

Australian Communications and Media Authority response to the Australian Competition and Consumer Commission Digital Platforms Inquiry Preliminary Report

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1. Executive summary

The Australian Communications and Media Authority (ACMA) welcomes the Australian Competition and Consumer Commission's (ACCC) timely and comprehensive Digital Platforms Inquiry preliminary report of December 2018 (the ACCC preliminary report).

We note the ACCC preliminary report reflects several themes identified in the ACMA's earlier submission to the Digital Platforms Inquiry issues paper. It also draws on ACMA research to illuminate changes and challenges in the contemporary media and communications landscape. We appreciate the ACCC's recognition of our current and potential future roles in addressing these challenges.

The ACMA is an independent statutory authority tasked with the regulation of media and communications in Australia. Of specific relevance to this inquiry, the ACMA has primary responsibility for the regulation of media and communications content in Australia. Therefore, this submission seeks to address the sections of the ACCC preliminary report that are related to the regulatory functions of the ACMA's remit.

The ACMA strongly supports the general direction of the ACCC preliminary report. As the inquiry's preliminary recommendations include policy matters for decision by government, this submission focuses on options for implementing the preliminary recommendations, should they be adopted, and outlines several issues for further consideration.

The ACCC has made a clear case for bringing digital platforms into the regulatory framework for content delivery.

Digital platforms emerged as innovative 'start-ups' but have become global behemoths. As the ACCC recognises, these platforms now have significant market power in Australia as a consequence of their dominance in digital advertising and media content, including news.

The ACMA agrees that it is time to consider the areas for—and the scope and form of—regulation of digital platforms operating in Australia.

The case for regulatory intervention is strong in relation to news and journalistic content, given their importance to Australia as a free, democratic society.

The provision of news and analysis of matters of public importance is fundamental to a well-functioning democratic society. It enables informed participation in social, economic and democratic processes.

Digital platforms now have significant influence due to their roles as aggregators, curators and distributors of content, in particular news and journalistic content. However, they are not considered within current arrangements that regulate only traditional media platforms, which historically have been considered the most influential sources of news.

As the ACCC preliminary report observes, the increasing influence and market power of digital platforms mean that regulatory reform is now urgent. A new regulatory framework should cover all producers, aggregators, curators and distributors of news and journalistic content, without interfering with their editorial independence.

The ACMA is intending to undertake more in-depth research into various aspects of news content and distribution: localism, impartiality and diversity of voices in news, and distinguishability and disclosure of paid news content. While the research will be focused on the regulation of news specifically as it relates to the ACMA's current remit, it will necessarily consider news in a wider context of all production and delivery platforms.

A new regulatory framework should be developed that is principles-based, outcomes-focused, based on a communications stack model and allows for different regulatory approaches.

Principles-based

Consistent with the findings and recommendations of the 2017 ACMA Review,¹ the ACMA considers that the reform process should start with agreement on a set of intervention and regulatory design principles to guide the development of the new regulatory framework.

Intervention principles would include that, where market interventions are considered necessary, policy makers should not rely exclusively on ‘black letter’ regulation, co-regulation and self-regulation, but should also consider other options such as direct and co-investment, contracted service delivery, indirect funding (e.g. tax incentives) and facilitation and education programs.

For example, intervention in media markets has been based on a principle of imposing different regulatory expectations on different sources and types of media through the use of the concepts of ‘influence’ and ‘control’. As a consequence, the level of regulation on commercial radio broadcasters is very different to that imposed on community radio broadcasters.

As the ACCC identifies in its preliminary report, digital platforms have significant influence due to their roles as aggregators, curators and distributors of content, in particular news and journalistic content, yet are not considered within established influence measures.

Any new regulatory framework will need to consider whether the ways in which ‘influence’ and ‘control’ are monitored, measured and responded to can be adapted to the new media environment. New and innovative approaches may need to be found.

In addition, regulatory design principles would include establishing clear and simple rules which are applied consistently across technologies to minimise competitive impacts, and providing remedies that are proportionate to the nature of the relevant breach.

Based on enduring concepts

Again, consistent with the ACMA Review, regulatory reform should be guided by a set of enduring policy objectives that continue to remain relevant in the rapidly evolving media environment.²

Outcomes-focused

The ACCC preliminary report identifies that platforms deliver content to consumers through (mostly) automated processes reliant on algorithms and, increasingly, AI and machine learning. These present real challenges in developing regulatory approaches based on prescriptive, process-based rules.

The ACMA considers that a better approach would be to develop regulatory requirements based on what these services deliver, or should not deliver, to consumers.

Based on a communications stack model

The current media regulatory framework is based on a vertical model with mode of delivery determining the nature and extent of regulation. In the current framework, a single piece of content published across different platforms is subject to different content standards and compliance measures.

The ACMA Review proposed that future regulation should model the emerging communications and media landscape as a ‘stack’ with regulation—where called for—targeted across each layer of the stack rather than at particular delivery modes (see diagram in section 3). This would help to overcome the imbalances of sector-based regulation and

¹ Department of Communications and the Arts, *Review of the Australian Communications and Media Authority: Final Report*, 2017, pp. 86–7.

² *ibid.*, p. 88.

achieve greater flexibility to accommodate future technological developments in the media and communications industry.

While the ACCC's inquiry has focused on a new framework for content regulation, the ACMA considers that a single principles-based and outcomes-focused Communications Act should be developed to cover the entire communications stack.

A further independent review of the regulatory framework is not required. Significant thinking has already been undertaken to guide development of a new framework.

While the ACMA strongly supports the ACCC's preliminary finding that the exponential growth of digital platforms demonstrates a need for regulatory reform, it does not consider that a further review is required prior to commencing that program of reform.

There has been significant work undertaken to guide reform of the media and communications sectors over some years, including the 2017 ACMA Review, the ACMA's previous work on 'enduring policy concepts', reviews of the National Classification Scheme (2011 and 2012), the Independent Inquiry into the Media and Media Regulation (2012) and the Convergence Review (2012). This work provides many of the 'building blocks' for reform, with the ACCC's Digital Platforms Inquiry providing the missing piece of the reform puzzle.

Development of a new regulatory framework could be undertaken collaboratively by government and industry with extensive consultation with the Australian public.

A single regulatory framework for content delivered across any platform should have oversight by a single content regulator, the ACMA, in consultation with local and international regulators.

The ACCC's preliminary recommendations 4 and 5 propose that a single regulator be tasked with monitoring the activities of digital platforms in the areas of advertising and news and journalistic content. The ACMA considers that creating a separate regulator for digital platforms appears inefficient and would defeat the purpose of the proposed regulatory reform—to have a consistent approach to the production and distribution of content in Australia.

Given its current remit and experience, the ACMA considers that it is best placed to take on the cross-platform, content-regulation role. With respect to recommendation 4, the ACMA considers it would be well placed to take on any aspects of the proposed role that extend beyond the remit of the ACCC.

Reform could commence under existing regulatory arrangements while legislative amendments are pursued.

The ACMA would work with the Department of Communications and the Arts to identify opportunities to bring digital platforms into the current content regulation regime administered by the ACMA, whether through new or existing legislative provisions.

Existing complementary content functions of the ACMA include: the broadcasting co-regulatory codes of practice; content rules in the *Broadcasting Services Act 1992* (BSA), including specific rules that relate to tobacco, political matter and therapeutic goods; Australian content and local news quotas; and online content regulation, including gambling advertising and interactive gambling.

New content regulation will require close cooperation between Australian regulators and with international counterparts. While most issues raised by the ACCC are clearly categorised as 'content' or 'competition' issues, others, such as the advertising-monitoring proposals under recommendation 4, may span this divide and require close cooperation between the ACCC and the ACMA. An important element of implementing reform will be setting up cooperative processes between the agencies to consider which is best able to address particular issues. This can be achieved by building on the existing memorandum of understanding between the agencies and the proposed cross-appointment governance measures.

The ACMA recognises that the broader policy and regulatory issues raised in the ACCC preliminary report require careful consideration by government. The ACCC has proposed a comprehensive range of practical options for addressing these issues and the ACMA stands ready to provide the necessary support to enable their implementation.

2. Context

2.1 Digital platforms and news content

To date, digital platforms have been lightly regulated internationally, which was an appropriate regulatory disposition when these platforms were emergent. As noted in the ACCC preliminary report, digital platforms have grown exponentially with the result that in 2019 they have revolutionised the way that people communicate, access information and conduct business. They now also have significant market power in Australia as a consequence of their dominance in digital advertising and digital media distribution.

Importantly, the larger digital platforms are now in a position to materially affect the consumption of news and journalistic content in Australia. Digital platforms are more than distributors or intermediaries, assuming a range of functions that overlap with those of media companies, including selecting, evaluating and ranking content.³ Moreover, many of these functions are now at least partly automated—performed by dynamic algorithms that adapt through AI, machine learning and analysis of user data. Trends suggest that the line between digital platforms and media producers will only become increasingly blurred.⁴

The provision of news and analysis on matters of public importance is fundamental to a well-functioning democratic society. It enables informed participation in social, economic and democratic processes. The operation of digital platforms is therefore a matter of substantial social and economic impact, with the production and consumption of reliable and informative news and journalism universally valued as a public good.⁵

This has implications for both the ACCC, as Australia’s competition and consumer regulator, and the ACMA, as the communications and media regulator. Areas for attention include:

- > decreased viability of traditional news-media businesses, especially local and regional businesses
- > increased incentives for media companies to produce commercialised news and entertainment-driven content at the expense of public-interest journalism, especially that relevant to small or local audiences
- > a possible increase in the amount, availability or distribution of unreliable news and information
- > content atomisation and a lack of transparency in the algorithmic delivery of news leading to a reduced ability for consumers to make informed choices about news sources and content
- > a proliferation in the amount of personal data in the hands of digital platforms and other commercial enterprises, along with a lack of consumer control over that data.

2.2 The need for regulatory reform

The ACMA agrees with the ACCC that regulatory reform is required. The current media regulatory framework is based on a vertical model, with the mode of delivery determining the nature and extent of regulation. This model made sense in the pre-digital media environment, but service and content delivery are now largely independent of network technologies. The existing framework is under significant and increasing pressure, leading to regulatory imbalance and difficulty in achieving policy outcomes that satisfy industry, consumers and government.

³ Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Preliminary Report*, 2018, p. 126.

⁴ *ibid.*, p. 128.

⁵ *ibid.*, pp. 243–47.

Over time the media regulatory regime has been incrementally amended to address some of these industry changes. This has extended some consumer protections to new services and mitigated some market distortions. However, it has also reduced the coherence of the regulatory regime and substantially expanded its size, creating additional complexity for industry and consumers.⁶

The increasing conflict between the current legislative framework and the evolving media and communications industry is affecting the ACMA's day-to-day work as it attempts to apply legacy concepts to innovative services and delivery mechanisms that were not envisaged at the time existing core legislation was enacted.⁷ Areas of particular strain include:

- > *Content regulation:* Current regulation distinguishes between broadcasting services and other content delivery services, regulating the former but rarely the latter. It is an approach that is proving less and less aligned with trends in the media industry and with consumer behaviour and expectations. In the current framework, a single piece of content published across different platforms is subject to different content standards and compliance measures.
- > *Media diversity:* Current ownership and control rules for broadcasting, datacasting and newspapers are designed to limit the degree of influence of any one media proprietor in a particular licence or geographic area. This framework struggles to accommodate the proliferation of new forms and suppliers of communications services and media content, and of new technologies which enable content to be generated, distributed and accessed from multiple locations nationally and internationally.

For many years, degree of influence has been a pivotal concept in the regulation of broadcasting and other media. Parliament's express intention, as articulated in the BSA, was that different levels of regulatory control be applied across the range of broadcasting, datacasting and internet services according to the degree of influence that these different types of services are able to exert in shaping community views in Australia.⁸

Despite the significant influence of digital platforms on news and journalistic content noted above, they are not considered within established influence measures.

There are increasingly contested views on the levels of influence of newspapers, commercial television and commercial radio in a digital environment, and on whether diversity in the ownership or control of media assets necessarily correlates with diversity of content and views. As a result, the regulatory approach to influence and control may need to evolve if it is to remain fit for purpose.

As noted by the ACCC, the increasing influence and market power of the digital platforms mean that regulatory reform is now urgent, and the ACCC preliminary report provides key guidance on an approach to digital platforms that can be accommodated within a flexible, cross-sector regulatory model.

⁶ Department of Communications and the Arts, *Review of the Australian Communications and Media Authority: Final Report*, 2017, p. 86.

⁷ Australian Communications and Media Authority, *Broken Concepts*, 2011, p. 6.

⁸ *Broadcasting Services Act 1992*, Section 4.

3. Regulatory reform

In preliminary recommendation 6, the ACCC proposes a separate, independent review to design a regulatory framework that effectively and consistently regulates the conduct of all entities which perform comparable functions in the production and delivery of content, including news and journalistic content, in Australia. This framework would apply regardless of whether the entities are publishers, broadcasters, other media businesses, or digital platforms.

The ACMA supports the ACCC's recommendation for reform of the regulation of Australia's media and communications sector, focusing on the content and applications layer of the communications stack (as discussed below).

However, enough is known about the need for, and potential direction of, reform of the regulation of media and communications in Australia without further review. What is now required is the urgent development of that new regulatory framework through a collaborative process between government, industry and regulators.

The ACMA considers that the reform process should commence immediately with the development of a new regulatory framework informed by:

- > enduring policy objectives in the media and communications environment
- > the model proposed by the ACMA Review that envisaged a media and communications 'stack' of interdependent services and activities rather than vertical industry-specific silos
- > an outcomes-focused approach.

As a starting point, work should commence to establish a set of intervention and regulatory design principles to guide the development of the new regulatory framework:

- > Intervention principles would include that, where market interventions are considered necessary, policy makers should not rely exclusively on 'black letter' regulation, co-regulation and self-regulation, but also consider other options such as direct and co-investment, contracted service delivery, indirect funding (e.g. tax incentives) and facilitation and education programs.
- > Regulatory design principles would include establishing clear and simple rules which are applied consistently across technologies in order to minimise competitive impacts, and provide remedies that are proportionate to the nature of the relevant breach. A consultative approach should be taken to guide development of the rules.

Regulation should be guided by enduring policy objectives

Consistent with the ACMA Review, regulatory reform would be guided by a set of enduring policy objectives that continue to remain relevant in the rapidly evolving media environment.⁹

These were outlined in full in the ACMA's submission to the Digital Platforms Inquiry issues paper and the ACMA notes the particular relevance of the following to the recommendations made in the ACCC preliminary report:

- > *Competition:* Markets should be open and competitive to encourage investment, innovation and diversity of choice. Regulatory settings should embody competitive neutrality across platforms and among market participants and minimise potential market distortions.
- > *Diversity of voices:* There should be a diversity of major information sources and perspectives expressed in the public sphere to foster an informed citizenry and

⁹ Department of Communications and the Arts, *Review of the Australian Communications and Media Authority: Final Report*, 2017, p. 88.

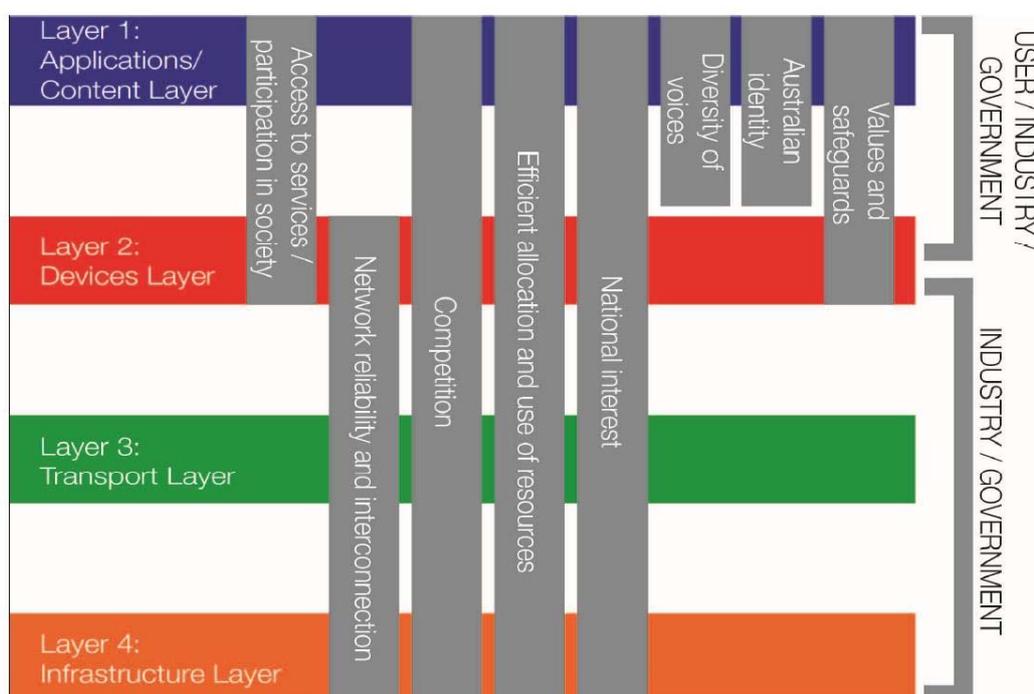
healthy democracy. It is important that these information sources be fair, accurate and transparent.

- > *Values and safeguards:* Services should reflect community standards, meet community needs and be 'fit-for-purpose'. Users should be provided with effective and accessible avenues of complaint and redress if standards are not met. In relation to content, children in particular should be protected from harmful material.

Regulation should be applied across horizontal 'stacks' not vertical industry silos

The ACMA Review proposed that future regulation should model the emerging communications and media landscape as a 'stack' of services and activities, with each layer in the stack providing services to the layer above and depending on the services provided by the layers below.¹⁰ Regulation, where called for, would be targeted across each layer of the stack rather than at particular delivery modes, helping to overcome the imbalances of sector-based regulation and achieving greater flexibility to accommodate future technological developments in the media and communications industry.

The communications layers, with relevant policy objectives illustrated in grey



The ACMA is pleased to note that this approach has also been flagged by the ACCC in its consideration of broad reform for the regulatory framework to allow equitable and effective cross-sector regulation across the content layer of the media and communications industry.¹¹

Regulation should be aimed at delivering specified outcomes not defining process inputs

Finally, the ACMA considers that regulation of content, across all platforms, should be outcomes-based.

The ACCC preliminary report observes that digital platforms deliver content to consumers through mostly automated processes reliant on algorithms, artificial intelligence and machine learning. In the ACMA's view, prescriptive process-based rules and oversight of systems that are technically complex and undergoing constant change may not be optimal, or even possible. Instead, the ACMA recommends that regulatory requirements are developed based

¹⁰ Department of Communications and the Arts, *Review of the Australian Communications and Media Authority: Final Report*, 2016, p. 32.

¹¹ Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Preliminary Report*, 2018, pp. 130, 151.

on outcomes that address what platforms deliver, or importantly, should *not* deliver, to consumers and businesses.

The blurring of industry boundaries by technology will continue to raise challenges for regulation that is targeted to particular sectors. Regulating outcomes across different types of service rather than the processes of particular services would provide greater flexibility in the face of future change.

The ACCC preliminary report identifies some of the public-interest outcomes relevant to the operations of digital platforms. These include:

- > transparency and non-discrimination in rankings of advertising for related and unrelated companies
- > transparency, reliability and diversity in ranking, selection and distribution of news and journalistic content
- > transparency of data collection and usage and opt-in consent provisions
- > effective and timely take-down of copyright-infringing content.

An effective and appropriate monitoring, investigation and enforcement regime aimed at achieving outcomes such as these is feasible. The ACMA has considerable experience in developing and implementing similar risk-informed regulatory approaches in existing areas of regulation.

4. A single content regulation framework and a single regulator

The ACMA notes the ACCC's preliminary recommendation that a single regulator be tasked with monitoring the activities of digital platforms in the areas of advertising and news and journalistic content.

We recommend that this regulator be responsible for content regulation across all sectors, not only for digital platforms. A single regulator to address the content layer of the communications stack would provide cross-industry oversight and avoid industry silos arising from the current regulatory model. The single regulator would work with industry to ensure the effectiveness of self-regulatory and co-regulatory schemes, while recognising the editorial independence of publishers of news and journalistic content.

This notwithstanding, the ACMA notes there may be good reason for targeted areas of diffusion of regulatory responsibility (for example the distinct and key role of the Office of the eSafety Commissioner in coordinating and leading online safety efforts across government, industry and the community).

However, creating a separate regulator for digital platforms would appear inefficient and defeat the purpose of the proposed regulatory reform—to have a consistent approach to the regulation of the production and distribution of content in Australia.

The ACMA considers it is best placed to take on the cross-platform content regulatory role as it is already responsible for a wide range of content regulation of traditional media and increasingly of online platforms. This includes:

- > advertising-related media regulation covering advertising placement by broadcasters, transparency of commercial arrangements and the facilitation of informed choices by advertisers and consumers
- > direct and co-regulatory arrangements directed at delivering news content that is accurate and impartial, that appropriately distinguishes paid content, and that delivers defined levels of local content by broadcasters in regional Australia
- > co-regulation of broadcasting codes that establish program classification requirements, and administering rules such as anti-terrorism standards that are closely associated with the National Classification Scheme
- > control, ownership and diversity rules for media operations
- > rules about the broadcast of 'political matter'
- > administration of the Regional and Small Publishers Innovation Fund
- > public-education campaigns relating to media and communications services including developing influential and widely disseminated materials on consumer safeguards, most recently on captioning, unsolicited communications and telecommunications¹²
- > Australian and children's content quota obligations arising under the BSA, the Australian Content Standard 2016 and the Children's Television Standards 2009
- > investigation of complaints and initiating investigations, compliance and enforcement activities across television, radio and online content services.

¹² See for example ACMA web content [consumer education priorities for 2018-19](#) concerning spam communications including [advice for consumers to stop unwanted communications](#); [consumer education](#) about internet connections and performance; and [consumer resources](#) explaining captioning obligations and complaints-handling.

The ACMA is proposing to further enhance the evidence base of its regulatory approach with active engagement over the next 12 months with aspects of news and current affairs. We are commencing research to explore the concepts of transparency, distinguishability and impartiality, as they are central to the broadcasting codes of practice and other elements of the regulatory framework (including self-regulation) that govern news and current affairs in Australia. Diversity of news is also a key area for exploration by the ACMA, and the research may consider issues associated with local news, which is being reshaped by digital platforms.

The ACMA recommends that the ACCC's final report identify the ACMA as the single content regulator with an expanded remit covering:

- > digital platforms' preferencing of advertising content where this function extends beyond the remit of the ACCC as the competition regulator (preliminary recommendation 4)
- > the ranking of news (preliminary recommendation 5)
- > take-down procedures for copyright-infringing material on digital platforms (preliminary recommendation 7)
- > a nationally uniform classification scheme (preliminary recommendation 6). The ACMA notes that the Australian Law Reform Commission recommended in 2012 that a single agency should be responsible for the regulation of media content under the National Classification Scheme.¹³ Subsequent consideration by the Convergence Review and ACMA Review have suggested the ACMA as the appropriate agency.

The ACCC preliminary report also raises issues for further consideration related to content which the ACMA would also be well placed to undertake, namely funding of news production including through the existing Innovation Fund and conducting and overseeing news-literacy initiatives.

This approach aligns with recommendations of the ACMA Review, accepted by the government, that the ACMA's remit should cover all the layers of the communications market, including infrastructure, transport, devices, content and applications.

In its current remit, the ACMA works closely with national and international government agencies as well as industry peak bodies to negotiate the complexities of the media and communications market to achieve effective policy outcomes.

If the preliminary recommendations are implemented, the ACMA will work closely with relevant agencies, including the ACCC, to monitor the activities of digital platforms to achieve policy objectives. We recognise that some issues are best viewed as either 'content' or 'competition' issues, while others may span this divide and require close cooperation. Proposed cross-appointment measures between the ACCC and the ACMA, as well as the existing memorandum of understanding, will be key factors in building collaborative processes to implement potential regulatory reform.

¹³ Australian Law Reform Commission, *Classification—Content Regulation and Convergent Media Final Report*, 2012, recommendation 5-3.

5. Issues for further consideration

5.1 Supporting choice and quality of news and journalistic content

The ACCC preliminary report seeks input on a proposal to provide greater transparency to consumers about the news they consume on digital platforms. Under this proposal, digital platforms would be required to badge content from news providers that comply with codes of practice which conform to accepted journalistic standards.

The obligation on digital platforms to badge content from compliant news providers could be enforced through a separate co-regulatory code registered with or mandated directly by the ACMA. The ACMA could readily assume the functions proposed by the ACCC, which parallel the ACMA's current functions monitoring the compliance of broadcasters with co-regulatory codes of practice registered under the BSA.

The ACMA considers the proposal strikes the right balance between giving greater confidence to consumers of the credibility of news sources on digital platforms and limiting impact on press independence. While creating a direct relationship between the regulator and digital platforms, the ACCC proposal maintains self-regulation for news agencies. Industry bodies would continue to monitor and ensure compliance with journalistic standards through the mechanism of a complaints-handling system, as the Australian Press Council, for example, currently does for its members.

In considering the regulatory approach for digital platforms, the ACMA notes that under the existing legislative framework within the BSA, the ACMA has a mix of co-regulatory and direct regulatory powers. The ACMA has discretion to investigate complaints made under registered codes of practice where these complaints are not first resolved between the complainant and the broadcaster. It may also conduct investigations of its own accord. Although the BSA does not currently enable regulation of internet services—except where directly specified—due to the effect of the Ministerial Determination No.1 of 2000,¹⁴ the ACMA notes that this determination 'sunset' later in 2019 and there are a number of current areas of specified regulation of internet services under the BSA, including for online gambling advertising.

The ACMA also sees synergies between this code-development function and the ACCC's proposal for the ACMA to work with digital platforms to improve consumer understanding of how platforms curate and display news content. The ACMA stands ready to take on this program, noting that its current role includes public education. Among other matters, an education program could include addressing the findings of the *Digital News Report: Australia 2018*, which identified that the majority of Australian respondents have low or very low levels of news literacy (68%).¹⁵

Further aligned with this proposal is the ACMA's administration of the Regional and Small Publishers Innovation Fund. The objective of the Innovation Fund is to encourage small and regional news publishers to develop and trial sustainable models for the provision of public-interest journalism. This recognises the challenges faced by small and regional publishers in comparison to larger metropolitan publishers.

5.2 Strengthening consent requirements

The ACCC makes a preliminary recommendation (8(c)) to strengthen consent by amending its definition within the *Privacy Act 1988* to require express, opt-in consent wherever it is required under that Act—and by amending the Australian Privacy Principles to require

¹⁴ Determination under paragraph (c) of the definition of 'broadcasting service' (No. 1 of 2000).

¹⁵ Park, S., C. Fisher, G. Fuller, G. & J.Y. Lee, *Digital news report: Australia 2018*. Canberra: News and Media Research Centre, 2018, p. 10.

consent to be adequately informed, voluntarily given, current and specific. This reflects recent changes brought by the European Union's General Data Protection Regulation.

Consistent with the findings in the ACCC preliminary report on consumer consent, the ACMA's May 2018 Report to the Minister on industry self-regulation of commercial electronic messages, the Do Not Call Register and the Integrated Public Number Database (Report to the Minister) also found that consumers expect clear consent arrangements to be in place on connected digital platforms and want to be able to choose the communications they receive.

The Report to the Minister proposed that any new unsolicited-communications framework could take a principles-based approach to regulation to provide a consistent set of consumer safeguards across all communications platforms. This could ensure consumers have improved agency over (and understanding of) the use of their consent, while providing greater clarity to industry.

The report is available at: <https://www.acma.gov.au/-/media/Regulatory-Frameworks-and-International-Engagement/Report/PDF/Report-to-the-Minister-for-Communications-on-self-regulation-of-functions-pdf.pdf>

5.3 Summary of recommendations of the ACCC preliminary report

Preliminary Recommendation	Detail	ACMA response
1—merger law	<p>That section 50(3) of the <i>Competition and Consumer Act 2010</i>, which identifies the factors to be considered in assessing the likely competitive effects of a merger or acquisition, could be amended to make it clearer that the following are relevant factors:</p> <p>(a) the likelihood that an acquisition would result in the removal of a potential competitor, and</p> <p>(b) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition.</p>	The ACMA has no comment on this recommendation.
2—prior notice of acquisitions	The ACCC is also intending to ask large digital platforms (such as Facebook and Google) to provide advance notice of the acquisition of any business with activities in Australia and to provide sufficient time to enable a thorough review of the likely competitive effects of the proposed acquisition.	The ACMA has no comment on this recommendation.
3—choice of browser and search engine	<p>(a) suppliers of operating systems for mobile devices, computers and tablets be required to provide consumers with options for internet browsers (rather than providing a default browser), and</p> <p>(b) suppliers of internet browsers be required to provide consumers with options for search engines (rather than providing a default search engine).</p> <p>The ACCC considers that where options for internet browsers and search engines are presented, no option should be pre-selected.</p>	The ACMA has no comment on this recommendation.
4—advertising and related business oversight	A regulatory authority should be tasked to monitor, investigate and report on whether digital platforms are engaging in discriminatory conduct by favouring their own business interests above those of advertisers or potentially competing businesses.	<p>The ACMA considers it would be well placed to take on any aspects of the proposed role that extend beyond the remit of the ACCC.</p> <p>This function is aligned with the ACMA's existing advertising-related regulatory remit, which is focused on transparency of commercial arrangements and the facilitation of informed choices by advertisers and consumers.</p>

<p>5—news and digital platform regulatory oversight</p>	<p>A regulatory authority could monitor, investigate and report on the ranking of news and journalistic content by digital platforms and the provision of referral services to news media businesses.</p> <p>The regulatory authority could have powers to investigate complaints, initiate its own investigations, make referrals to other government agencies and publish reports and make recommendations.</p>	<p>The ACMA submits that, if the recommendation is accepted, these functions should be performed by a regulator responsible for content regulation across all sectors, not only for digital platforms.</p> <p>The ACMA considers it would be well placed to take on a role as the single content regulator.</p>
<p>6—review of media regulatory frameworks</p>	<p>That the government conduct a separate, independent review to design a regulatory framework that is able to effectively and consistently regulate the conduct of all entities performing comparable functions in the production and delivery of content in Australia (including journalistic content, whether publishers, broadcasters, other media businesses, or digital platforms).</p>	<p>The ACMA supports the ACCC’s preliminary recommendation for regulatory reform of the Australian media and communications sector.</p> <p>The ACMA suggests that no further independent reviews are required to enable the design of a new regulatory framework as the building blocks for potential reform have been well established through previous reviews.</p>
<p>7—take-down standard</p>	<p>That the ACMA determine a mandatory standard regarding digital platforms’ take-down procedures for copyright infringing content to enable effective and timely take-down of copyright infringing content.</p>	<p>The ACMA submits that, if this recommendation is accepted, implementation should be undertaken by the ACMA as the single content regulator.</p>
<p>8—use and collection of personal information</p>	<p>Amendments to the <i>Privacy Act 1988</i> to better enable consumers to make informed decisions in relation to, and have greater control over, privacy and the collection of personal information.</p> <p>Recommendations (a) and (b) are aimed at reducing information asymmetries to improve the transparency of digital platforms’ data practices.</p> <p>Recommendations (c) and (d) seek to provide consumers with stronger mandated controls over the collection, use, disclosure and erasure of their personal information to lessen the bargaining power imbalance between consumers and digital platforms.</p> <p>Recommendations (e) to (g) are measures to increase the deterrence effect of the <i>Privacy Act 1988</i>.</p>	<p>The ACCC’s proposed changes to transparency under the <i>Privacy Act 1988</i> would likely have practical implications for the industries the ACMA oversees. For more detail refer to the discussion in section 5.2.</p>
<p>9—OAIC code of practice for digital platforms</p>	<p>That the OAIC engage with key digital platforms operating in Australia to develop an enforceable code of practice under Part IIIB of the <i>Privacy Act 1988</i> to provide Australians with greater transparency and control over how their personal information is collected, used and disclosed by digital platforms. A code would allow for proactive and targeted regulation of digital platforms’ data collection practices under the existing provisions of the <i>Privacy Act 1988</i>.</p>	<p>The ACMA has no comment on this recommendation.</p>

10—serious invasions of privacy	<p>That the government adopt the Australian Law Reform Commission’s recommendation to introduce a statutory cause of action for serious invasions of privacy to increase the accountability of businesses for their data practices and give consumers greater control over their personal information.</p>	<p>The ACMA has no comment on this recommendation.</p>
11—unfair contract terms	<p>That unfair contract terms should be illegal (not just voidable) under Australian Consumer Law, and that civil pecuniary penalties should apply to their use, to more effectively deter digital platforms, as well as other businesses, from leveraging their bargaining power over consumers by using unfair contract terms in their terms of use or privacy policies.</p>	<p>The ACMA has no comment on this recommendation.</p>
Areas for further analysis and assessment	<ol style="list-style-type: none"> 1. Supporting choice and quality of news and journalism 2. Improving news literacy online 3. Improving the ability of news media businesses to fund the production of news and journalism 4. A digital platforms ombudsman 5. Monitoring of intermediary pricing 6. Third party measurement of advertisements served on digital platforms 7. Deletion of user data 8. Opt-in targeted advertising 9. Prohibition against unfair practices 	<p>Areas 1–3 are addressed in section 5.1 of this paper.</p> <p>The ACMA notes the ACCC’s proposal for a digital platforms ombudsman and recognises there may be a need for independent consideration of complaints from businesses. However, with respect to consumer complaints, there may be overlap with the functions of the proposed regulator if preliminary recommendations 4–6 are implemented.</p> <p>We also note the ACMA’s ongoing work to address scams via technological solutions developed in cooperation with industry.</p> <p>The ACMA has no comment to make on areas 5–9.</p>