by government.

Co-regulation is commonly justified on the basis that it creates opportunities for better targeted rules, and better rules are said to lead to better regulatory outcomes. Co-regulation creates opportunities for better targeted rules because it allows government to draw on greater expertise and access specialist information and resources. Greater expertise and specialist information and resources are usually associated with industry input and the desirability for regulatory solutions that are grounded in industry practice. However, capturing consumer and public input is equally valuable. This point is illustrated in the case studies provided in the previous work of one of the authors in relation to *Industry Code ACIF C625: Information on Accessibility Features for Telephone Equipment Code (2005):*

> The central issue involved the information equipment suppliers had to provide. Its resolution turned to a significant degree on the information people with disabilities needed to assess if phone equipment was appropriate for their particular circumstances. All consumer and disability representatives were knowledgeable about those issues and could draw on developments in the UK and elsewhere. One had involvement with Cost 2019, a European Community-funded project which among other things, considered accessibility features and telephone equipment. Another was trained electronics engineer with over 10 years' work experience modifying electronics equipment for individuals with physical disabilities. The third representative co-wrote an extensive report on accessibility features in 1998. As one consumer and disability representative stated, with some exceptions, equipment manufacturers were the ones lacking knowledge of the issues surrounding disability.[7]

This example shows the potential offered by responsive forms of co-regulation, where experienced consumer representatives are directly involved in rule formation. It is a potential unlikely to be met by alternative forms of government regulation.

We offer this view on the desirability of a co-regulatory environment noting that we are addressing only its rule-making aspect, and that there are other aspects of co-regulation (eg, those relating to enforcement) under consideration in this review, which may affect overall conclusions about the mix of regulatory approaches. We also note that voluntary instruments such as guidelines may be effective in relation to some matters, other than those dealt with in the TCP Code and other consumer codes, which require a coordinated and consistent industry approach.

2. How could the code-making process be strengthened to improve consumer outcomes and industry compliance?

    a. Based on our research, we propose that the Telecommunications Act be amended to set a new objective for industry bodies to engage comprehensively with the public, especially in circumstances where there is likely to be widespread application or significant consumer impact. While Communications Alliance has performed well in deploying mechanisms such as working committees that include consumer representatives, the legislative framework should provide a surer footing for individual consumers to be involved in developing rules that directly affect them and should encourage the exploration of new forms of engagement that address

[7] Lee, K. (2018), *The Legitimacy and Responsiveness of Industry Rule-Making*, Hart Publishing, Oxford, UK, p. 112.

known participation barriers. The Telecommunications Act also needs to be adapted to further assist the work of consumer representatives who already participate in the Part 6 process.

b. To support these objectives, the statutory criteria for registration of a consumer code under Part 6 should be varied to require ACMA to be satisfied that certain minimum engagement levels have been reached (except in the case of minor modifications to existing codes). These minimum requirements could include the following:

    i. the extent of public and consumer consultation must reflect the likely impact of the proposed rules on consumers and the wider public

    ii. the industry body has consulted at least one representative consumer organisation early in the code development/review process (ie, at the issues-gathering stage) and has appointed consumer or public members to a working committee to draft the code

    iii. the industry body has published an issues paper before issuing draft rules/variation, to allow for public comment at two stages; and

    iv. the industry body has made reasonable efforts at inclusivity and addressing participation barriers in its engagement practices.

c. In addition to these minimum requirements, the Telecommunications Act should give the ACMA powers to specify the mechanisms of engagement industry bodies should use in specific circumstances. There are various specific proposals for enhancing engagement activities (eg, using focus groups or round tables to elicit responses on complex issues; issuing marked-up versions of code revisions). Some of these could be included in the set of measures considered by the ACMA. A more general requirement could be that consultation documents of an industry body are deposited with the ACMA or another communications hub so there is a central point for communications industry consultation.

d. Related to these aspects of code registration, the Consultation Paper (p.15) notes that 'the test for registering codes is low and subjective' and that the current legislative provisions might prompt ACMA to make an overall decision on the code when there might be a need for amendments/improvements to specific provisions. On p.24 it proposes new provisions 'specifying that ACMA must refuse to register sub-optimal codes or code provision(s), and can require changes to sub-optimal provisions, for example, to address consumer concerns or lack of clarity in provisions' and 'providing a higher threshold for code registration beyond providing "appropriate community safeguards"'. We agree with these comments and suggest that the test, at least for consumer codes, requires that the ACMA be satisfied that the code will improve consumer outcomes (eg, by having a material effect in addressing consumer harms or by enhancing consumer safeguards).

e. In our view, the Telecommunications Act should also be varied to allow public and consumer members of a working committee to present to the ACMA, collectively, an alternative version of the code for registration, in circumstances where agreement has not been reached by the committee despite the good faith efforts of working committee members. A more far-reaching proposal is for the Telecommunications Act to give consumer organisations that meet certain criteria the power to develop consumer codes and to seek registration by the ACMA. Under this scenario, it would

be consumer organisations that would have an obligation to promote and manage engagement in code development, and the ACMA would need to gauge the impact on suppliers before making a decision to register the code. This approach might be particularly suited to some aspects of consumer protection that would benefit from a consumer-driven approach, and would help to provide incentives for industry to address the areas of concern raised by consumer representatives.

f. Finally, the Consultation Paper (p.14 and p. 24) notes the length of time taken to develop some codes and contemplates this as a reason for moving to government regulation. In our view, delays in code development should be addressed by placing an obligation on ACMA to monitor working committee progress and a power to impose its own deadlines if milestones set by the working committee are not met. Problems with time management should not be a reason to revert to government regulation without adequate exploration of possible measures that incentivise all parties to conclude code development in a timely fashion. Co-regulation provides opportunities for consumer engagement that are in most cases superior to direct regulation.

3. Are current constraints on ACMA's power to make industry standards regulating consumer safeguards appropriate?

    i. The Consultation Paper (p.14) notes that ACMA can only request that industry develop a code in certain circumstances. On p. 24 it proposes 'ACMA could be given "reserve" powers to make consumer protection rules without first requesting a code or finding a code deficient, where it is satisfied that prompt, direct action is necessary'. Notwithstanding our support for co-regulatory fora, we support this proposal for two reasons. First, as the Paper suggests, it allows fast responses to urgent situations that could lead to consumer harm. Second, it provides an incentive for industry participants to develop genuine and effective co-regulatory processes.

[e] A 3rd party access regime

Third party access regimes for bottleneck facilities and infrastructure have been successful in facilitating market entry in other sectors exhibiting prohibitive barriers to entry, including telecommunications. Similarly, a digital platform data access regime could reduce a key barrier to entry if designed and administered to:

- Preserve the privacy and discretion of customers – drawing on experience from recent data access regimes in other sectors
- Cover only raw data itself, not analytical tools and techniques (including algorithms) developed by the incumbent that entrants could reasonably (and creatively) supply themselves
- Minimise scope for parties gaming the system, including stalling access through numerous disputes and lengthy appeals
- Specify clear end-point conditions for the regime rather than leaving this open-ended.

We note that UK data access proposals are for inclusion in the proposed code and not a legislative regime. Given the greater flexibility of a code, the merit of a similar approach here should be considered.

- **Consultation Question 5:** To what extent should a new framework in Australia align with those in overseas jurisdictions? What are the key elements that should be aligned?

Alignment is beneficial for the large digital platforms for three reasons:

- First, the effectiveness of the regulation given many of their services are provided globally meaning limited scope for effectiveness at the individual jurisdiction level
- Second, alignment would reduce the red tape burden on the digital platforms
- Third, alignment allows for replication of successful regulatory models from other countries.

However, the pursuit of alignment needs the be tempered by different institutional settings across jurisdictions, and different levels of concern between countries about particular consumer harms or limits to competition being addressed by regulation.

Issue 3: Resolving disputes

- **Consultation Question 15:** Should specific requirements be imposed on digital platforms (or a subset of digital platforms) to improve aspects of their processes for resolving disputes with business users and/or consumers? What sorts of obligations might be required to improve dispute resolution processes for consumers and business users of digital platform services in Australia?

In March 2022, the Centre for Media Transition issued the consultation version of a report titled *Digital Platform Complaint Handling: Options for an External Dispute Resolution Scheme*. Two of the authors of that report, Derek Wilding and Karen Lee, have contributed to this submission. The consultation report is the first output of research funded by UTS and through a research grant from the Australian Communications Consumers Action Network (ACCAN).[8] It was prompted by Recommendations 22 and 23 of the Final Report of the ACCC's Digital Platforms Inquiry (concerning respectively the development of minimum internal dispute resolution standards and the establishment of an ombudsman scheme) and by the Government's response to those recommendations; namely, that the Government 'work with major digital platforms to scope and implement a pilot external dispute resolution mechanism for complaints between consumers, businesses and digital platforms'.[9]

While the CMT's report on this topic will not be finalised until the researchers have considered feedback from stakeholders, some preliminary findings are set out below. We recognise that this research concerns the viability of an external disputes scheme, whereas the consultation question is concerned with internal standards (although section 8.4.2 of the discussion paper also refers to the proposal for a digital platform ombudsman). Nevertheless, we think our research may be of value to the ACCC for two reasons. First, the background to external and internal dispute resolution – that is, the types of complaints made and how they are handled – is the same. Second, our research shows there are

[8] The operation of ACCAN is made possible by funding provided by the Commonwealth of Australia under section 593 of the *Telecommunications Act 1997*. This funding is recovered from charges on telecommunications carriers.
[9] Australian Government, *Regulating in The Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry*, December 2019, p 13.

likely to be some significant challenges in developing an effective EDR scheme for digital platforms; this, in turn, might point to the value of developing – as an alternative – internal dispute resolution standards as proposed in DPI Recommendation 22.

Background – complaints by users of digital platforms

Research published by ACCAN in late 2021 showed that 74% of Australians think that it needs to be easier for people to make a complaint and that 78% think that it needs to be easier for people to get their issues resolved.[10] Our review of the types of problems that consumers encounter on social media resulted in the identification of two broad categories of matters: social complaints and transactional complaints.[11] We further separated each of these two categories into two sub-categories, with social complaints being either 'civic' complaints (being those that have a social dimension, in terms of their possible impact on the community more broadly, rather than specifically on an individual eg, online pornography or disinformation), or complaints about personal harms (those that, while they might also have a wider social impact, are most likely to be most acutely felt by an individual, such as online abuse or defamation). Transactional disputes were separated into complaints about contracts, property rights, business practices (those that concern unmet contractual expectations, undesirable business practices such as spam or an infringement of some kind of property right like copyright) and complaints about the conduct of digital platforms themselves (those that mainly concern the conduct of the platform in its role as 'service provider', such as suspending an account or misusing personal information, even thought they might arise from the conduct of third parties).

Table 1 below shows our classification of these complaints.

Handling of complaints

Some providers of social media services such as Meta have developed sophisticated mechanisms for flagging and review of problematic content, as well channels for complaint in relation to participation in buy and sell groups and other forms of e-commerce. It appears that in most cases at least the initial stage of any reporting or complaint is automated. For social complaints, where service providers need to deal with vast quantities of content, flagging of content by users is itself a secondary stage after the application of the platform's own automated content moderation system. It seems that relatively few matters are the subject of human review, and reporting problematic content, where the user may have no further communication on the matter from the service provider, is not regarded as the registering of a complaint.

While the association representing digital platforms, DIGI, has recently formed an independent complaints committee, this mechanism is narrow in scope as it will only address complaints concerning misinformation and disinformation under the Australian Code of Practice on Disinformation and Misinformation, and then only about the failure of the signatories to the code to implement policies and procedures in accordance with the commitments they make under the code to combat misinformation and disinformation.

As the ACCC recognised in the Digital Platforms Inquiry, there is no equivalent for the digital platform sector of the Telecommunications Industry Ombudsman (TIO), an institution with statutory recognition under the *Telecommunications (Consumer Protection and Service*

[10] See https://accan.org.au/media-centre/media-releases/1942-new-research-finds-nearly-three-quarters-of-australians-want-better-complaints-handling-from-digital-platforms.

[11] We adopted this distinction between 'social disputes' and 'transaction disputes' based on the work of Ethan Katsch and Orna Rabinovich-Einy. See Katsch, E. & Rabinovich-Einy, O. (2017), 'The Challenge of Social and Anti-social Media' in Ethan Katsch and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press) 109-130, 114.

Standards) Act 1999 (Cth) that was established in 1993 to 'provide free, independent, just, informal and speedy resolution of complaints about telecommunications services'.[12]

Social	Transactional
Civic complaints • Pornography and other offensive content • Disinformation and misinformation • Advertising content (breaching community standards) • News content • Election advertisements • Censorship* • Use of fake accounts	**Complaints about the conduct of digital platforms** • Claims made against digital platforms about their own conduct in relation to other businesses • Consumer claims against digital platforms re product quality, charges etc • Other privacy breaches by digital platforms* • Service disruption, suspension of account etc
Complaints about personal harms • Online-specific abuse • Other serious harms with an online dimension • Disclosure of confidential or protected information* • Damage to reputation • Other privacy breaches by third parties*	**Complaints about contracts, property rights, business practice** • Sale of prohibited goods and services • Scams • Advertising and product claims, unfair terms, product defects • Account hacking • Breach of copyright • Identity theft, impersonation* • Comments in reviews of products and services • Spam and unwelcome notifications or communications*

Table 1: Types of complaints made about content and conduct on digital platforms

Options for an external complaints scheme

In the DPI Final Report, the ACCC nominated the TIO as a likely home for unresolved complaints about digital platforms. In its submission to Treasury in response to the Final Report, the TIO noted that it is already receiving – although it is unable to respond to – some complaints about digital platforms. It said the time had come for the introduction of a 'Digital Platform Ombudsman'; that industry schemes are a proven model for new industries; and that – were its resourcing and remit extended to handle these complaints – it would be well suited to take on this role.[13] The TIO submission discussed the sorts of complaints it currently handles, the additional areas of complaint it could handle, and the areas of complaint that would be outside of its scope.

In addition to the TIO, our research considered the roles of the Australian Communications and Media Authority, the eSafety Commissioner, the ACCC (and other consumer protection agencies), DIGI, the Office of the Australian Information Commissioner, and the Australian Small Business and Family Enterprise Ombudsman. Given the initial work of the ACCC and

[12] Anita Stuhmcke, 'The Rise of the Australian Telecommunications Industry Ombudsman' 26 (2002) *Telecommunications Policy* 69-86, 69.
[13] *Submission from the Telecommunications Industry Ombudsman to the Treasury's consultation on the final Digital Platforms Inquiry Report*, September 2019.

its recommendations in the DPI Final Report, our principal concern was to assess whether it would be viable for the TIO to take on an expanded ombudsman role; however, we also considered whether any of the other existing bodies could take on an expanded external dispute resolution role, whether or not this took the form of an ombudsman. Because of resource limitations, our analysis was confined to the external resolution of disputes involving social media platforms.

Our preliminary view, consistent with what we believe is implicit in the ACCC's recommendations, is that the TIO is the only one of the existing bodies that merits serious consideration as a platform ombudsman. We did not reach this view as a result of any perceived failings on the part of other bodies; rather, the other bodies all have functions that mean they are ill-equipped to take on digital platform complaints, or that the addition of these complaints would be likely to impede their existing work. The reasons for this view are set out in our report that will be finalised soon. This led us to identify three options for the creation of an external dispute resolution mechanism:

1. An expanded TIO
2. A new Digital Platform Ombudsman
3. An industry-led clearing house and social disputes resolution scheme.

We then narrowed this list down by eliminating option 2. In our view, an entirely new ombudsman scheme that would cover the field of consumer and small business complaints is unlikely to be a viable option. Our research revealed some of the problems that are likely to arise in developing a new scheme in an environment where several existing channels of complaints are already well established and perhaps likely to be further entrenched over the next few years. Complaints relating to privacy, online harms covered by the Online Safety Act, probably copyright complaints and perhaps defamation complaints, will be dealt with by specialised bodies. This will leave a depleted jurisdiction for a new ombudsman. While there may be a reasonable argument for creating a new arm of an existing EDR scheme (ie the TIO) to address these new issues, it is unlikely to be cost effective to set up an entirely new ombudsman.

Therefore, the two models we identified as worthy of further consideration are as follows: an expanded TIO that takes on social complaints as well as some transactional complaints, and an industry-led clearing house with an additional mechanism for addressing social complaints. These would both involve some prioritisation and some necessary compromise on the principles for good complaint handling. For example, the TIO model may score highly on independence, fairness and accountability, but less highly on the other criteria on account of the necessary overlap with other channels of complaint. The clearing house model might score less highly on aspects such as accountability and independence but more highly on efficiency and ultimately effectiveness if the referral system works well and the scheme includes a social complaints arm.

We would be pleased to share the final version of our report in May/June when we have considered stakeholder feedback. In the meantime, we consider that the difficulties involved in the establishment of an EDR scheme might well mean that the development of minimum internal standards represents a more pragmatic approach. As resourcing limitations mean we have not yet conducted research on this aspect, we offer no decisive view at this stage.