



Law Council  
OF AUSTRALIA

# Digital Platforms Inquiry – Preliminary Report

The Australian Competition and Consumer Commission

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

In the preparation of this submission, the Law Council is grateful for the assistance of:

- the Privacy and Data Law Committee of the Law Society of New South Wales (**Privacy and Data Law Committee of the Law Society of NSW**);
- the Privacy Law Committee of the Law Council's Business Law Section (**Privacy Law Committee**); and
- the Competition and Consumer Committee of the Law Council's Business Law Section (**Competition and Consumer Committee**), in relation to preliminary recommendation 11 and proposed area for further analysis and assessment 9.

## Executive Summary

1. The Law Council welcomes the opportunity to provide a submission to the Australian Competition and Consumer Commission (**ACCC**) in response to its Preliminary Report on the Digital Platforms Inquiry (**Preliminary Report**).
2. The Law Council has limited its comments to the ACCC's preliminary recommendations 8, 9, 10 and 11 and to proposed areas for further analysis and assessment 4, 7, 8 and 9, as they are most relevant to privacy considerations in the view of the Law Council. In the final section of our comments, the Law Council proposes additional issues for the ACCC to consider.
3. The Law Council acknowledges that the complex and rapidly evolving nature of the digital platform marketplace is reconstituting the power and knowledge relations between consumers, digital platform providers, digital intermediaries, media organisations and advertisers. Data about activities, preferences and interests of individuals has become a new currency which consumers knowingly or otherwise trade for services offered over digital platforms. These changes have significant implications for data regulation of transparency, choice, unambiguous consent, reciprocity of benefits, and data handling practices of many entities, including providers of digital platforms. This is an important emerging area for privacy regulation in Australia.
4. The Law Council welcomes the contribution that the Preliminary Report makes to addressing pertinent issues in this emerging area of regulation and law reform. The Law Council strongly agrees with the ACCC's position that privacy and data protection laws have a role to play in increasing consumer protection and potentially enhancing competition between digital platforms. The business practices of a range of business entities impact the depth, range and value of data about activities, preferences and interests of individuals that are the currency of digital platforms. Those business practices need to be scrutinised from a number of perspectives: competition policy, consumer protection, privacy regulation, advertising and marketing regulation (particularly rules protecting children and other vulnerable persons), and protection of human rights, including rules against discrimination.
5. In the view of the Law Council, regulation to date has not been entirely satisfactory in addressing some of the issues that the rise of digital platforms either creates or exacerbates. However, the ACCC's preliminary findings do not demonstrate a need for fundamentally different rules as to collection, use and sharing of personal information about individuals, or centralisation of regulatory functions in the ACCC (or in any other broadly-based regulator). Rather, in the view of the Privacy Law Committee and the Privacy and Data Law Committee of the Law Society of NSW, the principal problem in application of data privacy regulation has been under-resourcing of the privacy regulator.
6. The ACCC's preliminary findings rightly suggest some refinements of existing data privacy laws. However, the findings underlying these refinements are not by way of changing fundamental settings of data privacy law and regulation. Privacy law and regulation remains central in addressing many consumer concerns and protecting the legitimate interests of consumers, in parallel with operation of the Australian Consumer Law (**ACL**) and the ACCC actively fulfilling its consumer protection mandate.
7. Many of the consumer protection issues identified by the ACCC, as associated with activities of digital platforms, could be addressed by the ACCC exercising its broad consumer protection powers and discretions under the ACL. For example, the ACCC could exercise its ACL powers to address shortcomings in privacy statements and in

terms of use of digital platforms. In the final report of the Digital Platforms Inquiry, the Law Council submits that the ACCC may wish to more specifically discuss why the ACCC has elected not to more actively exercise broad consumer protection powers and discretions to date. The Law Council notes that that the US Federal Trade Commission has actively used similar powers against many digital service providers and changed digital markets behaviour as a result.

8. The Privacy Law Committee and the Privacy and Data Law Committee of the Law Society of NSW suggest that the ACCC should exercise caution in recommending the creation of a new body of laws and regulation around digital platforms, rather than more specifically identifying and addressing any defects and shortcomings in existing regulatory schemes. It is tempting to move straight from identification of new issues caused by the rise of digital platforms to advocacy of new regulatory powers and functions centralised in a competition and consumer regulator. There is a significant danger that an inquiry rightly focussed upon the effect of a few very large digital platforms upon creation and distribution of news in Australia may become a vehicle for additional, narrowly based regulation and further centralisation of powers in one regulator, rather than a spur towards improving existing regulation and the level of cooperation and coordination between existing regulatory agencies.

## Preliminary Recommendations

### Preliminary Recommendation 8 – Use and collection of personal information

9. The Law Council notes the ACCC's concerns that the current regulatory framework does not effectively deter data practices that exploit the information asymmetries and bargaining power imbalances that characterise the relationship between digital platforms, intermediaries and consumers. The Law Council understands that the ACCC proposes to recommend that the *Privacy Act 1988* (Cth) (**Privacy Act**) be amended to enable consumers to make informed decisions and to have greater control over privacy and the collection of their personal information.
10. The discussion as to the bounds of 'personal information about individuals', de-identification and use of data linkage and de-identified data does not cite, and appears to have had little regard to, the extensive analysis and guidance of the Office of the Australian Information Commissioner (**OAIC**) on these topics. The discussion does not consider how data linkage may be conducted under appropriate, reliable and verifiable controls and safeguards that enable minimisation of use of personal information about individuals.
11. The ACCC does not discuss how empowering data intermediaries to use de-identified data subject to appropriate, transparent, reliable and verifiable controls and safeguards can provide benefits to consumers and enable data intermediaries to capture value that otherwise accrues only to the operators of the major digital platforms themselves. Of course, any such benefits should be fairly shared with individuals. Benefits may not be identified and shared unless there is greater transparency as to such data practices and better understanding of consumers and other stakeholders as to what are fair and reasonable uses of data about individuals (whether or not those individuals are identified or identifiable to the relevant entities using that data).
12. This transparency requires better engagement of digital service providers and data custodians with affected individuals about fair and reasonable uses of data about individuals. Engagement with consumers as to what is fair and reasonable is more likely to change market behaviour quickly and pervasively, as compared to the slower processes of formulating, enacting and adapting regulation.

#### Notification and consent

13. The ACCC proposes to recommend that Australian Privacy Principle (**APP**) 5 be amended to impose greater notification requirements when personal information of consumers is collected or disclosed.<sup>1</sup> Additionally, the ACCC proposes to recommend that the definition of consent in the Privacy Act be amended to include 'only express consent'.<sup>2</sup>
14. Notification and consent are increasingly problematic. Many data collections are intermediated by devices, such as the Internet of Things (**IoT**) devices, where the affected individual is not the person notified or providing consent. Consumers may already be overwhelmed or fatigued by information. Provision of more, or even better, information places the onus upon the consumer to then read, assimilate and evaluate

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<sup>1</sup> Australian Competition and Consumer Commission (ACCC), *Digital Platforms Inquiry Preliminary Report* (December 2018) 227 preliminary recommendation 8(a) ('*Preliminary Report*').

<sup>2</sup> *Ibid* 229 preliminary recommendation 8(c) [emphasis added].

that information. Often a consumer may think, rightly or wrongly, that they need the service and they don't really have a choice.

15. The Law Council recommends that there is greater emphasis upon trust marks and other industry regulatory initiatives that encourage digital service providers to act in ways that nurture trust, rather than burdening consumers with more information, however well condensed, curated and presented that additional information may be.
16. The Law Council recommends that, given the increasing pervasiveness of IoT devices, the default assumption should become that device-intermediated collections of information from individuals should not require consumers to read or understand particular disclosures or to provide active consents, where such collections (and subsequent uses and disclosures) comply with registered codes that set out fair and reasonable data handling practices for particular devices or applications or particular industry sectors.
17. There is often a misconception amongst consumers that organisations require consent from the individual to collect, use and disclose their personal information. This misconception is compounded by the fact that many organisations require consumers to 'agree' to their privacy policy in the registration process. The Preliminary Report elaborates on the inadequate nature of consumer consents as a result of being:
  - (a) poorly informed;
  - (b) not freely given;
  - (c) exercised in response to 'clickwrap agreements', 'bundled consents'; and
  - (d) subject to unilateral or 'take-it-or-leave-it' terms.<sup>3</sup>
18. The Law Council notes that, although there may be some overlap in their contents, the requirements for privacy policies pursuant to APP 1 and collection notices pursuant to APP 5, are two separate requirements under the Privacy Act. Neither APP 1 nor APP 5 require a consumer to consent to a privacy policy or collection notice. While the Preliminary Report lists the limited circumstances in which consent is required under the Privacy Act, the discussion of consent and privacy policies is confusingly combined.<sup>4</sup> Further, the Preliminary Report does not coherently explain the interaction between privacy policies and collection notices under the Privacy Act, nor does it make recommendations to dispel the misconception that consent is required for organisations to collect, use and disclose personal information.
19. The Law Council strongly supports the proposition a privacy policy is not a contract and that existing laws on misleading statements and negligent misstatements apply to policies that misrepresent the position on privacy and data protection matters.
20. The *Competition and Consumer Act 2010* (Cth) (**the CCA**) regulates the conduct of suppliers, wholesalers, retailers and consumers in Australia, including the conduct of any digital platforms carrying on business in Australia.<sup>5</sup>
21. The Preliminary Report notes that Schedule 2 of the CCA sets out the ACL, which prohibits businesses from engaging in the following forms of conduct:

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<sup>3</sup> Ibid ch 5.

<sup>4</sup> Ibid 175-81 section 5.3.

<sup>5</sup> Ibid 261.

*Misleading or deceptive conduct and false or misleading representations: businesses (including digital platforms) must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive, or make false or misleading representations about their goods or services. It does not matter if there is an intention to mislead or not. It includes express and implied representations, including for example statements about how user data is collected, used, or shared, that are incorrect or likely to mislead.*

*Unconscionable conduct: businesses (including digital platforms) must not engage in unconscionable conduct in connection with the supply or acquisition of goods or services. Whilst 'unconscionable conduct' does not have a precise legal definition, it generally refers to conduct that is against good conscience by reference to the norms of society and that goes beyond mere unfairness.*

*Unfair contract terms: Terms that are deemed to be unfair in standard form contracts are considered to be void and cannot be enforced. Digital platforms' consumer-facing terms of use and privacy policies would likely be considered standard form contracts, which would mean that they must comply with the unfair contract term provisions in the ACL.<sup>6</sup>*

22. The Law Council recommends that the ACCC consider whether it can use its consumer protection powers in circumstances where the ACCC is concerned that data platform operators and other digital service providers are misleading or confusing consumers or imposing unfair contract terms through lack of transparency as to relevant data handling practices.

**Recommendations:**

- **Greater emphasis be placed upon trust marks and other industry regulatory initiatives that encourage digital service providers to act in ways that nurture trust.**
- **Given the increasing pervasiveness of IoT devices, the default assumption should become that device-intermediated collections of information from individuals should not require consumers to read or understand particular disclosures or to provide active consents, where such collections (and subsequent uses and disclosures) comply with registered codes that set out fair and reasonable data handling practices for particular devices or applications or particular industry sectors.**
- **The ACCC consider whether it can use its consumer protection powers in circumstances where the ACCC is concerned that data platform operators and other digital service providers are misleading or confusing consumers or imposing unfair contract terms through lack of transparency as to relevant data handling practices.**

**Erasure of personal information**

23. In circumstances where consumers have withdrawn their consent and their personal information is no longer necessary to provide the consumer with a service, the ACCC

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<sup>6</sup> Ibid.

proposes to recommend that APP entities be obliged to erase the personal information of individuals.<sup>7</sup>

24. The Law Council supports this proposal. The Law Council notes that adoption of this proposal would bring Australia's privacy laws more closely into line with Article 17 of the *General Data Protection Regulation (GDPR)* addressing the 'right to erasure (right to be forgotten)'.<sup>8</sup> The Law Council also shares concerns that with technological developments in data analytics, consumers are increasingly at risk when information provided at one point in time when consent was given could be used in the future in ways the consumer had not envisaged when they gave their consent.<sup>9</sup>

### Third-party certification scheme

25. The ACCC proposes to recommend the introduction of a third-party certification scheme that would require audits of the data practices of certain APP entities.<sup>10</sup> The ACCC proposes that the APP entities required to obtain third-party certification would be those entities 'that meet an identified objective threshold' (e.g. by collecting the personal information of a certain number of Australian consumers).<sup>11</sup>
26. The Law Council considers that an independent third-party certification scheme as outlined in preliminary recommendation 8(b) would bring Australia's privacy law more closely into line with the approach taken under the GDPR. The Law Council notes that the full scope and requirements of the GDPR certification scheme is yet to be determined. It therefore remains to be seen how effective a third-party certification will be, whether it is necessary to prove compliance or whether it is enough that the law requires compliance and that there be effective mechanisms that address non-compliance.
27. Additionally, an important concern to take into consideration is the potential increase in costs that obtaining the certification will have on businesses and whether these additional costs are necessary to demonstrate compliance with privacy legislation.

### Increased penalties

28. The ACCC proposes to recommend that the maximum penalty for serious or repeated interference with privacy be increased to whichever is the higher of \$10 000 000, three times the value of the benefit received or, if a court is not able to determine the benefit obtained from an offence, 10 per cent of the entity's annual turnover in the last twelve months.<sup>12</sup>
29. The Law Council considers that increased penalties, as outlined in preliminary recommendation 8(e), would encourage businesses, including digital platforms, to take privacy protection seriously. The ACCC's proposed recommendation to bring the penalties for severe or repeated interferences with privacy into line with the new civil pecuniary penalties under the ACL would elevate the status of privacy law and increase the deterrence effect of the requirements under the Privacy Act.

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<sup>7</sup> Ibid 231 preliminary recommendation 8(d).

<sup>8</sup> *Regulation (EU) 2016/679 of the European Parliament and of the Council of 7 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119/1.

<sup>9</sup> ACCC, *Preliminary Report*, 231 preliminary recommendation 8(d).

<sup>10</sup> Ibid 227 preliminary recommendation 8(b).

<sup>11</sup> Ibid.

<sup>12</sup> Ibid 231 preliminary recommendation 8(e).

30. The Law Council recommends that an increase in penalties under the Privacy Act should be accompanied by an increase in the resources of the OAIC to effectively apply to the courts for civil penalties for serious or repeated interferences with privacy.

**Recommendation:**

- **An increase in penalties under the Privacy Act should be accompanied by an increase in the resources of the OAIC to effectively apply to the courts for civil penalties for serious or repeated interferences with privacy.**

**Direct rights of actions for individuals**

31. The ACCC considers that remedies for invasions of privacy under the current regulatory framework are inadequate and proposes to recommend that individuals be given the right to bring a direct action for breaches of the Privacy Act.<sup>13</sup>
32. The Privacy and Data Law Committee of the Law Society of NSW supports, in principle, a direct right of action for individuals (or a group of claimants in a class action) to seek injunctions and compensatory damages for harm suffered as a result of an infringement of the Privacy Act as outlined in preliminary recommendation 8(f). It notes that such a right would be separate from preliminary recommendation 10 to introduce a statutory tort of serious invasions of privacy.<sup>14</sup>
33. While the rationale for the recommendation seeks to provide consumers with a direct avenue to seek redress from a court without having to rely on representation by the OAIC,<sup>15</sup> the Law Council emphasises that the creation of such a right and corresponding remedies should not detract from the powers and resources afforded to the OAIC in its investigative and enforcement roles.
34. As discussed below in relation to preliminary recommendation 10, the Privacy Law Committee does not support the creation of the tort of serious invasion of privacy, as proposed by the preliminary recommendation 10 or the creation of a direct right cause of action under the Privacy Act, as proposed by preliminary recommendation 8.

**Increased resources for the OIAC**

35. Considering the increasing volume, significance and complexity of privacy-related complaints, the ACCC proposes to recommend that the OAIC's resources be increased to support its further enforcement activities.<sup>16</sup>
36. The Law Council strongly supports preliminary recommendation 8(g) and continues to advocate for increased resourcing of the OAIC. As the proposed recommendations expand the functions of the OAIC, increasing its resources will be necessary for the OAIC to effectively carry out its duties and for the proposed recommendations to be effective. The Law Council particularly supports the proposal to facilitate the OAIC's development of an enforcement focus.

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<sup>13</sup> Ibid 232 preliminary recommendation 8(f).

<sup>14</sup> Ibid 235-6.

<sup>15</sup> Ibid 232.

<sup>16</sup> Ibid 232-3 preliminary recommendation 8(g).

## Preliminary Recommendation 9 – OAIC Code of Practice for digital platforms

37. The ACCC proposes to recommend that the OAIC establish a digital platform-specific Privacy Code. The ACCC envisages that such a code would ‘contain specific obligations on how digital platforms must inform consumers and how to obtain consumers’ informed consent, as well as appropriate consumer controls over digital platforms’ data practices’.<sup>17</sup>
38. The Law Council strongly supports the establishment of a digital platform-specific Privacy Code under the Privacy Act. The Law Council considers that an enforceable Privacy Code, as proposed, may supplement the relevant provisions of the Privacy Act as they apply to digital platform providers and offer greater transparency to consumers regarding the handling of their information. A Privacy Code under the Privacy Act would address matters of substance in preliminary recommendation 8, such as consent, transparency, matters related to data analytics and related data uses such as AI and machine learning. Further, an enforceable Privacy Code could encourage compliance with privacy requirements by digital platform providers by establishing greater regulatory oversight.
39. As part of the process to establish a Privacy Code, the Privacy Commissioner and relevant stakeholders could consider the balance required between the need to apply international standards that operate in the global digital landscape with the additional requirements or qualifications as these may pertain to the Australian context.
40. The Law Council considers that the process of establishing the Privacy Code would provide the requisite level of consultation with relevant industry participants, in addition to Google and Facebook, as well as consumer groups and members of civil society. This is in line with international developments in competition law and data protection law, where competition regulators and data protection authorities regulate the behaviour of social media and platform providers as discrete and defined regulatory matters.
41. Recent findings by the Bundeskartellamt (Germany’s national competition regulator) in relation to Facebook’s position in the German market and the relevance of its data related practices, provides a good example of this.<sup>18</sup> In explaining the discrete roles for competition and data protection authorities, the Bundeskartellamt noted as follows:

*Monitoring the data processing activities of dominant companies is therefore an essential task of a competition authority, which cannot be fulfilled by data protection officers. In cases of market dominance a competition authority must take into account data protection principles, in particular in the assessment of whether terms and conditions for the processing of data are appropriate. In this respect there is an interface between competition law and data protection law. The Bundeskartellamt closely cooperated with data protection authorities in this case which explicitly supported the authority’s proceeding.*<sup>19</sup>

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<sup>17</sup> Ibid 233.

<sup>18</sup> Bundeskartellamt, ‘Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources’ (Press Release, 7 February 2019) <[https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07\\_02\\_2019\\_Facebook.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.pdf?__blob=publicationFile&v=2)>.

<sup>19</sup> Bundeskartellamt, ‘Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources: Background Information on the Bundeskartellamt’s Facebook Proceeding’ (Web page, 7 February 2019) 7 <[https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07\\_02\\_2019\\_Facebook\\_FAQs.pdf?\\_\\_blob=publicationFile&v=4](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=4)>.

42. If the OAIC is to be the developer of a Privacy Code of practice for digital platforms,<sup>20</sup> the Law Council considers that it should be adequately resourced for its involvement in the development, administration, investigation and enforcement of the Privacy Code. The Law Council considers that it would be appropriate for the ACCC to participate in the development of such a code in consultation with the OAIC, privacy and data law experts and relevant stakeholders. Given the ACCC's expertise, it is suitably placed to offer a consumer protection focus and advise on the potential alignment of the prescribed code requirements with existing ACL requirements.
43. However, the Law Council also has some important reservations about a proposed Privacy Code. The Law Council notes that the concerns raised about data practices that exploit information asymmetries and power imbalances between service providers and consumers are not exclusive to digital platform providers. Noting the importance of privacy protection in the consumer sphere more broadly, the Law Council recommends that consideration be given to whether a Privacy Code should have a broader reach. Should the ACCC recommend that an enforceable code is necessary, the Law Council recommends that an enforceable code may be more effective if it were to apply to the media and information services, marketing and advertising industry more broadly, rather than being solely limited to digital platforms.
44. The Law Council recommends that consideration also be given to whether an enforceable Privacy Code of practice for digital platforms may be burdensome on the entities to which it applies, as well as the OAIC, and if it is indeed necessary in view of the other proposed recommendations to improve the data practices of digital platforms.

**Recommendations:**

- **Consideration be given to whether an enforceable Privacy Code of practice for digital platforms may be burdensome on the entities to which it applies, as well as the OAIC, and if it is indeed necessary in view of the other proposed recommendations to improve the data practices of digital platforms.**
- **Should the ACCC recommend that an enforceable Privacy Code is necessary, an enforceable code may be more effective if it were to apply to the media and information services, marketing and advertising industry more broadly, rather than being solely limited to digital platforms.**
- **Noting the importance of privacy protection in the consumer sphere more broadly, consideration be given to whether a Privacy Code should have a broader reach.**

## **Preliminary Recommendation 10 – Serious Invasions of privacy**

45. Separate from the direct cause of action proposed in preliminary recommendation 8(f), the ACCC proposes to recommend that a statutory cause of action for serious invasions of privacy be adopted, as recommended by the Australian Law Reform Commission (ALRC).<sup>21</sup>

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<sup>20</sup> Ibid 234.

<sup>21</sup> Ibid 235-6. See also Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era - Final Report* (June 2014) <[https://www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_123\\_whole\\_report.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_123_whole_report.pdf)>.

46. The Preliminary Report states that:

*the introduction of a statutory cause of action for individuals would lessen the bargaining power imbalance between consumer and digital platforms by providing consumers with an additional way of seeking redress for poor data practices by digital platforms.*<sup>22</sup>

47. For some years, there have been differing views between the constituent bodies of the Law Council regarding the creation of a cause of action for serious invasion of privacy. In the Law Council's submission to the Department of the Prime Minister and Cabinet's inquiry into a *Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, it noted that the Law Institute of Victoria, the NSW Bar Association, the Law Society of South Australia and the South Australian Bar Association were in favour of a statutory cause of action. The bodies opposing a statutory cause of action included the Law Council's Media and Communications Committee of the Law Council's Business Law Section (**the Media and Communications Committee**) and the Privacy Law Committee.<sup>23</sup> The Law Society of NSW has also previously expressed support for a statutory tort of serious invasions of privacy.<sup>24</sup>

48. The Law Council's Media and Communications Committee provided a submission to the ALRC's inquiry into *Serious Invasions of Privacy in the Digital Age*. It stated that, in relation to invasions of privacy by the media, 'existing avenues of redress, available through the Privacy Act and co-regulatory media and broadcasting codes of practice, afford prompt, practical and affordable redress for individuals'.<sup>25</sup> In that context, the Law Council noted that if a statutory cause of action was to be enacted, it would need to ensure there is no chilling effect upon freedom of the media and it should be stated as a right of privacy within the Privacy Act.<sup>26</sup>

49. The Law Council provided a submission to the Legal and Constitutional Affairs Reference Committee's *Inquiry into the Phenomenon Colloquially Referred to as 'Revenge Porn'*. It questioned the necessity of the creation of the cause of action as victims of revenge porn may, in some cases, seek remedies in equity for breach of confidence.<sup>27</sup> The Law Council noted in this submission that the Law Society of South Australia and the South Australian Bar Association supported giving consideration to the interaction of a statutory cause of action.<sup>28</sup>

50. In relation to the ACCC's preliminary recommendation 8(f), the Privacy and Data Law Committee of the Law Society of NSW supports, in principle, the introduction of a statutory cause of action for serious invasions of privacy, covering intrusion upon seclusion and misuse of private information. Such a statutory cause of action could also have the potential to enable consumers to take action, especially where unauthorised surveillance and serious privacy concerns need to be addressed.

51. The Privacy and Data Law Committee of the Law Society of NSW considers that any proposed statutory development for such a cause of action be subject to a rigorous consultation process including careful scrutiny of the detail of proposed legislation. The

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<sup>22</sup> ACCC, *Preliminary Report*, 235.

<sup>23</sup> Law Council of Australia, Submission to the Department of the Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* (18 November 2011) 3 [4].

<sup>24</sup> Law Society of NSW, Submission No 122 to the Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (12 May 2014) <[https://www.alrc.gov.au/sites/default/files/subs/122\\_org\\_the\\_law\\_society\\_of\\_nsw.pdf](https://www.alrc.gov.au/sites/default/files/subs/122_org_the_law_society_of_nsw.pdf)>.

<sup>25</sup> Law Council of Australia, Submission to the Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (14 May 2014) 1.

<sup>26</sup> *Ibid* 2-3.

<sup>27</sup> Law Council of Australia, Submission to the Legal and Constitutional Affairs Reference Committee, *Inquiry into the Phenomenon Colloquially Referred to as 'Revenge Porn'* (13 January 2016) 4 [21]-[22].

<sup>28</sup> *Ibid* 4 [20].

Privacy and Data Law Committee of the Law Society of NSW reiterates that in drafting the legislation it will be necessary to strike the appropriate balance between protection of privacy, freedom of expression and communication and national security, and that courts will be empowered to weigh up the public interest in privacy against any other countervailing public interests.

52. The Privacy Law Committee does not support the creation of the tort of serious invasion of privacy as proposed by the preliminary recommendation 10.

### **Preliminary Recommendation 11 – Unfair contract terms**

53. The ACCC proposes to recommend that unfair contract terms (**UCTs**) should be illegal, not just voidable, under the ACL and that civil pecuniary penalties should apply to their use to more effectively deter digital platforms from leveraging their bargaining power over consumers by using UCTs in their terms of use or privacy policies.<sup>29</sup>
54. The ACCC noted that the proposed amendment to the UCT regime by preliminary recommendation 11 would have broader application than consumer bargains with digital platforms and would apply to the use of UCT in other contracts.<sup>30</sup>

### **Illegality of unfair contract terms**

55. As stated previously in this submission, the Law Council considers that a privacy policy is not a contract. Where there are specific cases of a contract (e.g. regarding data processing specific arrangements), the Law Council considers that normal contractual remedies should stand, as this is not the place to change the law of contract. Therefore, the Law Council recommends that the ACCC does not proceed to recommend that UCTs should be illegal.
56. The Competition and Consumer Committee recently provided a submission to Treasury on its *Review of Unfair Contract Term Protections for Small Businesses*.<sup>31</sup> In that submission, it discussed the UCT regime in the ACL and provided recommendations for its improvement. Those recommendations are reiterated in this submission.
57. The Competition and Consumer Committee does not consider that there is sufficient need at this time for UCTs to be illegal. The Competition and Consumer Committee is concerned that the ACCC has overemphasised the need for penalties in relation to the UCT regime, particularly in situations which do not involve a flagrant contravention and clear flouting of the law, but are in fact balanced, alternative views of the reasonableness of particular clauses set against the context of a particular industry or sector. Reasonable people can differ in relation to the interpretation of the UCT regime to particular cases. Therefore, the Competition and Consumer Committee suggests that there should be consideration of allowing a warning mechanism before the ACCC can resort to seeking penalties. The Competition and Consumer Committee believes these issues need to particularly be considered in more detail.
58. The Competition and Consumer Committee believes that the starting point in assessing the current operation of the UCT regime is to first consider current views as to the application of the UCT regime. In this respect, it reiterates that the UCT regime should have clear application so that businesses have a clear framework for compliance. In particular, there should be no ambiguity as to the operation of the regime, which could

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<sup>29</sup> ACCC, *Preliminary Report*, 237 preliminary recommendation 11.

<sup>30</sup> *Ibid* 237.

<sup>31</sup> Law Council of Australia, Submission to Treasury, *Review of Unfair Contract Term Protections for Small Businesses* (1 February 2019).

see law-abiding companies prosecuted and face significant penalties for contraventions together with adverse impacts on their business reputation.

59. The UCT regime sets out the types of terms that may be unfair. To be unfair, a term must:

- (a) cause a significant imbalance in the parties' rights and obligations;
- (b) not be reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
- (c) cause detriment (e.g. financial) to a small business if it were applied or relied upon.<sup>32</sup>

60. The UCT regime also sets out examples of terms that may be unfair, including those that enable one party (but not the other) to:

- (a) avoid or limit their obligations under the contract, such as a contract for removal services that allows the removalist to avoid responsibility for any property damage caused by their negligence;
- (b) terminate the contract for any reason, such as a franchise agreement that allows a franchisor to terminate a franchisee for committing a certain number of breaches of the agreement, regardless of the severity of the breaches or whether the franchisee remedied the breaches;
- (c) penalise the other party for breaching or terminating the contract, such as a contract for waste management services that penalises businesses for cancelling their contract before the end of the term, while allowing the provider to cancel at any time without penalty; and
- (d) vary the terms of the contract, such as a contract for internet services that allows the provider to change their pricing at any time, without giving the small business an opportunity to cancel the contract if that occurs.<sup>33</sup>

61. In the view of the Competition and Consumer Committee, the UCT regime creates some unique challenges given that a contract term in particular circumstances may be perfectly reasonable, while in other circumstances the term may not be reasonably necessary in order to protect the legitimate interest of a party who would be advantaged by the term.

62. For example, in relation to provisions which allow one party only to vary a contract term, this might be reasonable in certain circumstances. In the agricultural industry, a company dealing with a farmer may reasonably need to have an ability to require a farmer not to use a particular chemical or to produce products within certain specifications - which terms it may need to be able to unilaterally change to ensure compliance with health and safety standards or to meet requirements imposed by overseas customers or nations. Those changes may need to be made almost immediately to protect against contamination of Australia's exports for a particular product. In that situation, the unilateral change clause may be perfectly reasonable – while in other circumstances the very same clause may in fact be unfair.

63. Accordingly, care needs to be taken in assessing terms in the particular circumstances. Further, the ACCC may not always have the coverage or experience across sectors to

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<sup>32</sup> Australian Consumer Law ('ACL') s 23(1).

<sup>33</sup> Ibid ss 25(1)(a)-(d).

undertake such an appropriate assessment of the reasonableness or otherwise of a particular clause.

64. The Competition and Consumer Committee noted that the ACCC has recently stated (as part of its desire for pecuniary penalties for contraventions of the UCT regime) that companies were changing provisions before the ACCC had the chance to take them to Court, which generally suggests that the current regime is working, not that further enforcement mechanisms are required.
65. Nonetheless, the Competition and Consumer Committee considers that the UCT regime could be improved. It cautions that 'one size does not fit all' and care needs to be taken to ensure that a term should only be considered unreasonable in its own context having regard to the surrounding circumstances. As such, it recommends that appropriate provisions be introduced to the UCT regime in the ACL to allow the operation of UCT regime to have:
- (a) balanced operation given its application depends on particular circumstances;
  - (b) checks and balances in enforcement given (a); and
  - (c) restraint so that this does not become a form of de-facto regulation as to the prohibition of particular words and expressions that is not context dependent.
66. The Competition and Consumer Committee recommended that additional examples of UCTs be added to the ACL, provided there is appropriate consultation and the opportunity for meaningful discussion as to what those terms are, and that context is provided for any example of any term to be considered unreasonable. Particular examples of cases or results should provide specificity as to the terms of concern, their context, and the steps taken to address and resolve the ACCC's concerns.

**Recommendations:**

- **The ACCC does not proceed to recommend that UCTs should be illegal under the ACL.**
- **However, appropriate provisions should be introduced to the unfair contract terms regime in the ACL to allow the operation of unfair contract terms regime to have:**
  - **balanced operation given its application depends on particular circumstances;**
  - **checks and balances in enforcement; and**
  - **restraint so that this does not become a form of de-facto regulation as to the prohibition of particular words and expressions that is not context dependent.**
- **Additional examples of unfair contract terms be added to the ACL, provided that context is provided for any example of any term to be considered unreasonable, and that particular examples of cases or results should provide specificity as to the terms of concern, their context, and the steps taken to address and resolve the ACCC's concerns.**

## Civil pecuniary penalties for unfair contract terms

67. If the ACCC were to proceed to recommend that UCTs be illegal and that civil pecuniary penalties be introduced, the Law Council recommends that the ACCC recommend that warnings should be provided to the relevant party beforehand by the relevant regulatory agency so that the digital platform would be given an appropriate and reasonable opportunity to consider their position and amend the relevant terms. Given that a provision may be fair in some circumstances but not in others, care should be taken not to see regulatory over-reach and penalties imposed where reasonable people may have different interpretations of the provisions.
68. This would not prevent robust and appropriate enforcement, but would be a measured approach that is suitable to allow businesses to comply with the UCT regime, while not permitting businesses to avoid compliance or prevent the ACCC from seeking appropriate penalties for non-compliance.

### **Recommendation:**

- **If the ACCC were to proceed to recommend that UCTs be illegal and that civil pecuniary penalties be introduced in the ACL for the unfair contract terms regime, the ACCC should proceed to recommend that warnings be provided to the relevant party beforehand by the relevant regulatory agency.**

## **Proposed areas for further analysis and assessment**

### **Proposal 4 – A digital platforms ombudsman**

69. The ACCC is considering whether complaints about digital platforms could be handled by an ombudsman.<sup>34</sup> The Law Council does not consider that a digital platforms-specific ombudsman is necessary.
70. The Law Council notes that the powers proposed by the ACCC for a digital platforms ombudsman could potentially overlap with areas that are already handled by existing regulatory bodies. For example, preliminary recommendations 4(b) (disputes relating to scams) and 4(d) (disputes relating to false or misleading advertising) may sit within the operations of the ACCC, while 4(c) (disputes from media companies relating to the surfacing and ranking of news content) may potentially fall within the scope of the ACCC or the Australian Communications and Media Authority's (**ACMA**) regulatory activities.<sup>35</sup> If the ACCC proceeds to recommend a digital platforms ombudsman, the Law Council suggests that potential areas of overlap between regulatory authorities be reviewed to avoid duplication, minimise confusion, enable streamlining of resources and provide clarity of the complaint avenues, processes and expected outcomes for consumers.
71. The preferred view of the Law Council's is that, even where existing avenues for complaints about privacy breaches do not exist, existing regulatory bodies, (e.g. the ACCC, ACMA, OAIC or even the Australian Human Rights Commission), should be given the appropriate powers and resources to deal with those complaints, rather than creating a new ombudsman. It considers that it may not be necessary to have a designated digital platforms ombudsman if appropriate and effective avenues for complaint about the privacy breaches of data practices, more broadly, exist. This would also be an argument in further support of increasing the resources of the OAIC to handle

<sup>34</sup> ACCC, *Preliminary Report*, 16.

<sup>35</sup> *Ibid.*

the growing area of complaints arising from the data practices of digital platforms in line with the ACCC's preliminary recommendation 8(g).

**Recommendations:**

- **The ACCC does not proceed to recommend the establishment of a digital platforms-specific ombudsman.**
- **Existing regulatory bodies (e.g. the ACCC, ACMA, OAIC or even the Australian Human Rights Commission) should be given the appropriate powers and resources to deal with complaints, rather than creating a new ombudsman.**
- **If the ACCC proceeds to recommend a digital platforms ombudsman, potential areas of overlap between regulatory authorities should be reviewed to avoid duplication, minimise confusion, enable streamlining of resources and provide clarity of the complaint avenues, processes and expected outcomes for consumers.**

## **Proposal 7 – Deletion of user data**

72. The ACCC is considering whether a consumer's data should be deleted either once they stop using the digital platform's services or automatically after a set period of time.<sup>36</sup>
73. The Law Council acknowledges that this proposal would go further than preliminary recommendation 8(d), which appears to specifically place the onus on the consumer to withdraw their consent in order for their personal information to be erased. It would align with Article 17 of the GDPR – the 'right to erasure (right to be forgotten)' – which could be a useful guide for further development of this proposal.<sup>37</sup> APP 11.2, which requires an entity to destroy or de-identify information that the entity no longer needs for any purpose, should also be taken into consideration.

## **Proposal 8 – Opt-in targeted advertising**

74. In addition to strengthening consent requirements, the ACCC is considering whether express, opt-in consent should be required for targeted advertising.<sup>38</sup>
75. The Law Council supports this proposal in principle, subject to further details being developed, including how the mechanism would ensure ease of understanding and informed consent. The Law Council acknowledges that this proposal would align with the consent requirements under the GDPR and consider that the European Union's ePrivacy Directive could offer useful guidance in the development of this proposal, particularly Article 5(3), which requires prior informed consent for storage or for access to information stored on a user's terminal equipment.<sup>39</sup>
76. With respect to profiling, the Law Council recommends that the ACCC consider implementing a right similar to Article 22 of the GDPR which affords the data subject

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<sup>36</sup> Ibid 17.

<sup>37</sup> *General Data Protection Regulation* art 17.

<sup>38</sup> Ibid.

<sup>39</sup> *Directive 2002/58/EC of the European Parliament and the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communication Sector (Directive on Privacy and Electronic Communications)* [2002] OJ L 201/37.

‘the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or significantly affects him or her’.<sup>40</sup> It notes that there are certain limitations for this right, for example, if the decision is necessary for entering into, or for performance of, a contract between the individual and the organisation or if the decision is based on the individual’s explicit consent.<sup>41</sup>

**Recommendation:**

- **The ACCC consider implementing a right similar to Article 22 of the GDPR which affords the data subject ‘the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or significantly affects him or her’.**

## Proposal 9 – Prohibition against unfair practices

77. Separate to recommending that UCTs be illegal and attract civil pecuniary penalties (preliminary recommendation 11), the ACCC proposes a prohibition against unfair practices generally as area 9 for further analysis and assessment.<sup>42</sup>

78. The Law Council does not consider that a need for a prohibition against unfair practices has been demonstrated. The concept of an 'unfair practice' is inherently subjective. As discussed above in relation to UCTs, what is unfair in one context may be permissible in another. The UCT regime already captures unfair practices, and the Law Council considers an additional prohibition unnecessary.

**Recommendation:**

- **The ACCC does not proceed to recommend a prohibition against unfair practices.**

## Further recommendations for consideration

### ‘Personal information’

79. The Law Council notes that section 5.4.2 of the Preliminary Report discusses the different definitions and interpretations of ‘personal information’ and how this creates significant confusion for consumers of digital platforms.

80. Privacy regulation in Australia is generally concerned with whether information falls under the category of ‘personal information’. Section 6 of the Privacy Act defines ‘personal information’ as:

*information or an opinion about an identified individual, or an individual who is reasonably identifiable:*

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<sup>40</sup> General Data Protection Regulation art 22.

<sup>41</sup> Ibid art 22(2).

<sup>42</sup> ACCC, *Preliminary Report*, 17.

(a) *whether the information or opinion is true or not; and*

(b) *whether the information or opinion is recorded in a material form or not.*<sup>43</sup>

81. The definition covers two categories of information. The first, and perhaps less controversial, is information about an identified individual. This would include information such as name, address, phone number etc., which explicitly identifies an individual. The second category is information about an individual who is reasonably identifiable. The issue for ascertaining whether privacy law applies, concerns whether the individual is 'reasonably identifiable' by the information. There is little guidance provided by the Privacy Act as to the nature or scope of information in this category.

82. The Privacy and Data Law Committee of the Law Society of NSW suggests that it would be appropriate for the ACCC to include a recommendation to amend, or to seek further consultation on the amendment of, the definition of 'personal information'. This would have the benefit of clarifying the preliminary recommendation to enable the erasure of personal information<sup>44</sup> and considerations of deletion of user data.<sup>45</sup>

83. The GDPR adopts the concept 'personal data' which is defined by Article 4(1) as:

*...any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person...*<sup>46</sup>

84. Notably, the GDPR provides a non-exhaustive list of the types of information relevant to the regulation, and particularly types of information that would be appropriate for privacy regulation in a digital platforms context. The Privacy and Data Law Committee of the Law Society of NSW considers that this guidance is beneficial for individuals as well as businesses and organisations that would be required to be compliant with the regulation. The Privacy and Data Law Committee of the Law Society of NSW suggests that the ACCC take into consideration a proposed recommendation for the review and potential amendment of the definition of 'personal information' under the Privacy Act to provide greater clarity to consumers and digital platform service providers.

85. The Law Council does not recommend amending the definition of 'personal information'. It considers that if there is appetite for amendment from other stakeholders, the matter should be appropriately dealt with by the ALRC. That is not to say that the Law Council considers that the definition does not require amendment, but rather that 'personal information' is a fundamental legal threshold issue that requires careful consideration and implementation with minimum disruption. The Law Council notes that the current definition of 'personal information' is the outcome of the changes recommended by the ALRC in 2008,<sup>47</sup> which came into effect in March 2014.

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<sup>43</sup> *Privacy Act 1988* (Cth) s 6.

<sup>44</sup> ACCC, *Preliminary Report*, 13 preliminary recommendation 8(d).

<sup>45</sup> *Ibid* 17.

<sup>46</sup> *General Data Protection Regulation* art 4(1).

<sup>47</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report No 108) (2008).

**Recommendation:**

- **The ACCC does not proceed to recommend the amendment of the definition of ‘personal information’ in the Privacy Act.**

## **Extending privacy protection to the broader consumer sphere**

86. The Law Council recommends that the ACCC consider whether making digital platform-specific recommendations will be beneficial for the information services industry in the long term. It welcomes the ACCC’s interest in bolstering privacy protection and recommends that the ACCC’s recommendations with respect to privacy and data use extend to consultations on improving the privacy practices in the consumer sphere more broadly.

**Recommendation:**

- **The ACCC should consider whether making digital platform-specific recommendations will be beneficial for the information services industry in the long term. The ACCC’s recommendations with respect to privacy and data use should extend to consultations on improving the privacy practices in the consumer sphere more broadly.**