COMMUNICATIONS
ALLIANCE LTD

Communications Alliance Submission

to The Treasury on the
Final Report of the Australian Competition and Consumer Commission (ACCC)

Digital Platforms Inquiry

12 September 2019

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Introduction

Communications Alliance welcomes the opportunity to make a submission to Treasury on the Final Report of the Australian Competition and Consumer Commission (ACCC) Digital Platforms Inquiry (Inquiry).

We acknowledge that the changes brought about by the digital age, including by digital platforms, are fundamental and require ongoing consideration and informed debate from all angles of our society and economy.

It appears that much of the discussion around those changes focuses on the complexities arising from the collection and use of data of individuals and the potential risks to the privacy of those individuals that these activities may pose.

Our members take privacy seriously and they support a privacy regime that protects personal information and data usage. Accordingly, they spend significant amounts of time and resources on safeguarding the privacy of their customers.

Against this background, it is important to acknowledge the enormous contribution that our industry and platforms have made to our society and economy – essentially enabling the digital age. It is, therefore, crucial to ensure that any well-intentioned proposals for reform in this area achieve their desired objective, are clear and consistent, and do not operate to the detriment of consumers and businesses.

About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see http://www.commsalliance.com.au.

Discussion of Recommendations

Scope of the Inquiry and its Recommendations

The Report (and Ministerial Direction) state that the Inquiry is to consider "the impact of online search engines, social media and digital content aggregators (digital platforms) on competition in the media and advertising services markets" and to consider the "implications of these impacts for media content creators, advertisers and consumers and, in particular, to consider the impact on news and journalistic content." Indeed, the majority of the Report focuses on those issues.

It is, therefore, concerning that a number of Recommendations are aimed at broader regulatory reform and changes to legislation, e.g. the *Privacy Act 1988* (Act). These Recommendations are likely to impact sectors beyond the (appropriately) narrowly defined digital platform arena, and indeed may affect the whole economy, i.e. numerous sectors which are not, and ought not be, the subject of the Inquiry.

There is only very limited guidance as to what particular 'harm' these changes purport to address in these sectors. Nor is it clear what protective advantages the proposed changes would provide. Importantly, the Report does not provide a justification for its broader approach. It asserts, rather, that the purported problem is more general in nature and, therefore, warrants application to the wider economy. The Report does not provide any specific analysis or evidence of these assertions. The Report also does not recommend a Regulatory Impact Assessment for those changes.

Therefore, we are unable to support this approach or the resultant Recommendations. Consequently, we continue to call for further consultation on these issues, including the development of an Issues Paper and evidence-based Recommendations for review.

Given that neither the necessity for the recommended changes on an economy-wide level has been demonstrated, nor their effects on other sectors considered, it appears that any Recommendations that go beyond specifically addressing the identified policy question (digital platforms and their societal impact) are premature and would require significantly more evidence-based investigation and consultation.

We also highlight the need to take into account existing sector-specific privacy and data protection regulation, such as Part 13 of the *Telecommunications Act 1997* (which still reflects technology and thinking from several decades ago) when considering economy-wide reform to privacy and data-related regulation.

Recommendation 2: Advance notice of acquisitions

As highlighted by other stakeholders and indeed the ACCC's Final Report itself, the proposed advance notification of potential acquisitions may have "unintended effects on innovation and investment in digital markets"[1], such as the effect of creating additional difficulties for start-ups to raise capital. It may also have a chilling effect on entrepreneurship in this sector more generally, as the purchase of such smaller companies by larger competitors is often the desired end-game for founders and represents a common mechanism for early investors to obtain a return from their speculative investment.

Consequently, it will be very important to ensure that the minimum transaction value that would trigger a notification requirement is not set too low.

[1] p.110, ACCC, *Digital Platforms Inquiry Final Report*, June 2019

Recommendation 8: Mandatory ACMA take-down code to assist copyright enforcement on digital platforms

We note the revision of the Preliminary Recommendation, to create a take-down standard, to a Recommendation to create a code, to be developed by the ACMA in close consultation with all stakeholders.

We draw Government's attention to the fact that there is an existing notice and take down regime codified into the *Copyright Act 1968* and that amendments were made to this Act in 2018 to give copyright owners additional powers to seek Federal Court orders requiring search engines to demote or remove search results for infringing sites. We are not convinced that this amendment is insufficient to facilitate an adequate take down process for search engines at least. We would also like to highlight that despite repeated requests over several years to extend the existing safe harbour protections – an intrinsic complement to the notice and take down regime established under the *Copyright Act 1968* – to online service providers, this amendment has not been adopted by Government. It appears unreasonable to introduce yet another notice and take down regime without extending this protection to digital platforms.

In order for a code to become a practical instrument to reduce access to copyright-infringing content, such a code must take into account the global nature of operations of digital platforms and must not represent a substantial departure from global best practices for processing take-down notices. Were the code to create a more rigid regime, with potentially large, cumulative penalties for errors (as opposed to overt and deliberate non-compliance) attached to it, this would incentivise digital platforms to err on the side of caution and may trigger the use of algorithms prone to a higher (and potentially unacceptable) degree of content exclusion than necessary to limit access to copyright infringing material. It could also stifle a platform's desire to invest in innovative approaches to address the issue, as the risk of errors and the penalties associated with those could be deemed prohibitive.

Recommendation 15: Digital Platforms Code to counter disinformation

This Recommendation's intention is laudable but appears to be very difficult to implement in practice. On the one hand, the standard for material that is deemed to infringe the content standards of the code must to be low enough in order to deliver a significant impact on the accuracy of information that is published. On the other hand, if the information is not defamatory or misleading/deceptive in a commercial sense (or in violation other legislation), it would normally be regarded as free speech and ought to be publishable.

If implemented, this Recommendation would require digital platforms to make a large number of judgment calls on whether the material under consideration ought to be published or not, effectively forcing them to take on a censorship role which may not be appropriate.

We encourage Government to undertake greater consultation on the considerations and potential consequences of implementing this Recommendation.

Recommendation 16: Strengthen protections in the Privacy Act & Recommendation 17: Broader reform of Australian privacy law

As noted above and highlighted by a number of stakeholders during the course of the Inquiry, Recommendation 16 aims to amend to the *Privacy Act 1988* (Act) and, therefore, if implemented, would impose new/changed requirements on all sectors of the economy.

While the Final Report notes objections to this approach and outlines its potential drawbacks, it relies on mere assertions by the ACCC that the perceived or identified problems in the digital platforms sector are similarly present in other sectors of the economy and, consequently, warrant the proposed (economy-wide) changes to the Act.

If such far-reaching changes – including a change of the definition of 'personal information' – are being proposed, the onus ought to be on the ACCC to demonstrate, in line with the Government's Best Practice Regulation policy and via a Regulation Impact Statement, that the benefits of the proposed changes to the Act outweigh the costs on an economy-wide basis.

The ACCC notes that "[n]umerous amendments have been made to the Privacy Act, but these incremental changes may not be sufficient to address the volumes and significance of privacy and data protection issues proliferating in the digital economy."[2] It is, therefore, surprising that the ACCC then recommends further incremental changes to the Act, and even more so given those changes are not supported by an economy-wide cost-benefit analysis.

A broader review, and potentially also reform, of the privacy law in Australia may be useful to ensure that Australia's privacy regime is fit for purpose in the digital age. However, such a review must take a whole-of-economy approach (considering existing overlapping regulation) and be free of bias as to the outcome.

Unfortunately, while demanding broader reform, Recommendation 17 and the detail accompanying it in the Final Report appear to pre-empt the outcomes of such reform, again without providing evidence that the desired result would be appropriate when viewed through a more holistic lens. It is also not evident how the discussion of large parts of Recommendation 17 relates to the Terms of Reference for the Inquiry, e.g. the discussion of the coverage of Australian Privacy Principles (APP) entities (p. 479) appears to be a pure excurse into the (perceived or actual) deficiencies of the Act rather than commentary necessary to address the Terms of Reference.

In general, it appears inconsistent that the Final Report notes the incremental approach to privacy legislation in the past and its inability to keep pace with technological advancements and, consequently, demands broader reform while simultaneously proposing another set of incremental changes, derived from the assessment of a single sector.

The case for a broad-based, unbiased review and careful analysis of the privacy regime prior to enacting further changes becomes even clearer if one considers the additional complexities introduced by the new Consumer Data Right (CDR) and the experiences resulting from the European Union General Data Protection Regulation (GDPR).

The Final Report appears to be making Recommendations that aim at introducing requirements similar to those that form part of the GDPR. However, it ought to be acknowledged that the Australian privacy regime is based on a very different legal framework with different oversight and enforcement mechanisms. We also note that the GDPR was only adopted recently and its real impact and the lessons that could be learned from it are still unclear. Therefore, it would be inappropriate to rush to the conclusion that a similar approach would be suitable in an Australian context.

The Final Report attempts to counter critics' concerns that the proposed Recommendations may contain differences to the CDR and risk fragmenting and complicating the Australian privacy regulations by stating that "this Inquiry's Recommendations are forward-looking proposals for the Government to generally update and strengthen the overarching Australian privacy regulatory framework. In contrast, the CDR operates within the existing legislative framework to deal with certain types of data and mechanisms for accessing that data in specific sectors of the economy. The CDR privacy protections should therefore be viewed as extra protections applicable only to CDR data, as defined for the purposes of the CDR legislative framework."[3]

This view is overly simplistic. Numerous stakeholders and privacy experts have provided submissions to the CDR legislative process highlighting their concern with the complexities

[2] p.437, ACCC, *Digital Platforms Inquiry Final Report*, June 2019
[3] p.437, Box 7.26, ACCC, *Digital Platforms Inquiry Report,* June 2019

introduced by an additional layer or parallel privacy regime for the CDR, in part also caused by the likelihood that data will be drifting in and out of the CDR regime over time.

Similarly, the influence of the GDPR on businesses in Australia must not be underestimated. It will be important to carefully analyse the effect of both regimes on the Australian economy and their implications for the data and privacy practices of Australian business. It will be critical to ensure that no inconsistencies occur across the three regimes (Privacy Act, CDR, GDPR) and to minimise friction between the regimes. We contend that more work needs to be done, economy-wide, in this respect, prior to embarking on a process of further incremental – but fundamental – change to the Act.

In the following, we provide some thoughts on the specific Recommendations that form part of Recommendation 16. Those thoughts are not to be interpreted as an acceptance of any Recommendations that have an economy-wide impact but rather highlight some additional considerations or concerns.

Recommendation 16(a): Update 'personal information' definition

As previously indicated, a change in the definition of 'personal information' to include communications data (so-called metadata) and other technical data would represent a fundamental change that would require greater consideration outside the scope of the current Inquiry.

While it may be true that the current status of communications data is somewhat unclear and could benefit from clarification, the Inquiry has not provided evidence that the inclusion of the data would actually provide consumer benefit. However, it is clear that such change would impose substantial costs on the industry, which are likely to be passed on to consumers.

Importantly, the Final Report fails to explain that the information must be linked to an identified or identifiable individual, in order for it to be able to constitute personal information. For example, the location information of a specific device in a mobile network on its own with no additional data would not be personal information but, so we believe, could only potentially be considered personal information if it is linked (via a phone number and attached account information) to an individual. However, Recommendation 16(a) seems to suggest that the information as such constitutes personal information as it "may be used identify [sic] an individual" instead of it only being personal information if it is actually used to identify an individual, or at the very least only when it is also held with additional information that makes an individual reasonably identifiable.

Recommendation 16(b): Strengthen notification requirements & Recommendation 16(c): Strengthen consent requirements and pro-consumer defaults

Recommendation 16(b) proposes to "[r]equire all collection of personal information to be accompanied by a notice from the APP entity collecting the personal information (whether directly from the consumer or indirectly as a third party), unless the consumer already has this information or there is an overriding legal or public interest reason."[4] The Recommendation appears to suggest that such notification is to be provided at the time of collection.

However, the current Act recognises that an immediate notification requirement is not practical in some circumstances – for example where the collecting entity is a third party and does not own or operate the site it collects the data from – and, consequently, allows for notifications after collection where it is impractical to do so at the time of collection.

Where multiple entities are collecting information, the proposed Recommendation may create a situation of 'notification overload' for consumers who might be receiving numerous

[4] p.456, ACCC, *Digital Platforms Inquiry Final Report*, June 2019

notifications at the same time. This bears the risk of disengagement – the opposite outcome of what the Recommendation intends to achieve.

Therefore, a more practical approach would be to require the third-party operator of a website to provide the required information, either via a notice or another suitable means, instead of the APP entity collecting the information.

Recommendation 16(c) "[r]equire[s] consent to be obtained whenever a consumer's personal information is collected, used or disclosed by an APP entity, unless the personal information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an overriding public interest reason."[5]Importantly, the Final Report makes it clear that the Recommendation expressly excludes the 'legitimate interests' of a data processor as a reason to exempt the processor from the valid consent requirements.

In contrast, the GDPR, on which the Recommendations seem to be modelled, deliberately includes a legitimate interest exemption to balance those interests – which could include fraud prevention, legal actions or security functionalities – with the right for transparency and privacy of individuals.

A legitimate interest exemption also reduces the likelihood of consumers receiving repeated notifications for essentially the same processing activity or requests for activities which only have a minimal impact on their privacy.

The Final Report acknowledges the risk of 'consent fatigue' that could arise from the implementation of the Recommendations without offering a pragmatic approach to overcome or minimise this risk. Instead, the Report only points to "considerable uncertainty and concern surrounding the relatively broad and flexible definition of the 'legitimate interests' basis for processing personal information under the GDPR" to argue for the exclusion of the legitimate interests exemption in an Australian context.

We disagree with this reasoning. While the legitimate interests of organisations collecting and processing information may differ, the term does not offer a 'blank cheque' to process any information without consent. More work needs to be done to consider alternative privacy safeguards that could better balance the interests of consumers and data processors, such a pseudonymising data, minimisation of retention periods etc.

Independent of our concerns highlighted above, it ought to be made clear that the proposed notification and consent requirements could be complied with through an express notice/informed consent at the beginning of a customer relationship/contract and do not require individual notifications/informed consents each time personal data is being collected.

Anything else would be totally impractical as it could be interpreted to mean that, for example, notification is required prior to each phone call where new location information is being collected. The limitation that consent is not required where the information is necessary for the performance of a contract may also not be helpful in all circumstances as it may be difficult to differentiate whether information was necessary for the performance of a contract or only helpful for this purpose, or what exactly constitutes 'the performance of a contract'.

If the collection of data also comprises data that has been created by derivation, then it may often be difficult for businesses to clearly draw the line as to when data has been derived (potentially from data that itself has already been derived) and to notify individuals accordingly. Further analysis and discussion would be required to address these issues.

In any case, it will be imperative that the definition and interpretation of consent are not inconsistent with the respective definitions of the CDR and GDPR.

[5] p.456, ACCC, *Digital Platforms Inquiry Final Report*, June 2019

Recommendation 16(d): Enable the erasure of personal information

As highlighted above, the Final Report has not provided any evidence that far-reaching measures such as facilitating the erasure of personal information where consent has been withdrawn are appropriate, useful and/or economically and technically feasible for all sectors. Far more research and analysis in all sectors of the economy would be required before such a Recommendation could reasonably be made.

For example, it appears that the Final Report does not consider the risks to an individual's privacy that may arise as a result of the need to re-identify individuals through re-attribution of previously pseudonymised data in order to enable the subsequent erasure. In such instances, the well-intentioned requirement to erase personal data may be of greater detriment than use, not only for the individual whose data is to be erased but also to other consumers whose data may have been pseudonymised by means of the same key.

We also point out that our industry is required to collect and retain data under legislation, such as the Data Retention legislation, where these obligations are not tied to an entity's status as an APP entity. It needs to be clear that data retained under such legislation would be exempt from a proposed erasure requirement, independent of an entity's APP status and of whether the data retained is personal data or de-identified.

Consequently, without further in-depth analysis of the costs, benefits and risks of this proposal, we offer our preliminary opinion that such a requirement would not be appropriate nor indeed economically and/or technically feasible for our-members.

We note, that it is also not clear whether the right to such erasure could be waived by consumers.

Recommendation 19 – Statutory tort for serious invasions of privacy

As also stated in the Final Report, this Recommendation was proposed by the Australian Law Reform Commission most recently in 2014. This did not progress largely on the basis that it was recognised that the existing privacy and other laws in Australia provide significant consumer protections for serious invasions of privacy. The Final Report does not provide an explanation as to why the arguments that led to that conclusion are no longer valid or would be overridden by other arguments today.

As we have previously submitted, Communications Alliance is also concerned that the introduction of a statutory cause of action is likely to have adverse consequences and to result in an additional and unnecessary regulatory burden on business. There is a risk that the introduction of a cause of action will encourage litigation, including spurious claims, causing uncertainty and additional expense for business.

Recommendation 20: Prohibition against Unfair Contract Terms & Recommendation 21: Prohibition against Unfair Trading Practices

As with previous Recommendations that have an economy-wide impact, we oppose these Recommendations on the basis that they have not been assessed against the background of other sectors. The Final Report also does not appear to consider the impact of the proposed reforms to unfair terms and trading practices in combination with the reforms proposed to Australia's privacy regime.

We note that Government has also recognised the need for a thorough cost-benefit analysis prior to making changes to unfair contract terms as part of the work being undertaken by the Franchising Taskforce and, consequently, requested a RIS be provided.

The difficulties with these two Recommendations become even clearer when taking into account that the Review of the *Australian Consumer Law* (ACL) in 2017, i.e. a review with an economy-wide focus, considered the standard of unfairness – to be found in various

provisions of the *Competition and Consumer Act 2010* (CCA) – and rejected less far-reaching changes to unfair contract terms.

In 2017, the ACCC had suggested that the ACL be amended to prohibit terms that had previously been found unfair by a Court. Even this more limited proposal was rejected by the ACL Review as it was found that the terms must be considered in their specific context and on a case-by-case basis.

If Recommendation 20 intends to generally prohibit certain unfair contract terms via some sort of 'black-list', this would mean that no such individual consideration could be given. This unreasonably exposes businesses to risk as they are unable to protect their legitimate interests in their contract terms because a provision may be deemed unfair, and hence is prohibited, in a completely different context and set of circumstances. Even if no such 'black-listing' is intended, the uncertainty of what may constitute unfairness in combination with high fines for unfair terms may act as a deterrent to innovation and growth.

In relation to Recommendation 21, we believe that, if this Recommendation was implemented, a significant amount of work would need to be done to provide guidance as to the criteria that would be applied to assess unfair practices, and to provide safeguards to ensure businesses are not unreasonably exposed to uncertainty and risk. However, the regulator ought not be empowered to develop further lists of specific conduct (noting that Part 3 of the CCA already contains an extensive catalogue of unfair practices) that it deems unfair and, consequently, prohibited.

We note that some of the examples the ACCC has described in its Final Report (e.g. see p. 498) may potentially fall within existing laws such as the Act and the ACL (e.g. prohibitions against misleading and deceptive conduct, unconscionable conduct, unfair contract terms).

It is also worth highlighting that comparisons with international counterparts may only be of limited use unless the analysis includes the broader consumer protections frameworks already in place in the respective countries, including Australia.

It will also be important that any additional regulation is not framed in such a way that it stifles emerging ways of consumers and businesses transacting with one another.

Overall, we echo the concerns that the prohibition of unfair terms and practices and the introduction of high penalties would introduce a high degree of uncertainty around the definition of the term 'unfair'. If additional prohibitions are to be included in the ACL, it must clearly be shown that the practices subject to the regulation are detrimental to consumers and unaddressed by existing laws, and that the benefits of the proposed remedies outweigh the attendant costs and risks.

<u>Recommendation 23: Establishment of an ombudsman scheme to resolve complaints and disputes with digital platform providers</u>

If Government accepts Recommendation 23, a range of issues would need to be considered in deciding whether the Telecommunications Industry Ombudsman (TIO) should take on the role of Digital Platforms Ombudsman, including governance, membership, and funding, as well as appropriate resourcing and knowledge development. Further, if the TIO takes on the role of Digital Platforms Ombudsman, it will be critical to clearly define the entities captured by the new ombudsman scheme, the scope of the scheme, and how it will operate.

We would also recommend that a broader analysis should be undertaken to determine how complaints are currently processed both directly and indirectly by digital platforms (i.e. which third parties are currently receiving complaints relating to digital platforms).

Conclusion

Communications Alliance looks forward to continued engagement with Treasury, the ACCC and other relevant stakeholders over the Digital Platforms Inquiry, with a focus on the impact of online search engines, social media and digital content aggregators on competition in the media and advertising services markets. We also stand ready to further engage over an economy-wide review of Australia's privacy regime to ensure that Australia's privacy practices are fit for purpose and globally compatible in the digital age.

As highlighted in our submission, Communications Alliance believes that a number of Recommendations contained in the Final Report require significant further analysis, including through a RIS, and discussion as they go well beyond the scope of the Inquiry and imply substantial changes – and potentially unintended consequences – for sectors that were not the intended subject of the Inquiry.

For any questions relating to this submission please contact Christiane Gillespie-Jones on 02 9959 9118 or at c.gillespiejones@commsalliance.com.au.

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