

5 June 2020

ACCC

### News media bargaining code Concepts paper submission: data sharing aspects

My comment is focussed on the consumer data aspects of the request.

I appreciate that the ACCC is trying to meet the government's timeline for a code and is therefore necessarily focussed on seeking input to a range of complex questions to assist it in reaching a pragmatic proposal as soon as possible. However, I would like to suggest an approach that, while it may not be able to be implemented fully within the code, might inform some of its development and future related and complementary work of the Commission. As this suggestion is focussed on the consumer data aspects it does not resolve other matters that the code will address, but it may help in addressing some intersecting and complementary issues.

As the concepts paper questions make clear, the task of the ACCC is complex and involves many competing and varied stakeholder interests. My observation is that it is primarily focussed on resolution of competing positions between large social media platforms on the one hand and large media businesses on the other. But I acknowledge that it is not solely focussed on large news businesses, which introduces additional complexity.

Sharing of user data is a key feature, but it is sharing between these (principally large) entities. It is not (directly) sharing of data by users with those entities. There are some issues with this, including how best to protect consumer interests and privacy in a transactional framework that does not directly involve them. What I suggest is that the ACCC considers how implementation of a more fulsome version of the Productivity Commission recommendations from its 2017 report *Data Availability and Use*<sup>1</sup> ("the PC Data Report") might prove to be a more effective long run solution to the root cause of the consumer data sharing aspects of the problem and some of the underlying issues.

Recommendation 8.1 of the PC Data Report was for new legislation to "establish the Comprehensive Right of consumers to access their data from government and private data holders alike, for the purposes of improving the services that are offered to them by alternative providers". The extension of this that I propose is in relation to digital platforms such as Facebook and Google. While the PC Data Report implicitly categorised this type of interaction in the "second group" of entities that "tend to face greater consumer choice", the reality – as demonstrated by the ACCC Digital Platforms Inquiry – is that the "network effect" operates to entrench the position of dominant players such as Facebook and Google, creating exactly the barriers to entry for other providers that were classed as the "first group" prioritised in that report for action.<sup>2</sup> There are also other drivers – including both the private and public goods associated with privacy, public discourse and politics – that enhance the interest in acting to expand consumer data rights.

For the purposes of the mandatory code development and related ACCC initiatives let us consider first the potential application to the (social) media sector. A consumer data right for social media has the potential to:

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<sup>1</sup> Productivity Commission Inquiry Report, *Data Availability and Use* (No. 82, 31 March 2017)

<sup>2</sup> Ibid, 80.

- give consumers greater visibility and control over their social media presence;
- improve competition in the market and related consumer outcomes: not only between social media and news businesses but between social media companies and also between all companies operating through digital platforms (which is the majority of all entities).

Naturally, there would be detail to consider, including the interface with existing contract provisions involved in consumer social media platform interaction – but these same issues also impact the current situation and the code development.

To picture the impact of this:

- If consumers had a broader data right<sup>3</sup> - or one that at least encompassed social media data - then they might more readily port their key social media (or search/browsing) data to different businesses. whether “digital platforms” or news businesses – noting that these categories are problematic and that the operation of these businesses, large or small, are all increasingly converging onto and into digital platforms.
- Consumers choose their social media interactions – this is data that in principle they should be able to control, move to, or share with different platforms if they so choose.
- Even if they are not able to port all of the advanced profiling and analytic data that Google, Facebook and others extract from their operations and its synthesis with other data profiles, they should be able to port posts, timelines, core “social graph” material and other proximate data reasonably required to enable an alternative provider. I note that Facebook expressly acknowledges user ownership of IP in their posts,<sup>4</sup> and Google’s terms of service do not claim ownership of user material.

Conceptually it is interesting that the consumer data right is not yet being applied to social media / digital platform interaction as this is by far the most voluminous significant set of consumer data. Looking at information cited by the PC Data Report also highlights the importance of addressing this data set in particular: given that consumers state a very low level of trust in social media to handle their personal information – the lowest of any category at less than 10%.<sup>5</sup> The report also noted the significance of the power of social media over a person’s access to their own social circles.<sup>6</sup> I submit that there are many reasons to prioritise the extension of the CDR rules to this type of information.

I move now to consider the broader impact of a more generalised consumer data right, in line with, but extending from, the original PC Data Report proposals. I suggest that such an approach would provide much more flexibility to emerging products and services and would ensure a more consistent regulatory framework. This is something that sector by sector codes might struggle to do as well.<sup>7</sup>

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<sup>3</sup> Which, as the PC Data Report points out, may be disconnected from issues of IP ownership.

<sup>4</sup> “You own the intellectual property rights (things such as copyright or trademarks) in any such content that you create and share on Facebook and the other [Facebook Company Products](https://www.facebook.com/terms.php) you use. Nothing in these Terms takes away the rights you have to your own content. **You are free to share your content with anyone else, wherever you want.**” - <https://www.facebook.com/terms.php> *emphasis supplied*

<sup>5</sup> OAIC data 2013 referenced at PC Data Report, 124. I acknowledge that this data is old but there is no reason to believe it has significantly improved, given the widespread data breaches that have occurred subsequently involving social media companies.

<sup>6</sup> Ibid, 92.

<sup>7</sup> There is a broader parallel to the narrower issue raised in question 6 of the concepts paper.

Regulatory splintering – through the development and implementation of many codes for different sectors - is particularly problematic in evolving markets where previously “separate” sectors start to blur, converge, and merge, making the regulatory object fluid. Think of start-ups servicing a merged product in the financial services and energy (and potentially telecommunications) markets; or businesses servicing a mix of news, social media and financial services. I note that the PC Data Report previously observed the use of social media by financial institutions.<sup>8</sup>

Wherever there are multiple overlapping rules and/or codes there is an increased risk of compliance costs and delays for business and confusion for consumers. While I am sure the ACCC is already conscious of such matters, this is another reason why I believe a more systematic and coherent approach to consumer data rights is important and why, when developing this new mandatory code, it is important to have a view to how the consumer data right may evolve, both to address some of the underpinning issues and also to avoid slightly divergent approaches that may not mesh so well especially as business models and behaviours evolve.

More broadly I submit that it may be useful to reconsider whether a “gradualist” model of CDR extension across different sectors is the best approach, given the points discussed above. On the other hand, I acknowledge that there are sound reasons for proceeding with caution especially around open banking, and I note the ACCC’s 4 June update on those matters.

Finally, I have a few brief comments on some of the other questions in the concepts paper:

- In respect of Question 31, my comment is that addressing these issues may prove problematic where “algorithms” consist of weightings in neural networks that evolve constantly in response to data feeds – as opposed to more “hard coded” approaches;
- In respect of Question 51, final dot point, I submit that it is conceptually problematic to privilege news media businesses over other content creators. Therefore it is best to have a regulatory approach that can potentially serve all content creators. Further, a system based around consumer control of sharing of data – including social media data and consumer generated (or “prosumer”) content – may go some way to assist this objective in a more consistent way.

Thank you for the opportunity to comment on the concepts paper and best wishes both in developing an appropriate code and with your broader work program around the Consumer Data Right and Digital Platforms.

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(this submission is personal not institutional)

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<sup>8</sup> Ibid, 82.