Submission in response to ACCC Preliminary Report

Digital Platforms Inquiry

Public Version

February 2019

CONTENTS

Section 1. EXECUTIVE SUMMARY

1.1 Optus welcomes the release of the ACCC's preliminary report on the inquiry into the impact of digital platforms on competition in the media and advertising sector (the preliminary report). This report heralds new insights on the role and influence that digital platforms have in producing, disseminating and facilitating access to information and its subsequent impact on competition in downstream markets.

1.2 The preliminary report raises issues concerning the market power of some digital platforms and the impact on advertisers, new media businesses and consumers. Flowing from these issues, a set of 11 preliminary recommendations are proposed. Of these, three relate to the market power of digital platforms; two relate to issues with activities relating to news media organisations and advertisers; a further two relate to regulatory imbalance; and four (with a further seven sub-parts) relate to better informing consumers when dealing with digital platform and improving consumers' bargaining power with the dominant platforms.

1.3 While the issue of digital platforms is relatively new, the regulatory problem that is being examined is not. The fundamental regulatory problem relates to firms that have significant market power (SMP) acting independent of the market and as a result, are acting in a manner contrary to the interest of their consumers. In other words, it is an assessment of abuse of a firm's (or firms') dominant position.

1.4 Optus agrees with the report's focus on addressing the market power of the digital platforms; and in the absence of being able to address it directly, to regulate the behaviour of digital platforms. In so far as the recommendations relate directly to digital platforms' abuse of their dominant market position, Optus does not have any concerns with the proposed recommendations.

1.5 However, problems associated with digital platforms taking advantage of their dominant market position do not justify recommendations that would apply to firms that do not have SMP, or which are in different industries than that subject to this inquiry.

1.6 Optus has concerns with several of the recommendations that arise out of the discussion on digital platforms and consumers; and specifically, recommendations that propose economy-wide reforms on the back of specific problems relating to the market power of dominant digital platforms.

1.7 There is significant potential regulatory and legislative scope creep that could flow from the proposed recommendations. While application to digital platforms may be warranted, the changes should not be applied to businesses and organisations more broadly without appropriate review of the existing frameworks that govern those industries.

1.8 It follows that any changes arising as a result of this inquiry be limited to the digital platforms that have been identified as having SMP and have abused their dominant position to the detriment of consumers and related markets.

1.9 The remainder of Optus' submission will focus on the recommendations that address the privacy protections for consumers in relation to digital platforms.

Section 2. SCOPE OF RECOMMENDATIONS

2.1 The key regulatory problem being examined in this inquiry is the ability of digital platforms to acquire market power and to assess whether there is any evidence of digital platforms that have SMP abusing their dominant position to the detriment of competition, media businesses, journalists and consumers.

2.2 Optus supports the examination of this important regulatory problem in the context of the growing influence of digital platforms in consumers' lives and, increasingly, in the wider economy. We observe that the majority of the preliminary report focuses on this problem. However, Optus is concerned that the discussion on the impact of digital platforms on consumers extends into broad regulatory reforms impacting the whole economy. In other words, the preliminary report recommends reforms to regulations impacting all Australian firms on the basis of the behaviour of two firms with market power. Optus does not support such an approach.

2.3 This section looks at:

(a) Issues relating to the digital platforms' misuse of consumer data and unequal bargaining positions, which arises due to the dominant position of the digital platforms; and

(b) The lack of justification to impose economy-wide changes on the basis of the abuse of dominant position of two firms.

Issues raised relate to abuse of dominant position by digital platforms

2.4 The preliminary report examines the impact digital platforms have on consumers. The report conducts extensive analysis looking at the manner in which consumers interact with digital platforms, including provision of consent and attitude to use of data by digital platforms.[1] The primary report makes clear that the analysis is focused on the interaction between digital platforms and consumers. This focus has been confirmed by the ACCC in other fora.[2]

2.5 The key market failure that may give rise to regulatory intervention is well summarised in the preliminary report, where it is stated "the ubiquity of digital platforms means many consumers feel they have to join or use these platforms, and agree to their non-negotiable terms, in order to receive communications and remain involved in community life."[3]

2.6 This market power led to the key finding that consumers are unable to make informed choices over the amount of data collected, and its use, by the digital platforms. This is due to the market power of the digital platforms resulting in unequal bargaining power and the information asymmetries that exist between digital platforms and consumers.[4]

2.7 Consequently, the ACCC considers that the current regulatory framework, including privacy laws, does not effectively deter certain data practices of digital platforms that exploit the information asymmetries and the bargaining power imbalances that exist

[1] ACCC, 2018, Digital Platforms Inquiry, Preliminary Report, December, Chapter 5.
[2] Sims, 2018, Speech to the Australian Conference of Economists.
[3] ACCC, 2018, Digital Platforms Inquiry, Preliminary Report, December, p.7
[4] ACCC, 2018, Digital Platforms Inquiry, Preliminary Report, December, p.13

between digital platforms. The ACCC claim that its preliminary recommendations aim to better inform consumers, and improve their bargaining positions, when dealing with digital platforms.[5]

2.8 Optus submits it is important to note the reference to digital platforms in all of the above statements. The ACCC has made no observation in relation to the privacy regime across the broader economy – or specifically, outside of dominant digital platforms. Notwithstanding this, the ACCC is proposing regulatory action that would impact the broader economy. This is the key concern of Optus – the making of recommendations that would impact sectors and firms that are not subject to this inquiry – and for which there is no analysis or justification contained within the preliminary report.

Economy-wide reforms are not warranted

2.9 The preliminary report contains one paragraph that asserts the observed behaviour of digital platforms also reflects the practices of many other businesses in financial, communications, retail and other sectors. The ACCC concludes that the detriments identified in relation to digital platforms "may extend" to other industries.[6]

2.10 Optus is concerned with this paragraph. We observe no evidence has been referenced in the report that would justify such a statement. The extension of recommendations to firms other than dominant digital platforms is without merit and appears disproportionate to the evidence before the ACCC. The assertion also fails to recognise the key difference between digital platforms and other firms in the economy – namely, the presence of market power and the ability to abuse dominant positions. As outlined above, it is the market power of the digital platforms that results in unequal bargaining power and the information asymmetries that exist between digital platforms and consumers.[7] In the absence of such market power, it is not clear that the identified problems would exist.

2.11 In addition, it is not clear whether proposing economy-wide changes to the privacy regime is consistent with the terms of reference. The terms of reference require the ACCC to inquire into the impact of platform services on the state of competition media and advertising markets, and the implications of this for media, advertisers and consumers.[8] It is difficult to see how the terms request the ACCC to undertake economy-wide reforms to the privacy regime.

Industry-specific data regulations

2.12 The preliminary report does not refer to the number of industry-specific regulations that deal with the collection and sharing of information. Further, it is not clear how the preliminary report envisages how the economy-wide recommendations would interact with existing obligations.

2.13 The telecommunications industry is subject to a range of industry-specific data obligations relating to the collection and sharing of data. For example, Part 13 of the *Telecommunications Act 1997* creates offences for the use or disclosure of any

[5] ACCC, 2018, Digital Platforms Inquiry, Preliminary Report, December, p.13
[6] ACCC, 2018, Digital Platforms Inquiry, Preliminary Report, December, p.223
[7] ACCC, 2018, Digital Platforms Inquiry, Preliminary Report, December, p.13
[8] Ministerial Direction for Inquiry into Digital Platforms, December 2017.

information or document which comes into the possession of carriers or carriage service providers (CSPs) in the course of business, where the information relates to:

(a) the contents or substance of a communication that has been carried by carriers and CSPs (delivered or not);

(b) the contents or substance of a communication that is being carried by a carrier or CSP;

(c) carriage services supplied, or intended to be supplied, by carriers and CSPs; or

(d) the affairs or personal particulars of another person.

2.14 The maximum penalty is 2 years imprisonment and/or $13,200 fine. Part 13 provides for a limited number of permissible uses (relating to public safety and security) and requires annual compliance reporting.

2.15 A further example is how the proposed right to erasure would interact with data collection and storage obligations of carriers under data retention scheme of the *Telecommunications (Interception and Access) Act*. This scheme requires providers of telecommunications services in Australia (service providers) to collect and retain specified types of telecommunications data for a minimum period of two years. The preliminary report does not contain a discussion on how the right to erasure would interact with the data retention scheme.

2.16 Further analysis should be undertaken to fully assess how the preliminary recommendations that propose economy-wide changes interact with existing regulations and obligations.

2.17 In general, Optus holds strong concerns over the potential regulatory and legislative scope creep the proposed changes are designed to address. While its application to digital platforms may be warranted, the changes should not be applied to businesses more broadly without appropriate review of the existing frameworks that govern those industries. It follows that any recommendation made be limited to the digital platforms and markets subject to this inquiry.

Section 3. COMMENTS ON SPECIFIC RECOMMENDATIONS

3.1 The preliminary report raises issues concerning the market power of some digital platforms and the impact on advertisers, new media businesses and consumers. Flowing from these issues, a set of 11 preliminary recommendations are proposed. Of these, three relate to the market power of digital platforms; two relate to issues with activities relating to news media organisations and advertisers; a further two relate to regulatory imbalance; and four (with a further seven sub-parts) relate to better informing consumers when dealing with digital platform and improving consumers' bargaining power with the dominant platforms.

3.2 This section outlines Optus' concerns with the preliminary recommendations arising out of chapter five of the report.

3.3 As discussed above, Optus' concerns focus on the application of the preliminary recommendations on sectors of the economy which are not subject to this Inquiry; and for which no specific preliminary findings have been made. There is no nexus for recommendations for amendments to the Privacy Act, arising from the conduct digital platforms, to apply to other businesses and organisation that were not considered within the scope of this Inquiry.

3.4 Optus agrees there is a stronger case for the establishment of a Privacy Code of Practice for digital platforms to be developed. This would allow for a more proactive and targeted regulation of digital platforms' data collection practices under the existing provisions of the Privacy Act.

3.5 Optus submits that it is premature to make changes to the Privacy Act where it applies more broadly than just to digital platforms. This is particularly the case where there has been no analysis undertaken on the extent of the problem or the concerns as it applies to other organisations and industries.

3.6 In addition, we observe that many of the proposed recommendations reflect practices and requirements similar to that imposed in Europe under its General Data Protection Right (GDPR). It is concerning that the ACCC is proposing to adopt significant reform, largely replicating European law, without the commensurate assessment of its suitability to the Australian economy. Optus does not support the introduction of GDPR-like obligations via an inquiry into digital platforms.

3.7 These measures and their intent are further discussed below.

Strengthen notification requirements – recommendation 8(a)

3.8 Recommendation 8(a) proposes to introduce an express requirement that the collection of consumers; personal information directly or by a third party is accompanied by a notification of this collection that is concise, transparent, intelligible and easily accessible, written in clear and plain language (particularly if addressed to a child), and provided free of charge.[9]

[9] ACCC, 2018, Digital Platforms Inquiry, Preliminary Report, December, p.225

3.9 The intent of this recommendation is to seek to reduce the information asymmetry between digital platforms and consumers. Optus notes this information asymmetry arises due to the market power of the digital platforms.

3.10 The Privacy Act currently does not expressly prescribe notification requirements for organisations collecting information on Australian consumers. It is currently a voluntary requirement for organisations under the APP to seek to disclose this information to consumers at its discretion. Nonetheless, the application of the current APP Guidelines issued by the OAIC is sufficient and the Information Commissioner already has enforcement powers to investigate any misuse of personal information and respond to privacy breaches.

3.11 While, the APP Guidelines may not be necessarily prescriptive in nature, they already incentivise positive changes to the handling of personal information by organisations. For instance, Optus has submitted an enforceable undertaking to the OAIC and is acting on it to ensure that it *must not do an act, or engage in a practice, that breaches an Australian Privacy Principle.* This includes complying with the enforcement powers by the Information Commissioner to conduct an assessment relating to the APPs.

3.12 The Preliminary report suggests that changes to APP 5 be considered. In particular, APP 5 should specify the type of information that must be set out in the notification including:

(a) The identity and contact details of the entity collecting the data;

(b) The types of data collected and the purposes for which each type of data is collected; and

(c) Whether the data will be disclosed to any third parties and, if so, which third parties and for what purposes.[10]

3.13 Optus does not consider that the proposed changes are justified across the whole economy.

3.14 For example, the need to provide consumers with information on the secondary (or further) processing of data collected will impose additional burden on businesses. While this may increase data transparency, the benefit of this additional notification may be limited if the information relates to anonymised or de-identified data; or if consumers are already notified that some data may be further processed on a de-identified basis.

3.15 This is evident through the recent review of privacy policies across the telecommunications industry, where service providers already do provide information on the secondary purposes. Optus has also recently updated their privacy policy to make it more easily understood and transparent.

3.16 In terms of breach notifications, the Notifiable Data Breaches (NDB) scheme requires all entities with obligations to secure personal information under the Privacy Act to notify individuals whose personal information is involved in a data breach that is likely to result in serious harm. Entities must also notify the OAIC within the specified timeframes.

3.17 The NDB scheme, which commenced on 22 February 2018, is a key transparency measure, reinforcing organisations' accountability for personal information security. During the 12-month period to 30 June 2018, the OAIC received 305 data breach

[10] ACCC, 2018, Digital Platforms Inquiry, Preliminary Report, December, p.227

notifications under the NDB scheme and 174 voluntary notifications. By comparison, in the 2016–17 financial year, the OAIC received 114 voluntary data breach notifications.[11] This suggests that the current arrangements are working, and it would be premature to support any changes to the current approach.

3.18 Importantly, the ACCC has made no attempt to identify the economy-wide problem it is trying to address, nor has the ACCC proposed regulatory and non-regulatory options, nor has the ACCC assessed the costs and benefits of each option. Consequently, Optus does not believe that this proposed recommendation is justified on the evidence presented in the preliminary report.

Introduce an independent third-party certification scheme – recommendation 8(b)

3.19 Recommendation 8(b) proposes an independent third-party certification scheme, requiring certain businesses, which meet identified objective thresholds regarding the collection of Australian consumers; personal information, to undergo external audits to monitor and publicly demonstrate compliance with these privacy regulations through use of a privacy seal or mark. The parties carrying out such audits would first be certified by the OAIC.

3.20 There are currently no provisions under the Privacy Act for independent third-party certification or audits of APP entity's data practices. Powers to conduct any assessment or audit of privacy protections already exist and remain under the remit of the Australian Information Commissioner of the OAIC. This is sufficient and should not change.

3.21 The proposed independent certification scheme would include:

> *The establishment of an independent certification mechanism and use of a data protection seal or mark could significantly increase the transparency of an organisation's data practices by enabling Australians to quickly assess the level of data protection offered by an APP entity.*[12]

3.22 We note this reflects Article 42 in the GDPR which similarly allows for the introduction of a certification scheme to be established on the basis that the certification is voluntary and available via a transparent process. However, the effectiveness of this scheme is yet to be observed. Accordingly, should the ACCC wish for this to be introduced, the certification should be voluntary as per the GDPR.

3.23 Optus questions the justification for the establishment of this scheme across the whole economy at this early stage of consideration. The preliminary report indicates a potential hierarchy at Figure 5.18, however this does not provide any supporting rationale on why it should be introduced. As it stands, a third-party accreditation body simply adds additional regulatory barriers and compliance costs onto businesses with no observable benefit. No evidence has been presented that this preliminary recommendation promotes beneficial outcomes sufficient to justify the large administrative and compliance costs.

3.24 The combined use of existing APPs, including opt-out arrangements, enforceable undertakings and privacy assessments sufficiently demonstrate that privacy protections are being taken seriously. The effectiveness of any external certification scheme remains to be observed, but nonetheless should be voluntary.

---

[11] OAIC, Annual Report 2017-18, p.9
[12] ACCC, 2018, Digital Platforms Inquiry, Preliminary Report, December, p.228

3.25 Furthermore, the ACCC has recognised that these issues could also be implemented as part of a Privacy Code of Practice applicable only to digital platforms as set out in Recommendation 9. Importantly, a code would allow for proactive and targeted regulation of digital platforms' data collection practices under the existing provisions of the Privacy Act. Optus would not object to additional requirement being imposed specifically on digital platforms with SMP.

Strengthen consent requirements – recommendation 8(c)

3.26 Recommendation 8(c) proposes to amend the definition of consent to require express, opt-in consent and incorporate requirements into the APPs that consent must be adequately informed (including about the consequences of providing consent), voluntarily given, current and specific. This means that settings that enable data collection must be pre-selected to 'off'. The consent must also be given by an individual or an individual's guardian who has the capacity to understand and communicate their consent. It is not clear that this recommendation adds anything more than currently exists. For example, current arrangements under APP 7 already allows an individual to opt-out of direct marketing and also opt-out of using their personal information for direct marketing by other organisations.

3.27 Consent is relevant to the operation of many information processing activities.

3.28 However, there often exists a compromise between consumers and their use of digital platforms that may prevent a consumer from making informed choices that align with their privacy and data collection preferences. For example, the tendency to use clickwrap agreements with take-it-or-leave-it terms that bundle a wide range of consents. This reflects the market power of digital platforms. It is not clear whether such problems arise where there is no market power, and where consumers voluntarily give permission when choosing between competing providers of services.

3.29 Optus notes that an important reason for distinguishing between 'personal information' and 'non-personal information' is because privacy protections generally apply only to user data that constitutes 'personal information'. That is, the Privacy Act only protects data within its definition of 'personal information', which is 'information or an opinion about an identified individual, or an individual who is reasonably identifiable'.

3.30 Current consent requirements are only required where personal data is collected in limited circumstances as set out under several APPs. These include: the collection of sensitive personal information (AAP 3); the use or disclosure of personal information for a secondary purpose (APP 6); the use or disclosure of personal information or sensitive personal information for direct marketing purposes (APP 7); and the disclosure of personal information to an overseas recipient (APP 8).

3.31 The ACCC highlights concerns that the definition for 'consent' is not consistently applied, and in many cases, 'implied consent' can be considered equivalent to 'express consent'. This issue is further conflated because despite the significance of the distinction between 'personal' and 'non-personal' information, digital platforms tend to use inconsistent definitions of 'personal information' or do not define the term at all. These definitions of 'personal information' also do not match the definition of 'personal information' under the Privacy Act.

3.32 Optus observes that the problems the ACCC discuss in the preliminary report relate to the behaviour of digital platforms – and specifically, the ability to do so because of the market power of some digital platforms. It is not clear that absent market power, the behaviours observed by some digital platforms would be sustainable. Further, it is not clear whether this behaviour extends across the whole economy.

3.33 Optus supports the current approach in the Privacy Act, which balances the need to protect privacy with the benefits that arise for both consumers and businesses, from access to non-personal data. Optus is concerned that the preliminary report is proposing fundamental change to the existing privacy laws without due regard to its impact across the economy. We repeat that the preliminary report does not present any evidence that would support such a conclusion.

Enable the erasure of personal information – recommendation 8(d)

3.34 Recommendation 8(d) proposes to enable consumers to require erasure of their personal information where they have withdrawn their consent and the personal information is no longer necessary to provide the consumer with a service.

3.35 Optus does not support this recommendation. Optus is concerned that this recommendation, when applied to other sectors of the economy, could lead to substantial detriment. While there is a general view that information should not be kept for longer than necessary, some records must be kept for a certain period of time in accordance with other legislation. This is particularly the case for a number of organisations where there may be industry specific legislation and regulations that require that information be stored and/or retained for a specified period or under specific circumstances. For example, the data collection and storage obligations of carriers under data retention scheme of the *Telecommunications (Interception and Access) Act* scheme requires providers of telecommunications services in Australia (service providers) to collect and retain specified types of telecommunications data for a minimum period of two years. The preliminary report does not contain a discussion on how the right to erasure would interact with the data retention scheme.

3.36 There are currently no provisions under the Privacy Act for the 'right to erasure', with the exception that under APP 11, entities must take reasonable steps in the circumstances to destroy the information or to ensure that the information is de-identified. Optus submits that this is sufficient and protects the interest of individuals. We also note that this recommendation goes beyond the corresponding GDPR article 13, which also requires that the entity must inform the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period.[13]

3.37 Optus observes there is limited justification for such a change to be applied more broadly to sectors outside of digital platforms. We note that this recommendation could have significant implications if applied to the whole economy, and as such, cannot be justified based on the preliminary report.

Increase the penalties for breach – recommendation 8(e)

3.38 Recommendation 8(e) proposed to increase the penalties for breaches of the Privacy Act to at least mirror the increased penalties for breaches of the ACL.

3.39 Optus submits that this recommendation is disproportionate to the identified problem. The proposed remedy is even more disproportionate when applied to all sectors of the economy. Optus is not aware of an economy-wide systemic non-compliance with current privacy laws sufficient to justify such a penalty.

[13] GDPR, Article 13(2)(a)

3.40 Further, we note that no mention is made of other sector-specific legislation which provides remedies against data breaches. Optus submits more analysis needs to be undertaken before this recommendation can be justified.

3.41 We observe that there is insufficient evidence to justify any change to the penalties framework that currently exists within the Australian framework.

Introduce direct right of action for individuals – recommendation 8(f)

3.42 Recommendation 8(f) proposes to introduce direct right of action for individuals to bring actions for breach of their privacy under the Privacy Act. Optus is concerned that this recommendation is proposed without reference or analysis as to its impact to businesses other than digital platforms.

3.43 Optus observes that current arrangements already exist for individual consumers to seek redress under the Privacy Act. For example, individuals have the ability to seek an injunction for breach of the Privacy Act; and lodge a complaint with the OAIC. Moreover, communications providers are covered by Part 13 of the Telecommunications Act 1979 in relation to their use and disclosure of personal information. Under this part, penalties include criminal sanctions of up to two years imprisonment.

3.44 Optus repeats that the case for increased penalties under the Privacy Act has not been made out with regards to application to the whole economy.

Introducing a Privacy Code of Practice for digital platforms is more practical

3.45 Recommendation 9 proposes that the OAIC engage with key digital platforms operating in Australia to develop an enforceable code of practice under Part IIB of the Privacy Act 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 Privacy Act.

3.46 The code of practice should contain specific obligations on how digital platforms must inform consumers on how to obtain consumers' informed consent, as well as appropriate consumer controls over digital platforms' data practices. The ACCC should also be involved in the process for developing this code in its role as the competition and consumer regulator.

3.47 The preliminary report identifies several issues to be covered by this Code of Practice:[14]

(a) Obligations for digital platforms to address information asymmetry regarding how personal information is collected, used and shared by digital platforms;

(b) Obligations to ensure consumers are better informed and have more control over the collection, use and disclosure of their personal information; and

(c) Obligation to help prevent against the harms that are particularly suffered by vulnerable consumers through the collection of their personal information.

3.48 While the preliminary report notes there are strong complementarities between the proposed amendments to the Privacy and development of this proposed code, this does

[14] ACCC, 2018, Digital Platforms Inquiry, Preliminary Report, December, p.234

not mean that the introduction of the proposed code must be conditional on changes to the Privacy Act being introduced.

3.49 Rather, the operation of a digital platform-specific code will more appropriately (and directly) address the concerns raised in this Inquiry without risking any unjustified change and unintentional consequence to the application of the Privacy Act and APPs to other organisations and industry sectors. This has also been recognised by the ACCC:

> *Likewise, by providing obligations more specific than those under the APPs, it will be easier for digital platforms, and regulators, to identify when data practices are below the standard expected from the privacy regulation.* [15]

3.50 Optus therefore agrees that introduction of a prescribed industry code would also serve to provide clarity to digital platforms on how they can communicate their data use practices to consumers, thereby reducing uncertainty in any information flows between the consumer and digital platform relationship.

3.51 The use of an industry code would address our concerns over the potential regulatory and legislative scope creep the proposed legislative changes are designed to address. While the application of these changes to digital platforms may be warranted, the changes should not be applied to businesses and organisations more broadly without appropriate review of the existing frameworks that govern those industries. It follows that any changes to arise as a result of this inquiry only be limited to the digital platforms and markets subject to this inquiry.

3.52 As a result, Optus considers the proposed recommendation to develop an enforceable code of practice is a more practical recommendation to address the concerns raised in this Inquiry than making direct amendments to the Privacy Act.

[15] ACCC, 2018, Digital Platforms Inquiry, Preliminary Report, December, p.234