

15 February 2018

By Email: platforminquiry@acc.gov.au

Dear ACCC,

Digital Platforms Inquiry – Preliminary Report

American Express Australia Limited (***American Express***) welcomes the opportunity to comment on the Digital Platforms Inquiry Preliminary Report.

American Express & Trust

American Express is a global payments network with direct relationships connecting consumers, businesses and merchants. It provides innovative payment, travel and expense management solutions for individuals and businesses of all sizes. With a 168-year history built on service, trust and security and with one of the most recognised brands globally, American Express aspires to provide the world's best customer experience every day. American Express has been backing Australians since 1954 and the first American Express card was issued in this market in 1974. Deeply committed to supporting the nation's growth and economic prosperity, we employ more than 1,400 Australians across the country.

American Express prides itself on its trusted brand. Data security and privacy are at the core of this trust and have been key components of the American Express service proposition since its beginning.

American Express has developed industry leading data analytics capabilities which help us run our business, doing everything from keeping customers safe when shopping online through 'best in class' fraud protection, helping them manage their spend and finances to delivering tailored lifestyle experiences.

Scope of Inquiry

The inquiry's terms of reference apply to digital search engines, social media platforms and other platform services. We note that the inquiry was set up to address some widely held concerns about the impact of digital platforms on competition, news content and consumer outcomes.

American Express is however concerned that the recommendations being proposed by the Australian Competition and Consumer Commission (ACCC) to address those issues, specifically the proposed changes to the *Privacy Act 1988* outlined in Chapter 5 (the "Privacy Changes"), go beyond the original scope of the inquiry and would have broader ramifications for all business in Australia and for American Express.

We do not consider that the findings in relation to digital platforms alone, provide a sufficient basis to impose the Privacy Changes on all businesses in Australia. Many businesses in Australia (American

Express included) have forged strong reputations for customer trust and security and take privacy compliance very seriously.

American Express would welcome clarification on the scope and intent of the proposed Privacy Changes. If the intent is to capture the data practices of digital platforms alone, clearly this would not be achieved through changes to the *Privacy Act 1988* but could be achieved by establishing a specific code of conduct for digital platforms (Recommendation 9). A specific code makes the intent and scope clear – It safeguards against unintended consequences that can arise from changes to the Privacy Act that haven't appropriately considered the business model of digital platforms versus the wider economy.

If broader changes to the *Privacy Act 1988* are pursued, we make the following points:

1. Further Consultation Required

American Express submits that the proposed Privacy Changes need to be re-assessed and considered against a broader range of business models within Australia. Consultation should be extended and specific sectors of the economy should be invited for comment.

2. Fragmented Approach to Privacy

American Express notes that there are several other legislative reforms underway in relation to the role of data in the new economy – most relevantly, the Consumer Data Right (CDR). A key feature of the CDR legislative package is the enhanced 'Privacy Safeguards'.

A fragmented approach by government to privacy reform risks creating an inconsistent and operationally difficult privacy framework for business to implement. A more considered and comprehensive approach tied to Australia's economic and trade objectives, is preferable.

3. Data Custodianship & Accountability

American Express believes data responsibility and accountability is a core component of effective privacy legislation; the 'no surprises' principle (that consumers should never be surprised by how their data is being held) should be paramount.

American Express is however concerned by the prescriptive nature of Recommendations 8(a) and (c). There is no evidence that imposing additional disclosure requirements and yet more consent 'tick-boxes' will do anything to ensure better privacy outcomes for consumers. It seems evident from the findings in the Preliminary Report that customers rarely read privacy notices and that decisions around ticking boxes often have more to do with 'convenience' rather than a careful consideration of the contents of a privacy disclosure.

American Express fully supports transparency and openness, but there are limits to what can be achieved in a written disclosure. Prescribing modes of disclosure can result in cumbersome user

journeys and notices that are a source of annoyance to online customers. It will also curb more innovative approaches to transparency by removing business flexibility to consider how best to meet the needs and expectations of customers based on their existing online assets.

American Express submits that changes to the current notification and consent requirements are not needed. If the government does not agree with this approach, we would be willing to engage in further discussion on possible reform. The changes recommended, however, seem to relate to digital platforms. If that is not the intent, consideration needs to be given to broader impacts.

4. Direct Marketing Approach Out of Step

Imposing a blanket 'express consent' requirement for Direct Marketing as is proposed under Recommendation 8(c) would go beyond comparable jurisdictions, including the European Union (EU). In our view, Recommendation 8(c) would substantially exceed EU General Data Protection Regulation (GDPR) requirements in relation to direct marketing. We agree with the ACCC that Australia does not need to adopt the GDPR in identical terms, but it does provide some useful guidance.

Under the GDPR, 'consent' is only one of many bases upon which personal data can be processed. One of the most common bases for processing data is where a business has a 'legitimate interest' in that processing. In relation to direct marketing, the GDPR makes it clear under Recital 47 that:

"...The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest."

Under the GDPR, responsible data holders are empowered to balance business objectives with the needs of customers, having regard to their particular relationship. Australian Laws have always supported that approach – for example the *Spam Act 2003* and the *Privacy Act 1988* currently allow direct marketing for relationships between a business and its customers where marketing would be 'reasonably expected' as part of that particular relationship.

American Express welcomes the opportunity to continue to engage with government on any proposed privacy reform and would be more than happy to discuss any part of this submission in more detail.

Please contact Julian Charters at julian.d.charters@aexp.com or Sarah Wood at Sarah.Wood@aexp.com for further information.