20 February 2018

By email: platforminquiry@accc.gov.au

Australian Competition and Consumer Commission
Level 20, 175 Pitt St
Sydney NSW 2000

Dear Sir / Madam

ACCC Digital Platforms Inquiry – submission in response to Preliminary Report

This is a submission by REA Group Limited (**REA**) to the Australian Competition and Commission (**ACCC**) Digital Platforms Inquiry (**Inquiry**) following the publication of the ACCC's preliminary report on 10 December 2018 (**Preliminary Report**).

REA thanks the ACCC for the opportunity to provide additional comment to the Inquiry in response to the Preliminary Report.

As the ACCC is aware, REA does not compete with the "global platforms" (as that term is defined in the Inquiry) in the distribution of news and journalistic content and related advertising services. Accordingly, this submission does not seek to address many of the key findings and recommendations of the Preliminary Report, including in relation to impacts on news media businesses, and the choice and quality of news and journalistic content.

However, as a customer and also a rival in the provision of digital property advertising services, REA agrees with the ACCC's preliminary views that both Google and Facebook:

(a) have market power in their respective spheres (Google in the supply of online search services, online search advertising services and news media referral services, and Facebook in the supply of social media services, display advertising services and news media referral services);

(b) could use their market power to favour their related businesses, and discriminate against others, including by manipulating their respective search engine and social media algorithms; and

(c) could also use their market power to foreclose competitors in markets for the supply of specialised services, such as digital property advertising services, by leveraging their relatively large databases and/or manipulating algorithms to restrict referral traffic to other suppliers of those specialised services.

REA also agrees with the ACCC's preliminary view that, given the above, it is appropriate to closely monitor Google's and Facebook's conduct and rigorously enforce the *Competition and Consumer Act 2010* (Cth) (**CCA**) where appropriate.

In that context, REA would like to make a number of observations regarding the Preliminary Report's recommendations.

1 Proposed merger factor reforms

Potential competitors

Under Preliminary Recommendation 1, the merger factor in section 50(3)(h) of the CCA would be amended to refer to "the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor *or potential competitor*".

REA has the following observations regarding this recommendation.

(a) (**Confusing terms of amended merger factor**) First, the precise meaning of the amended merger factor is unclear. REA assumes that the ACCC intends for the amended merger factor to cover either the removal of an *existing* competitor that can be characterised as vigorous and effective, or the removal of any merely potential competitor. However, in the terms currently proposed, the amended merger factor may be easily misread as requiring consideration of whether a merely potential competitor would, if it entered a relevant market, be likely to be vigorous and effective (indeed, that approach would be more in keeping with the policy behind the merger factor in section 50(3)(h) of the CCA, which recognises that an acquisition of a vigorous and effective competitor is more likely to result in a substantial lessening of competition).

(b) (**Disproportionate emphasis on potential competitors**) Second, assuming REA's interpretation of the ACCC's intention above is correct, the amended merger factor would place a disproportionate emphasis on potential competition. The merger factor in section 50(3)(h) rightly focuses on acquisitions in which a vigorous and effective (or "maverick") firm would be removed and is not directed to every transaction involving competitors. Under the ACCC's proposal, however, potential competitors in general would effectively have the same status in merger analysis as existing mavericks.

(c) (**More speculative approach**) Third, the amended merger factor would require the ACCC to be significantly more speculative about the likelihood of new entry (and possibly also about the likelihood that such entry would result in a vigorous and effective competitor – see above), unnecessarily complicating and lengthening the analysis. In this respect, the ACCC is right to recognise the "difficulty in reviewing acquisitions of nascent competitors and predicting the likely future in the absence of the proposed acquisition" (see Preliminary Report, page 63). However, the ACCC's proposal goes beyond even that because the amended merger factor would be relevant to acquisitions of targets that are not even nascent (i.e., actual, albeit emerging) competitors but merely potential competitors at some theoretical level.

(d) (**Unnecessary complexity**) Finally, to the extent that the amended merger factor requires a more speculative approach, it would be particularly likely to unnecessarily complicate and lengthen merger analysis in relation to dynamic markets and/or where barriers to entry/expansion are relatively low. In such markets, it may be possible to characterise a large number of targets as at least potential competitors (e.g., existing players in various adjacent, upstream or downstream markets), none of whom would be likely to enter the relevant market in the counterfactual (or be a vigorous and effective competitor even if they did).

Data

Preliminary Recommendation 1 also proposes a new merger factor in a new section 50(3)(j) of the CCA which refers to "the amount and nature of data which the acquirer would likely have access to as a result of the acquisition".

The Preliminary Report provides no compelling justification for such a new and largely industry-specific merger factor. While it may be acknowledged that the ability to gather and manipulate large datasets can be an important competitive advantage and a relevant factor to consider in some mergers, there are many other unrelated factors of equivalent importance in the same or other mergers that are not addressed by a specific merger factor – and the ACCC has not clearly articulated why data issues warrant special treatment in this respect.

2. Oversight of advertising and related businesses

Preliminary Recommendation 4 envisages a regulatory authority and regime to monitor, investigate and report on whether vertically integrated digital platforms (potentially subject to a $100 million per annum revenue threshold) are discriminating in favour of their related businesses.

Preliminary Recommendation 4 is expressed to apply to "digital platforms", which in the context of the Inquiry are defined as search engines, social media platforms and digital content aggregation platforms. However, it is conceivable that such a regime could, initially or in time, be legislated to apply to other businesses, including large suppliers of specialised advertising services such as REA.

The regime would be likely to impose significant additional compliance costs on relevant businesses (e.g., the costs associated with regularly providing information/documents to the regulatory authority and in responding to investigations as they arise). In that context, REA would be deeply concerned if it were to be subject to the regime, particularly in circumstances where specialised advertising markets were outside the scope of the Inquiry and the ability and incentive for participants in those markets to engage in discriminatory conduct was not explored or addressed in the Preliminary Report.

Accordingly, REA considers it critical that, in its final report, the ACCC explicitly recommends that businesses that are not "digital platforms" within the terms of the Inquiry should not be subject to any new regulatory regime. This would provide an important signal to government not to introduce overbroad reforms that are not specifically justified by the Inquiry's findings.

3. Breadth of proposed privacy changes

The proposed changes to Australia's privacy regime set out in Preliminary Recommendation 8 are significant and incorporate a number of underlying principles that are based on the European Union (**EU**) General Data Protection Regulation (**GDPR**).

While REA fully supports a privacy and data regime that is transparent and which lessens bargaining imbalances and information asymmetries, REA has concerns with implementing changes to Australia's privacy regime that are based on the GDPR in the manner proposed in Preliminary Recommendation 8, for the following reasons.

(a) (**Lack of guidance**) As noted in the Preliminary Report, the GDPR has only recently been implemented and the interpretation and practical effect of key provisions are still being established. The EU regulator guidance is also still in the process of being developed. REA considers that it would be premature to

amend key aspects of Australia's privacy regime in line with the GDPR until its practical effect is more clearly understood (including its impact on EU businesses and consumers). In particular, REA is concerned that there are likely to be unintended consequences associated with adoption of the GDPR which have not yet come to light and which may need to be addressed in an Australian context prior to the implementation of GDPR-style obligations in Australia.

(b) (**Unanticipated compliance costs**) A number of the amendments that are proposed in Preliminary Recommendation 8 are likely to require businesses to re-architect key systems. For example, the right for consumers to require erasure of their personal information (which is akin to the GDPR "right to be forgotten") will require organisations to undertake a detailed analysis of the relationship between key data sets to ensure that personal information can be clearly separated from other information, and erased as required. It is unlikely that Australian businesses will have accounted for these and other compliance costs so soon after the adoption of the GDPR in Europe. This may also result in businesses incurring additional costs as multiple iterations of system re-architecture are required as the impacts of the GDPR becomes clearer over time.

(c) (**Further consultation required**) REA understands the rationale which underpins some of the proposals in Preliminary Recommendation 8. Given the breadth of the changes that have been proposed, however, and the potential application of these changes to all organisations, rather than just digital platforms, REA is concerned that their full potential impact has not been considered across the broader economy (with appropriate opportunity for stakeholder input). There is a risk that many interested organisations will not have considered the changes in detail given that they have been proposed in the context of the Inquiry, which may not have been regarded as directly relevant to those interested organisations. REA would be concerned if the changes in Preliminary Recommendation 8 were implemented without further and specific consideration of the overall privacy landscape in Australia, and it considers that a separate, privacy-focused inquiry should be held to comprehensively consider the ACCC's proposed privacy-related reforms.

4. Direct right of action for individuals

REA is also concerned that the introduction of a direct right for individuals to bring actions for breaches of their privacy, as well as a statutory cause of action for serious invasions of privacy, may result in a number of unintended consequences in an Australian context and will have a greater impact on Australian businesses relative to other jurisdictions where a direct right of action exists.

Specifically, procedural controls associated with initiating class action claims are less onerous in Australia than in Europe. For example, in contrast to the opt-out class action system that exists in Australia, the UK group action procedure is generally one that requires members to opt-in. The UK procedure also requires claimants to obtain a "group litigation order" before a case can proceed as a group action.

In broad terms, those differences mean that class actions in Australia can be commenced more easily (since there is no requirement to first obtain an order allowing a case to proceed as a class action). In addition, the relevant class can be very broadly constituted and may include significantly greater numbers of persons than would be

typical in other jurisdictions (since all persons who meet the class description are included unless they opt-out). In this context, the introduction of a right for individuals to bring a direct claim for non-material compensation would be likely to have a greater impact on Australian businesses because of Australia's more readily available class action procedures. This would result in Australian businesses being much more conservative in the way in which data it utilised, resulting in a decrease in innovation and overall consumer benefit.

5. Unfair business practices

The ACCC is "considering whether its exposure to issues through [the] Inquiry support a general prohibition against the use of unfair practices in the [Australian Consumer Law (**ACL**)] to deter digital platforms (and other businesses) from engaging in conduct that consumers are uncomfortable with or that falls short of societal norms but which is not currently captured under the ACL" (see Preliminary Report, Box 2.52, page 237).

REA recognises that the ACCC's thinking on the need for a new and separate "unfair practices" prohibition is at an early stage and that the ACCC itself has acknowledged that further analysis is required. In that context, REA would like to make two general comments to inform the further work to be done in this area.

(a) (**Potential unintended consequences**) First, a new "unfair practices" prohibition may be attractive from an enforcement perspective because it may overcome difficulties that have been experienced in successfully prosecuting contentious conduct through the prohibition on unconscionable conduct. However, unconscionable conduct was always intended as, and should be, a high bar to avoid regulators/courts regularly making subjective judgements about the appropriateness of commercial conduct and second-guessing consumers' own decisions to acquire particular goods or services under particular terms or in particular circumstances. If such subjective judgments are made in relation to commercial conduct by reference to, for example, vague and inherently uncertain terms such as "unfair", "societal norms" and consumer "comfort" levels, then that is likely to have a chilling effect on legitimate competition and innovation. This is an issue identified in previous reviews on the issue, which have indicated that the introduction of a general unfair conduct prohibition is likely to create uncertainty and confusion,[1] and which have regarded the concept of "unfairness" as "so open to a variety of different interpretations that it would be inimical to the development of a coherent and relatively clear body of law".[2]

(b) (**Alternative targeted approach**) Second, the ACL already includes a number of specific prohibitions on "unfair practices" including, for example, false and misleading representations, unsolicited supplies, and certain pricing practices. Those specific prohibitions are appropriately focused on conduct that is considered to be harmful and also relatively straightforward to identify (both by businesses and regulators). This provides a better model for addressing any specific problems identified by the ACCC, particularly given that the problems that have been identified in the Preliminary Report generally relate to ways in

[1] Commonwealth Senate Standing Committee on Economics, "The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974*", December 2008, page 35.

[2] Commonwealth Senate Economics References Committee, "The effectiveness of the Trade Practices Act 1974 in protecting small business", March 2004, page 85.

which businesses administer their consumer agreements and relationships and those should be able to be easily addressed through more targeted prohibitions.

Yours sincerely

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