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Mr Rod Sims
Chairman
Australian Competition and Consumer Commission

Email: platforminquiry@accc.gov.au

Dear Mr Sims

DIGITAL PLATFORMS INQUIRY PRELIMINARY REPORT

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission on the Preliminary Report to the Digital Platforms Inquiry by the Australian Competition and Consumer Commission (ACCC).

1. General comment

Ai Group's membership comes from a broad range of industries and includes businesses of all sizes. Given the breadth of this inquiry, we have received input from businesses in the IT, telecommunications, energy and retail sectors.

Overall, industry recognises the importance of protecting customer information and data, and supports a data and privacy regime which can benefit both customers and businesses through outcomes such as improved transparency and customer experience. However, we are concerned about the breadth of scope and lack of clarity regarding certain proposed recommendations made in the Preliminary Report. More substantive work will be needed to develop a basis and detail for these recommendations before they can be considered further.

Given the broad scope of the Preliminary Report, we recommend more investigation and consultation is necessary before recommending changes that would have economy-wide impacts.

We would also welcome the opportunity to work with the ACCC to bring together a range of industries who may be affected by this Preliminary Report to be consulted with further.

The responses below highlight common key areas of concern for a wide range of industry sectors. These relate to proposed recommendations and areas for further analysis and assessment in the Preliminary Report relating to privacy and data protection regulation, and unfair practices.

2. Use and collection of personal information

The Preliminary Report includes Preliminary Recommendation 8 on the use and collection of personal information, and proposes further analysis and assessment on the deletion of user data (Area for Further Analysis 7).

2.1 General lack of clarity

At the outset, it is unclear what actual harm Preliminary Recommendation 8 and Area for Further Analysis 7 seek to address, as well as which businesses will be affected by this recommendation and the extent of the impact on these businesses. Part of the problem relates to a lack of definition or threshold for when and how the proposed new obligations would apply.

For example, the recommendation proposes a new amendment to the Privacy Act relating to giving direct rights of action for individuals. On its face, this may sound reasonable; however, in the absence of clear constraints around such a new right, it has the potential to give rise to frivolous legal action against businesses.

We recommend that the ACCC clarify the scope of and need for these changes to assist more appropriately targeted investigation and consultation.

2.2 Impact on customer experience

The broadest interpretation of these proposed changes could damage the customer experience over time. For example, any arbitrary rule or timeframe after which user data would need to be deleted, in accordance with Area for Further Analysis 7, fails to take into account the highly variable level of engagement that customers may have with a variety of digital platforms over time. Customers who deal sporadically with digital platforms are likely to see a negative impact on their customer experience.

2.3 Interactions with other data and privacy regulatory regimes

Businesses are already subject to a range of existing and proposed privacy and data regulations, including the Privacy Act, industry-specific privacy and data retention laws, and the Consumer Data Right (CDR) regime that is currently under development by the Federal Government. In addition, some businesses must also comply with overseas privacy and data regulation, including the EU General Data Protection Regulation (GDPR).

It is important that any ACCC recommendations in this space take account of, and are consistent with, the broader privacy and data regulations to which businesses already are, or soon will be, subject. To do otherwise would risk introducing additional regulatory complexity, which will make implementation more difficult and provide no clear benefit to consumers.

Below are specific examples where further clarification will be needed:

- The different approaches to consent and authorisation obligations.
- The lack of clarity and potential inconsistency in definitions such as for 'data', 'personal information' and 'consumer' under the different regimes including the Privacy Act and CDR.
- Interactions with industry specific rules and obligations around data – for example in the energy sector and telecommunications sector.

We recommend that the ACCC clarifies how the preliminary recommendation relating to the use and collection of personal information, and further analysis and assessment on the deletion of user data, will fit with other relevant legislative and regulatory regimes.

2.4 Effectiveness of alternative and existing approaches

Much of the ACCC's focus appears to be on regulating businesses around privacy and data obligations and rights. However, there appears to be a lack of recognition of the effectiveness of alternative non-regulatory approaches and the existing industry approaches noted above, as well as whether businesses have the technical capability to comply with new obligations.

Where alternative approaches effectively address clearly identified problems, further regulation would create an unnecessary burden for both regulators and businesses.

Ultimately, in the absence of these other considerations, consumers may not benefit from the introduction of new regulatory responses. For instance, creating new privacy and data obligations and rights could overload consumers with more information, leading to further disengagement, which would be an adverse outcome for consumers.

It should be appreciated that some in industry are proactively servicing customer requests about their data as they have a commercial incentive to do so.

Education will also play a key role with input from consumer representative groups. For example, it can be used to help explain any differences between definitions and obligations under the different privacy and data regimes.

We recommend the ACCC takes into consideration the effectiveness of alternative and existing approaches before considering regulatory-based approaches around the use and collection of personal information, and deletion of user data.

3. Office of the Australian Information Commissioner (OAIC) Code of Practice for digital platforms

Preliminary Recommendation 9 proposes the development of a Code of Practice for digital platforms by the OAIC.

With this recommendation, it is also unclear what the meaning and scope of “digital platforms” is, and therefore what types of industry sectors and businesses are being targeted.

As mentioned above, some businesses may have existing obligations and practices, and it will be difficult to understand how this proposal will apply and impact on them without further information.

We recommend that the ACCC identifies the types of businesses that would be subject to this preliminary recommendation, and how this proposal would fit in with any existing obligations for affected businesses.

4. Serious invasions of privacy

Preliminary Recommendation 10 proposes to introduce a statutory cause of action for serious invasions of privacy.

We note that this recommendation was previously raised by the Australian Law Reform Commission over a decade ago.¹ Since that time, it is uncertain whether this recommendation is still relevant for this inquiry, and unclear that the introduction of a statutory right of action for serious invasions of privacy will result in a benefit for consumers over and above the remedies to which they already have access.

We recommend that the ACCC provide further detail on how this preliminary recommendation on serious invasions of privacy is relevant to this inquiry, and if so, how will it apply and operate with other existing obligations for affected businesses.

5. Unfair contract terms and unfair practices

Preliminary Recommendation 11 proposes that unfair contract terms should be illegal under the Australian Consumer Law (ACL), with pecuniary penalties applied to their use. This is supplemented with the Preliminary Report’s proposal for further analysis and assessment on a general prohibition of unfair practices.

The Preliminary Report discusses the theory behind information asymmetries and bargaining power imbalances between consumers and digital platforms as the basis for its recommendation. It also notes with respect to further analysis around general prohibition of unfair practices, “the ACL Review had found that the value of introducing an unfair trading prohibition was uncertain, but stated that exploring an unfair trading prohibition in Australia would be an ongoing priority”.²

¹ ALRC, “For Your Information: Australian Privacy Law and Practice” (Report No 108, 2008) Rec 74–1. And more recently, the ALRC considered serious invasions of privacy: ALRC, “Serious Invasions of Privacy in the Digital Era” (Report No 123, 2014).

² CAANZ, Australian Consumer Law Review Final Report, March 2017, p 51.

While recognising the ACCC identifies potential concerns in this regard, it is not clear from the Preliminary Report that existing provisions are insufficient to protect consumers. Without substantiated evidence to the contrary, the above statements suggest that a case has not been made that a problem exists under the current law and therefore changes should not be required to the existing regime. In other words, the existing unfair contracts regime, and the related protections in the ACL, appears to be working effectively for consumers and businesses.

Further, it seems that such a provision could potentially open the door to significant uncertainty with consequential difficulties in practical compliance by businesses. For instance, the ACCC notes that such a provision could be used to protect consumers from conduct that they are unaware of, such as certain types of data collection, yet the Privacy Act already sets out the sorts of information for which disclosure is required and it is unclear why an amendment of that mechanism is not the best available means to address these issues.

Even in the event of their being sufficient evidence to support proceeding with Preliminary Recommendation 11, existing contracts already in place should be protected and exempted from the effect of this recommendation. That is, the recommendation should not have a retrospective effect. Otherwise, changes arising from the recommendation could lead to open ended challenges to a broad range of existing contracts (agreed to prior to the recommendation) and create inconsistencies in the execution of these contracts.

We recommend that the ACCC not proceed with its preliminary recommendation on unfair contract terms and prohibition against unfair practices, unless it can substantiate its rationale for reviewing the current law in this area.

6. Digital platforms ombudsman

The Preliminary Report proposes further analysis and assessment on whether there should be a digital platforms ombudsman.

The intent behind this proposal for a digital platforms ombudsman is unclear.

The need for, and scope of, any regulatory intervention via an ombudsman should also take into consideration the following factors:

- Some industry sectors such as energy and telecommunications already have ombudsmen with a broad scope to address complaints, including those relating to data and privacy.
- Certain industries are also self-regulated through mechanisms such as industry codes of practice (e.g. retail) which may already be effective.
- Certain businesses may consider that they have internal mechanisms to deal with the types of complaints proposed to be covered by a digital platforms ombudsman.

Before the ACCC considers a digital platforms ombudsman, we recommend that it takes into account the relevant factors listed above. Otherwise, there could be adverse consequences such as creating a conflict of jurisdiction between existing ombudsmen and other mechanisms, and the proposed digital platforms ombudsman.

7. Opt-in targeted advertising

The Preliminary Report proposes further analysis and assessment on whether an opt-in consent should be introduced for consumers with respect to the use of personal information for targeted advertising purposes.

The report does not explain how the current law is ineffective in a way that would justify this new type of obligation. There exists a requirement under Australian Privacy Principle 7 of the Privacy Act for opt-out targeted advertising.



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Further, as the Preliminary Report notes, the proposal could negatively impact on businesses and how they market to their customers. However, it should also be recognised that consumers do benefit from targeted advertising as well e.g. improved user experience. This should be taken into account in considering an opt-in process.

Should the ACCC decide to proceed with its proposal for further analysis and assessment on opt-in targeted advertising, we recommend it do so in close consultation with industry and other affected stakeholders.

Should the ACCC be interested in discussing our submission further, please contact our Digital Capability and Policy Lead Charles Hoang (02 9466 5462, charles.hoang@aigroup.com.au).

Yours sincerely,

Peter Burn
Head of Influence and Policy