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By Email: platforminquiry@accc.gov.au

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Dear Commission,

Submission regarding Digital Platforms Inquiry – Preliminary Report

Thank you for the opportunity to provide a submission on the Australian Consumer and Competition Commission's (ACCC) Digital Platforms Inquiry Preliminary Report (**Report**).

Gladwin Legal is a retail-specialised law firm which acts for a wide variety of small and large business clients, operating both brick and mortar and online retail stores. We are based in Melbourne and work with local, national and international retailers. Our website is www.gladwinlegal.com.au and provides an outline of the types of services that we offer to retailers as well as current news, events and articles relating to the Australian retail industry. We consider that given our depth of experience and integration within the Australian retail industry that it was incumbent on us to make a submission given that a number of the discussions and recommendations set out in the Report will have a profound effect on the retailers with whom we work on a daily basis.

The Report largely focuses on the impact of digital platforms on consumers and media and news organisations, however we thought it important to note the influence and effect of digital platforms such as Facebook and Google, on businesses in the Australian retail sector.

1. Advertising and related business oversight

As specified in the Report, digital platforms with substantial market power, such as Google and Facebook, have a near monopoly over the online advertising market, giving advertisers such as Australian retail businesses little to no bargaining power over advertising terms. Additionally, given their market power and their various commercial interests, there is an incentive for those digital platforms, when providing search results, to favour their own related businesses or businesses with which they have an existing relationship.

In Preliminary Recommendation 4, it is suggested that a regulatory authority should be implemented to monitor, investigate and report on whether digital platforms are engaging in discriminatory conduct by favouring their own business interests. We agree with this recommendation as there should be an effective means to enable businesses to issue complaints or request a review of such practices. Currently the process does not have sufficient transparency to ensure that users are being provided with unbiased results, or if it is transparent, it is so technical and convoluted that everyday users would not understand the algorithms used to report search results. An independent body could provide transparency and clarity for consumers and Australian retailers.

2. Copyright take-down procedures

Background

As recognised by the Report, specific digital platforms have, or are gaining, significant advertising market power. Our focus in this section of the submission will be on Facebook, being one of the key digital platforms identified in the Report, however we note that online marketplace platforms such as eBay can also have a substantial effect on businesses and consumers and should also be considered in relation to these issues.

We have worked with a number of businesses that hold registered and unregistered intellectual property rights in Australia. A number of these clients have experienced difficulties in having digital platforms remove infringing or potentially infringing content despite clear evidence of intellectual property ownership by our clients and infringement by the offending party.

Key issues

As set out in the Report, we agree that digital platforms often lack clear takedown policies and guidelines, and that digital platforms have discretion in selecting which content to remove and how timely such content is removed. Additionally, there seems to be very little incentive for these platforms to action a request to takedown in a timely manner. Further, unless an appeals process is established by that digital platform, there is no avenue for a rights holder to appeal a decision by the digital platform and no means to enforce intellectual property rights against the digital platform itself for any infringement.

Whilst a review of copyright infringement and take down procedures is a welcome first step, we note that there are also very few avenues for enforcement of trade mark and design rights aside from obtaining a court order (which would involve costly and time-consuming court proceedings to obtain). This should be considered, especially given that when a right has a formal registration (such as a registered design, or registered trade mark) it is generally unequivocal, even more so than in copyright infringement, as to which party is being aggrieved.

Additionally, without a formal process, there is the practical issue that intellectual property rights holders have no means to determine who is running an infringing Facebook page and as a result, the takedown

of one infringing Facebook page is often ineffective because another account or page will be created containing the same or similar infringing content.

This is of concern given that, unlike unregistered rights held in copyright, a registered intellectual property right should provide the owner with prima facie exclusive right to use their registration and this should be sufficient to allow for removal of an infringing Facebook business page or eBay listing.

In a similar vein, we have had clients request our assistance in dealing with unauthorised third parties posing as the business or an authorised distributor of the business' products on Facebook, then not delivering the product or delivering low quality imitations of the business' products. We note that digital platforms are not incentivised to deal with these types of pages and they may not always strictly fall under the intellectual property take-down categories.

For example, a Facebook page could use images of our client's product and allege to be selling our clients product. However, if the Facebook business was a scam and did not ship or distribute any product after payment was made it could result in degrading the goodwill and value that our client had built up in its brand. In such example, the response from Facebook was that in the subjective view of Facebook, the business was offering our client's product for sale and had therefore not infringed Facebook policy. Further, there is often no effective process for removal of "scam" business pages, which is a key issue for both consumers and business's protection of goodwill and reputation.

Response to ACCC Recommendations

We appreciate that Preliminary Recommendation 7 (being ACMA take-down standards) is suggested as a short-term remedy and that these issues are to be considered in a broad future inquiry by the ACCC. Nevertheless, our view is that take-down standards for copyright infringement are insufficient to deal with the broad range of intellectual property issues brought about by the significant market power of digital platforms.

In the short-term, Preliminary Recommendation 7 should be extended to cover trade mark and design infringement, as well as scamming and fraudulent pages. These standards should include a system in which a party may be blocked or prevented from using the digital platform if that party creates multiple infringing or scamming accounts or pages (for example, a digital platform could be required to block an I.P. address from creating new accounts and pages).

Further, digital platforms should be required to immediately remove content where a claim has been made based on a registered intellectual property right and then relevant parties may dispute the removal.

In the long-term, we would consider a separate infringement body, such as the UK's IPEC as a possible method of dealing with some of the issues set out above (including allowing for a method for businesses to appeal a digital platform's infringement decision).

3. Unfair contract terms

The ACCC has proposed in Preliminary Recommendation 11, that unfair contract terms be illegal (not just voidable). Although the aim of such recommendation is to prevent digital platforms from implementing unfair contract terms in their privacy policies and other standard form agreements, should the illegality of such terms be extended to all consumer and small business standard form contracts, our view is that this could be a detriment to Australian businesses.

In the consideration of unfair contract terms, a court views a contract in its entirety and not just specific terms in a contract, to determine whether a contract is 'unfair'. This analysis can be subjective as the distinction between an 'unfair contract' and protection of the legitimate commercial interests of a business is not always clear. The result could be that a business inadvertently breaches this provision and attract criminal penalties.

Whilst we would welcome further clarity from the legislature as to which terms would be considered unfair, criminalising such arrangements would be a step too far. Additionally, from a commercial perspective, the threat of having a contract voided, or challenged as unenforceable in open court seems to be a significant detriment to a number of retailers from having unfair consumer contracts.

Further, as these 'unfair' terms are already voidable under the law, consumers and small businesses have protection from the effects of these terms – to then penalise a business when it is not inherently clear whether their contract is 'fair' or 'unfair' would be unduly onerous on businesses.

We appreciate your consideration of this submission and the effect of digital platforms on businesses in the retail industry and would welcome any further discussion or submission on this matter.

Yours sincerely,



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Principal