ADMA Association for data-driven marketing & advertising

1 March 2019

Digital Platforms Inquiry
Australian Competition & Consumer Commission

via email: platforminquiry@accc.gov.au

Digital Platforms Inquiry: submission in response to the Preliminary Report

The Association for Data-driven Marketing & Advertising (**ADMA**) is pleased to submit its response to the Australian Competition & Consumer Commission's (**ACCC**'s)s **Digital Platform Inquiry Preliminary Report** (**Report**) on behalf of ADMA and its sister associations, Data Governance Australia (**DGA**) and the Institute of Analytics Professionals of Australia (**IAPA**) (collectively referred to as the "**Associations**").

As the organisation representing its 400+ members with a subscriber base of over 30,000 individuals, many of whom are on the cutting edge of the data revolution, ADMA is the principal industry body for data-driven marketing and advertising in Australia. Data-driven marketing and advertising includes any marketing communication that uses data insights, including personal information, to engage with a consumer with a view to producing a tangible and measurable response. ADMA supports data innovation and the expansion of the responsible use of data in marketing and advertising.

ADMA also acknowledges and supports the submission made by the Australian Association of National Advertisers (AANA).

This submission responds to key issues raised in the Report, focusing primarily on issues relating to data, privacy and measurement. The Associations will also be represented at the ACCC's Digital Platforms Inquiry Privacy Roundtable on 1 March.

Kind regards

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General observations in response to the Report

Our general observations fall into four categories, those pertaining to:

- Scope of the Report
- Duplication of regulation
- Agility of regulatory response; and
- Business impact

Scope of the Report

The Digital Platforms Inquiry was launched with terms of reference that focused on the impact digital platforms have on the state of competition in marketing and advertising services markets. Particularly in relation to the "supply of news and journalistic content, and the implications of this for media content creators, advertisers and consumers".

The breadth and reach of the 378-page Report and its 293 pages of attendant materials went far beyond the Inquiry's original Terms of Reference and Issues Paper. Aside from the expected consideration of competition and market power, the Report delved into and made recommendations with respect to a plethora of issues, including:

- discrimination
- defamation
- privacy
- copyright
- targeted advertising
- consent
- notice and transparency
- unfair contracts
- unequal bargaining power
- advertising algorithms
- consumer awareness and understanding

The scope and length of the Report is, in and of itself, a barrier to engagement as many small and medium sized entities struggle to come to terms with the level of detail. This diverts focus from the Inquiry's original intent and obviates potential collaboration between business and government.

Over a decade ago "red tape reduction" was a key regulatory goal. The Productivity Commission's report "Rethinking Regulation – Report of the Taskforce on Reducing Regulatory Burdens on Business" in January 2006 clearly recognised the concept of "regulatory creep" and included it as a priority area of reform.

We encourage the ACCC to return to the original terms of reference and contain the scope of the Inquiry accordingly. We say this not in dismissal of the issues raised in the Report but with the

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assertion that these issues can be addressed through education and collaboration within the context of existing regulatory provisions.

Duplication of regulation

Australia's regulatory system already contains a number of regulators with overlapping areas of focus. We are already facing additional regulation and regulators with the introduction of the Consumer Data Right and the advent of the National Data Commissioner.

In addition, Australia is still unsure about the impact of the General Data Protection Regulation (GDPR) and now is about to implement APECs Cross Border Privacy Rules (CBPR) System following APEC's endorsement of Australian's application on 23 November 2018.

The Report seeks to address several issues that already have protections in place; for example requirements for consent, transparency and the deletion of data. Australian privacy laws were comprehensively overhauled in 2014 after a lengthy period of consultation and we address this further in our specific responses to Preliminary Recommendations 8, 9 and 10 below.

Issues relating to data access, use and ownership were scrutinised by the Productivity Commission when it undertook a comprehensive analysis of Australia's data eco-system, including data availability and use. The Federal Government released the Productivity Commission's Final Report into Data Availability and Use[1] ("PC Final Report") on 8 May 2017.

The 2018-19 Budget allows $65.1 million between 2018-2022 for new data sharing and release arrangements. These include the proposed Data Sharing & Release legislation and the Consumer Data right as well as several other initiatives. The new legislation will fall within the ambit of the new National Data Commissioner. Submissions regarding the proposed legislation were to be closed on July 2018 however, the consultation process was reopened and is continuing.

Agility of regulatory response

Australian business and the economy are going through a phase of disruption and rapid transformation as the result of new technologies, media convergence, the proliferation of digital media and digital platforms, and the emergence and globalisation of the data-economy. While the impact and disruption of these developments are acutely, and to some extent – more adversely – experienced by Traditional Media Organisations (**TMO**'s), the potential for transformation and growth across the economy is unimaginable.

ADMA submits that any inquiry into the state of competition in the marketing and advertising services market must, as a matter of necessity, take account of the rapid speed of technological improvements and innovations that make the continued disruption and transformation of the market and economy, inevitable. The speed at which technological innovations disrupt the market and economy makes any assessment of market competition difficult because the next disruptive technology is always just around the corner. We anticipate the improvements and innovations in Artificial Intelligence, Augmented Reality and Virtual Reality will be the next wave of disruptive forces that are likely to challenge and change the current state of competition in marketing and

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advertising services. This is likely to be the case for any technology or platform that promotes or increases user experience ("**UX**") and the real-time engagement of users and/or consumers.

The rate of technological change also informs the nature of regulation which is why Australia's latest Privacy Act[2] amendments were principle-based, technology neutral and platform agnostic.
To be responsive to the needs of both consumers and business we urge the government to utilise the regulatory tools currently at its disposal.

Business Impact

The proposed recommendations will add another level of regulatory complexity that may prove to be an untenable burden for many small to medium sizes businesses, charities and not-for-profits. For example, if the introduction of additional regulation means that the average SME spends an additional 15 minutes per week on regulatory compliance at a nominal $50 per hour in business cost this could easily extrapolate to an additional burden of $1 billion or more on the Australian economy. The figure would be far greater if the impact to all businesses was considered.

In addition, as alluded to previously, the globalisation of privacy is fast approaching and this means further disruption and change as Australia addresses the GDPR, APEC's CBPR System and other issues.

Even terminology is an issue as we see an expanding data lexicon across the regulatory framework (for example: data – personal information – personal data – user data).

Of course, the burden on business must always be balanced with need to safeguard consumers however, at first blush it would seem that the Digital Platforms Inquiry might have gone too far. It is still early days, as further consultation and investigation are needed but we strongly encourage the government to consider the important role that both self-regulation and co-regulation play in the regulatory landscape.

If regulation is needed then our focus would be to contain cost whilst balancing the interests of consumers however our contention is that here, at least in general terms, the proposed regulation is not needed as it already exists within our current regulatory framework.

Specific responses to relevant Preliminary Recommendations

Preliminary Recommendation 8 – use and collection of personal information

The amendments to Privacy Act that came into force in 2014 were the culmination of an extended period of consultation following the ALRC's report and recommendations in 2008[3].

The amendments introduced in 2014 included provisions relating to the use and collection of personal information. There are already significant and consistent penalties in place for regulatory

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breaches relating to data and privacy and businesses also face significant reputational damage if a breach occurs or if they fail to address a breach appropriately.

ADMA strongly supports the rights of consumers, this is not an altruistic position. If consumers are not respected and consulted, they will simply take their business, and their data elsewhere.

We believe that rather than focusing on amendments to existing legislation, the government should focus on education, of both businesses and consumers and use of the existing enforcement framework.

The OAIC's own consumer trends feedback shows that consumers do not have a good understanding of their existing rights under the Privacy Act, that they do not read Privacy Policies, and that a large majority of those surveyed did not know that there was a Privacy Commissioner.

Preliminary Recommendation 9 – OAIC Code of Practice for digital platforms

A Code of Practice should not be necessary as existing regulation already addresses privacy protections, misleading and deceptive conduct, unfair terms and other areas of concern raised in the Report.

The proposed amendments should also be considered in the context of the global market. The Privacy Policies of the digital platforms considered by the Preliminary Report have been written in accordance with the requirements of General Data Protection Regulation (**GDPR**) and other international provisions. In order to reflect business operating in a global market, any additional changes to Australian privacy laws should be considered in the global context. Indeed, as previously highlighted, we are already facing amendments as Australia moves to adopt the APEC Cross Border Privacy Rules System.

Regardless of whether there is a Code of Practice, consumers need to understand data practices. This requires a basic level of data literacy – both for consumers and for businesses and their workforces. This can be particularly challenging for SMEs and Not-For-Profits, who may not have the resources to navigate the increasingly complex terrain of leading practice data governance, privacy, and protection. Here lies another opportunity to move forward by providing education to both consumers and businesses to facilitate a shared understanding of the digital environment.

Preliminary Recommendation 10 – serious invasions of privacy

The Australian Law Reform Commission (ALRC) tabled a report [4] to Parliament in 2014 addressing Serious Invasions of Privacy in the Digital Era following an inquiry which addressed both prevention and remedies for serious invasions of privacy.

Australia has taken some small steps to address the recommendations of this ALRC report however, in general the recommendations have not been acted on.

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Our submission is that this issue should be addressed separately from the Digital Platforms Inquiry.

Specific responses to relevant areas for further analysis and assessment

Area 4 – a digital platforms ombudsman

We reiterate our previous comments regarding duplication of regulation.

Area 6 – third party measurement of advertisements served on digital platforms

Data presents the most significant post-industrial opportunity for innovation and value-creation. The types, quantities, and value of data collected and used is vast and ever-growing. Businesses have for a long-time treated data as an asset, which is evident in the significant investment made in data – including the technology, infrastructure, processes and people to support data collection, use, analysis and application.

Google and Facebook, while major players in the commercialisation of data, are not alone in this investment. Major corporations, such as supermarkets, banks, aviation, retailers, insurers, etc. have all made substantial investments into the collection, use, analysis and application of data across their businesses. This has resulted in innovation, new business models, and importantly better and more tailored products and services for consumers. Large corporations are not alone in this investment, with many smaller companies, and in particular tech start-ups, also investing in data.

ADMA submits that as a result of the significant investment that organisations make in data, that data must be viewed as an asset of an organisation. This asset may also include additional intellectual property rights. Algorithms and advanced data analytics are an example of organisational intellectual property. It should also be noted that data and the insights from data analytics simply provides insights to the organisation. Acting on those insights is the responsibility of stakeholders and decision makers within the organisation. Granting organisations a right to access and use the data of those organisations that invest significant resources into data, in effect diverts the assets of one organisation to another and may stifle innovation and competition as organisations will not be incentivised to continue its investment.

In our highly converged media environment, consumers determine when, how and on which platform they access information. Data has become the driving force of most marketing activity as it enables marketers to micro-target across all digital media platforms and ensure that the right message is delivered to the right person at the right time.

ADMA submits that the characterisation that the data owned by Google and Facebook is inaccessible to news and traditional media organisations is somewhat misleading. While the data economy is still in the early stages of its development, the commercialisation and trading of data is not a novel concept or practice. Both Google and Facebook have created a range of data-products and data-

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services, that enable access to specific audiences through their advertising platforms. Advertisers can reach these audiences without having access to the consumer's data. Advertising platforms optimize campaigns based on signals, with advertisers identifying their desired audience characteristics and leaving it to the platforms to target their ads without actually sharing any data. Others such as News Limited, Telstra and the banks operate in the same way, which highlights the reality that most businesses are now data-driven. . In addition, we have also witnessed the emergence of data-brokers, which trade in and sell data. News and traditional media organisations are able to access these troves of valuable information through commercial agreements or through purchasing data-products and services.

Area 7 – deletion of user data

The Privacy Act already contains provisions providing control and access of personal information to consumers. An education and awareness campaign for consumers, highlighting their options and industry practices would of enormous assistance in this regard. For example, there are (and need to be) different rules about retention of customer information in different industries e.g. public health management would require some patient information to be retained in case of an outbreak, product recall and so on.

Suppression lists or "Do Not Contact" records are a prime example of consumer misunderstanding. Consumers often insist that proof be provided that all their details have been deleted and they be provided with an assurance that they never be contacted again. It is simply not possible to do this given the inherent nature of a suppression list. There is an opportunity for business to educate consumers in this and other practices to build trust and understanding.

Area 8 – opt-in targeted advertising

The issue of consent and opting into or out of various channels of communications has already be considered and adopted in Australia's privacy regime. Also, may digital platforms already make provision for consumers to opt-out of targeted advertising. Allowing consumers options for advertising preferences is good business practice and essential for strong consumer sentiment.

Education can also assist. Consumers are starting to understand data is transactional and has valued. For example, where a consumer is using a digital platform for 'free', they would understand that the price they pay is providing their data, and they expect to receive advertising within that platform as part of a value exchange.

Much can be done to educate both consumers and business about this value exchange and establishing a regime of transparency, trust, and enhanced user experience.

Observations regarding ongoing investigations

The Report also references five ongoing investigation sunder the Competition and Consumer Act 2010 (Cth) (**CCA**) including potential breaches of the Australian Consumer Law (**ACL**).

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The investigations relate broadly to the CCA's monopoly provisions (s.46) and various potential breaches of the ACL. Our concerns relate to the latter as the issues raised relating to privacy policies are all matters which can be considered by the Office of the Australian Information Commissioner (**OAIC**) under existing provisions.

Summary

We reserve a level of skepticism that the challenges faced by the disruption and transformation of the news and media industry can most effectively be addressed through additional regulation. The Organisations maintain the view that market-forces can resolve the challenges and issues currently being faced by the unprecedented disruption and transformation of the news, media, marketing and advertising industries. ADMA urges the ACCC to carefully consider any proposed regulatory action in response to this Inquiry that may interfere with legitimate business activities in such a manner as to distort the operation of the free market.

An extensive regulatory framework already exists in Australia. If protections can be improved then this should be achievable within the current regime through collaboration and education, without the need for further regulation.

If these measures are not effective consumer sentiment and market forces should act as key behavioral drivers for business.

Where enforcement is necessary, we encourage regulators to be guided by the current regulatory enforcement pyramid adopted by most Australian regulators. That is to start a dialogue addressing issues and including education and collaboration before moving "up" the pyramid to more stringent enforcement measures.

We encourage the ACCC to return to the original Terms of Reference and use the Inquiry to leverage the input of key stakeholders to form a working group to address issues via an ongoing collaborative dialogue. We would be happy to assist the Inquiry by facilitating this or providing further input.

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[1] Productivity Commission, Productivity Commission Inquiry into Data Availability and Use, Final Report, 8 May 2017.
[2] *Privacy Act 1988* (Cth)
[3] Australian Law Reform Commission (ALRC) - *For your information: Australian Privacy Law and Practice* (ALRC report 108)
[4] Australian Law Reform Commission (ALRC) – *Serious Invasions of Privacy in the Digital Era: Australian Privacy Law and Practice* (ALRC report 123)

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